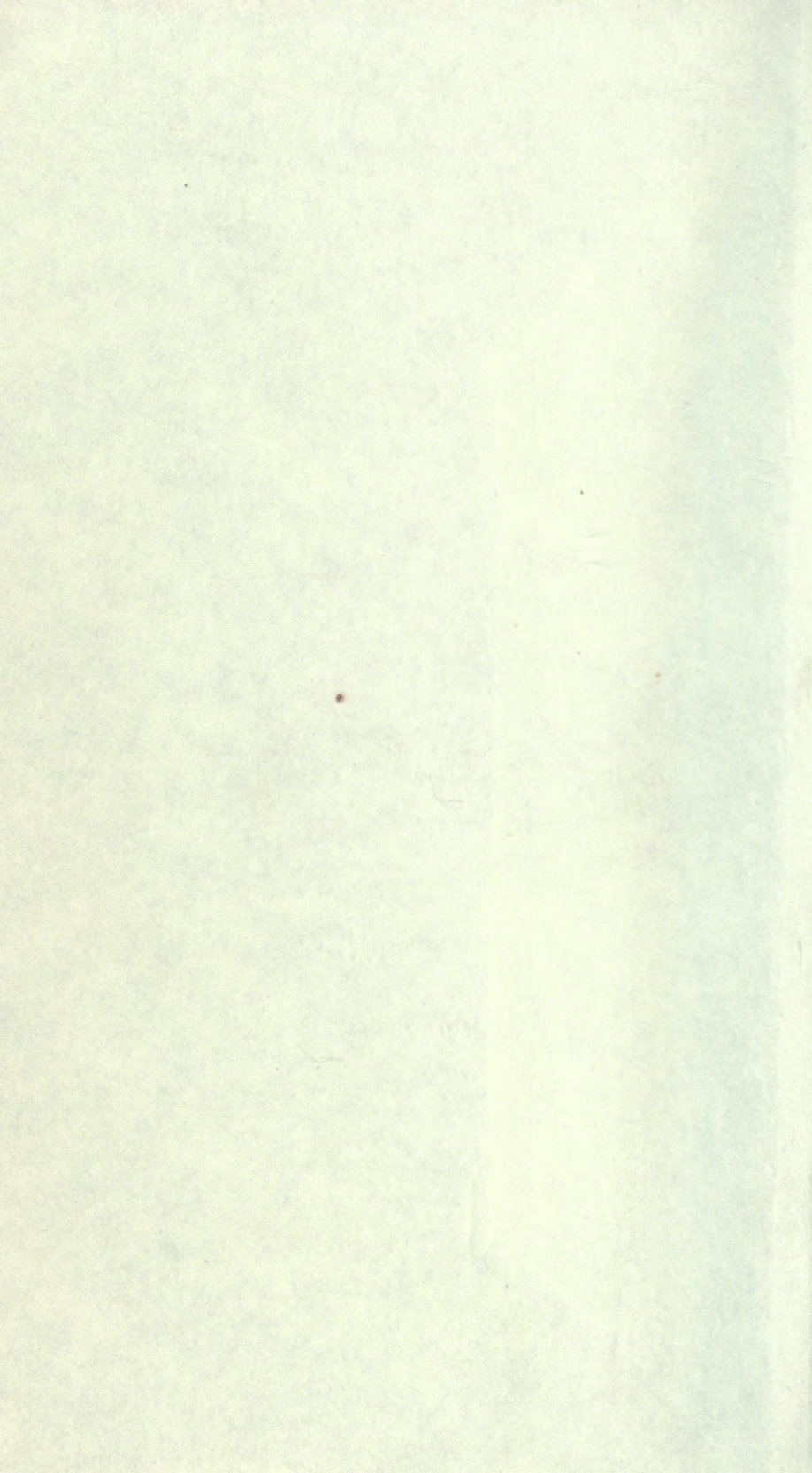




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Abridgement of the Law.

BY MATTHEW BACON,

OF THE MIDDLE TEMPLE, ESQ.

THE SEVENTH EDITION, CORRECTED;

WITH LARGE ADDITIONS, INCLUDING THE LATEST STATUTES AND AUTHORITIES.

VOLUMES II. III. AND IV. (EXCEPT THE ADDENDA,)

By SIR HENRY GWILLIM,

OF THE MIDDLE TEMPLE, KNIGHT;

LATE ONE OF THE JUDGES OF HIS MAJESTY'S SUPREME COURT
AT MADRAS.

VOLUMES I. V. VI. VII. AND VIII. AND THE ADDENDA TO THE
OTHER VOLUMES,

By CHARLES EDWARD DODD,

OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

IN EIGHT VOLUMES.

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EJECTMENT.

- (A) Of the Nature of the Action, and Ancient Manner of Proceeding in Ejectment.
- (B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein,
 - 1. *Of serving the Declaration, Notice to the Tenant in Possession, and entering into the common Rule.*
 - 2. *Of adding proper Parties.*
 - 3. *Of the Costs.*
- (C) In what Case the Ancient Form is still to be adhered to.
- (D) Of the Declaration in Ejectment: And herein,
 - 1. *Of what Things an Ejectment will lie.*
 - 2. *What shall be a sufficient Description thereof.*
 - 3. *Of the Demise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster.*
- (E) Of the Plea and General Issue in Ejectment.
- (F) Of the Verdict and Judgment in Ejectment.
- (G) Of the Writ of Execution: And herein,
 - 1. *Of the Time when the Writ is to be sued.*
 - 2. *How the Writ is to be executed.*
 - 3. *How the Plaintiff is to be quieted, and what Relief he has where his Possession is disturbed.*
- (H) Of the Mesne Profits, and how to be recovered.
- (I) Of bringing a new or second Ejectment.

(A) Of the Nature of the Action, and Ancient Manner of Proceeding in Ejectment.

5 Co. 105.

9 Co. 77.

(a) For it is

real in respect

of the lands, and personal in respect of the damages and costs. Comb. 250.

AN ejectment is a mixed (a) action, in which a lessee for years, when ousted, shall recover his term, as also his damages.

10 Mod. 177.

1 Burr. 119.

21 Ja. 1. c. 16.

[It is also a *possessory* action, grounded on a *right* to the possession of the premises in question between the parties. It is always necessary, therefore, for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some of the exceptions allowed by the statute.]

6 Co. 7. Ferrar's case.

This remedy was contrived to supply several defects which attended the bringing of real actions; for in these the party could not recover any damages, neither could he regularly bring a second action if he was barred in the first.

(b) F.N.B. 220.

(c) This method appears

to have been

settled as early

as the reign of

Edw. 4. In

7 E. 4. 6. per

Fairfax, si

home portejec-

tione firmæ, le

plaintiff re-

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terme qui est

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ejecit infra

terminum; et,

si nul soit ar-

rere, donques tout

But the concluding the demandant by one action being oftentimes found to be very prejudicial to his right; to supply this, and several other inconveniencies which attended the bringing of real actions, the manner of forming a term for years, and the lessee's bringing an ejectment to recover the term, thereby to assert the title of the lessor of the plaintiff, was found out, and was (b) first introduced in the 14 H. 7. (c), before which time it seems that leases for years were but of very short duration, and were generally defeated or determined before any intricate title could be decided, and were such precarious possessions with respect to the power which the owner of the freehold and inheritance had over them, that every such lessee was looked upon only as his bailiff; and if ousted, could only have recovered damages for the loss of his possession; and if ousted by his lessor, he could only seek a remedy from his covenants.

Bro. Abr. 1. *Quare ejecit infra terminum*, p. 6.]

It seems also, that some time before the above-mentioned period, long terms had their beginning, which, to secure to themselves, the lessees used, when molested, to go into equity against the lessors for a specifick performance, and against strangers, to have perpetual injunctions to quiet their possessions. This, drawing the business into the courts of equity, was probably one reason which obliged the courts of law to come to a resolution, that they should recover the land itself in an *habere faciās possessionem*. Hence this action became, and still continues, the common method of controverting the title to lands and tenements.

As this resolution brought on a new method of trial unknown before to the common law, it became usual for a man that had a right

right of entry into any lands to seal leases of ejectment on the lands, and then any person that next entered on the freehold was an ejector (a). But, as this was a means of turning any man out of possession, because the lessee would recover his term without any notice to the tenant in possession, the courts of justice would not suffer that men should lose their possessions without any opportunity to defend them; they therefore made it a standing rule, that no plaintiff should proceed in ejectment to recover his lands against such a feigned ejector, without delivering the tenant in possession a declaration, and making him an ejector and proper defendant if he pleased.

is of much earlier date. 3 Burr. 1297.]

This was a proper rule; for otherwise the court would be made instrumental in doing an injury to a third person, because a declaration might be delivered to a stranger, a feint defence be made, and a verdict, judgment, and execution obtained without the tenant's having any notice of it. For, though it is not to be doubted but that such actions were brought at first against the real ejectors that resided in the possessions; yet because any person that came into the land *animo possidendi*, was equally an ejector with him that resided, and the action, in strictness of law, might be brought against him, which might turn to the injury of the residing possessor; therefore the courts declared that they would not give judgment unless the tenant in possession had notice of it, and an affidavit was made that he was served with a copy of the declaration.

Upon such notice to the tenant in possession, and affidavit as aforesaid, the tenant in possession used to move the court, that as the title of the land belonged to him, he might defend in the casual ejector's name, which motion the court, upon an affidavit of that matter, would grant, and direct that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless. But the casual ejector was not permitted to release errors in prejudice of the tenant in possession, though the suit was carried on in his name by rule of court, and the process for costs was taken out against him; and he was obliged to put the bond of the tenant in possession in suit, who undertook to save him harmless.

Also, by the ancient practice, such leases were actually to be sealed and delivered, because otherwise the plaintiff could maintain no title to the term: they were to be sealed too on the land itself, because it was maintenance to convey out of possession.

(a) [The practice of setting up a casual ejector is said by Keeling to have been introduced about the time of the troubles, 1 Keb. 705. but in truth it is of much earlier date. 3 Burr. 1297.]

F. N. B. 489.

Style, 468.
T. Raym. 93.
Keb. 705. 740.

See Forcible Entry

(B) Of the Modern Manner of Commencing and Proceeding in Ejectment: And herein,

1. *Of serving the Declaration, Notice to the Tenant in Possession, and entering into the common Rule.*

(a) [Which is the first process. *Roe v. Doe, Barnes, 173.*]

(b) Which notice is, that as the casual ejector does

not claim title, unless the tenant appears and defends his title, the casual ejector will suffer judgment to pass by default, whereby the tenant will be turned out of possession. [It must be signed by the casual ejector. *Barnard. K. B. 43.* or by the nominal plaintiff. *3 T. R. 351.*] || The name of the tenant in possession must also be prefixed to it; and when the possession of the disputed premises is divided between several, it is usual to prefix the names of all the tenants to each declaration; though it does not seem necessary to prefix more than the name of the individual tenant upon whom the particular declaration is served. *Roe v. Roe, 7 T. R. 477.* ||

Salk. 255.

(c) [But by the modern practice, service on the child or servant of the tenant is deemed good service, provided the affidavit of service state that it was made on the premises, and afterwards received by the tenant or his wife.

Barnes, 175, 176. 180. 188. 190. 192. 2 Wils. 263. and that, though it

It hath been holden, that the service of the declaration ought to be on the tenant himself, or his wife, and that the service on any of his children or (c) servants is not good; and now by the 4 G. 2. c. 28. it is enacted, "That in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to enter for the non-payment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such declaration in ejectment; and such affixing shall be deemed legal service thereof; which service or affixing such declaration in ejectment shall stand in the place or stead of a demand and re-entry," &c.

should not clearly appear that the declaration came to the hands of the tenant before the essoign day of the term. *Goodtitle v. Thrustout, Barnes, 183. Smith v. Hurst, 1 H. Bl. Rep. 644.* || But, though such be the practice of the court of C. P. in this respect, yet the court of K. B. require a statement in the affidavit, that the declaration was delivered to the tenant before the essoign day. *Roe v. Doe, 14 East, 441.* || The service, if made personally on the tenant himself, need not be on the premises. *Savage v. Dent, 2 Str. 1064.* || So, if made on the wife, provided it be sworn, that she and her husband were living together as man and wife, when the service was made. *Jones v. Marsh, 4 T. Rep. 464. Doe v. Bayliss, 6 T. Rep. 765. Goodright v. Thrustout, 2 Bl. Rep. 800. Doe v. Roe, 2 Bos. & Pull. 55. Jenny v. Cutts, 1 N. R. 308.* The mere acknowledgement of the wife that she has received a declaration in ejectment and given it to her husband, if it be not personally served upon her, will not be good service, *Goodtitle v. Badtitle, 1 B. & P. 384.*; but, where the service was

upon the daughter, and on a subsequent day the wife acknowledged that she had received the declaration, and shewed it to the attorney; who then read it over to her, and explained it, upon which she then said that the paper should be sent to her husband, the service was holden sufficient. *Smith v. Hurst*, 1 H. Bl. 644. But, if the tenant abscond, or keep out of the way, to avoid being served, it is usual, if there are any special circumstances, to serve a declaration on some person residing at his house, or if that cannot be done, to affix the same upon the door; and then, on an affidavit of the circumstances, to move the court for a rule upon the tenant, to shew cause why the service mentioned in the affidavit should not be deemed sufficient; though, if the plaintiff is aware of the difficulties, it is better to move prior to the service, why a service of such a nature should not be sufficient. *Sprightly v. Dunch*, 2 Burr. 1116. *Goodright v. Noright*, 1 Bl. Rep. 290. *Fenn v. Denn*, 2 Burr. 1181. *Gulliver v. Wagstaff*, 1 Bl. Rep. 317.]

After the declaration delivered, the plaintiff's attorney (except as is above excepted by the statute) is obliged to make oath that he delivered to *J. D.* tenant in possession of the premises in question, a true copy of the annexed declaration, with the before-mentioned subscription, which subscription the deponent did then read to the said *J. D.* and acquaint him with the contents thereof.

This affidavit is to be positive, that *J. D.* was tenant in possession, or that the defendant acknowledged himself to be so, because no man should be turned out of possession without a positive affidavit, on which he may charge the defendant with perjury.

Barnard. K. B.
330. 429.
[Affidavit of
service on *A. B.*
tenant, or *C.*
his wife; or
the wives of

A. and B. who or one of them are tenants: neither sufficient. *Barnes*, 173, 174. — The affidavit required, where the declaration is served in pursuance of 4 G. 2. c. 28. is, in substance, as follows: "That the declaration was fixed on such a place, being the most notorious part of the premises in question (there being no person in possession, on whom the declaration could be legally served): that half a year's rent was then due from the tenant: that no sufficient distress was to be found on the premises to answer the arrears then due: that the late tenant held such premises by virtue of a lease from the lessor of the plaintiff; and that therein is contained a clause of re-entry for non-payment of that rent." *Cas. Pr. C. P.* 68.]

Regularly, the affidavit should be made by the person who served the declaration. But an affidavit by a person, who saw the declaration served upon, and heard it explained to, the tenant in possession, has been admitted.]]

Goodtitle v.
Badtitle, 2 Bos.
& Pull. 120.

Upon this affidavit the plaintiff moves for judgment against the casual ejector, which is always granted, unless the defendant in due time enters into the common rule of confessing lease, entry, and ouster. This rule being made by assent of parties, an attachment lies for non-performance of it, as for all other rules of court that are disobeyed; and this is all (a) the remedy which the parties on both sides have for their costs. (a) *Salk.* 259.

If there be several persons that claim title, the rule may be drawn generally or particularly: generally, as that *J. H.* who claims title to the premises in question in his possession should be admitted defendant for such messuages; and this puts a necessity on the plaintiff at the assises to distinguish by proof what tenements are in each defendant's possession, because by the rule he is to confess lease, entry, and ouster, only for the lands in his possession; and if the plaintiff cannot distinguish by proof what tenements are in each defendant's possession, he

can have no verdict against him, and, consequently, no judgment.

Or the rule may be drawn specially, that *J. H.* who claims title to such lands, expressing them particularly, should be admitted defendant; and that supersedes the necessity of proof, that the lands are in his possession; and if the defendant's attorney will not give a note of the particulars of the land for which he was admitted defendant, the plaintiff may summon him before a judge, who will order the rule thus specially to be drawn up, in case the party in possession will admit himself to be defendant.

Runnington's
Eject. 165.

[In the King's Bench, if the premises are situate in *London* or *Middlesex*, and the notice requires the tenant to appear on the first day, or within the first four days of the next term, the plaintiff should regularly move for judgment against the casual ejector, in the beginning of the term; and then the tenant must appear within four days inclusive after the motion, or the plaintiff will be entitled to judgment. If, however, the motion be deferred till the latter end of the term, the court will order the tenant to appear in two or three days, and sometimes immediately, that the plaintiff may proceed to trial at the sittings after term; though if the motion be not made before the last four days of the term, the tenant need not appear until two days before the essoign day of the subsequent term. And should the notice in such case require the tenant to appear in the next term generally, the tenant has the whole of that term to appear in.

Reg. Tr. 32.
Car. 2. C. B.

In the Common Pleas, if the premises are situate in *London* or *Middlesex*, and the tenant has notice to appear in the beginning of the term, the plaintiff cannot take any thing by his motion for judgment against the casual ejector, for default of appearance, unless such motion be made within *one week* next after the first day of every *Michaelmas* and *Easter* terms, and within four days next after the first of every *Hilary* and *Trinity* terms. But it has been holden, that this rule does not extend to the case of a vacant possession under 4 G. 2. c. 28.

Barnes, 172.

|| The notice may be to appear in the next issuable term, and judgment against the casual ejector may be then moved for.
Doe v. Roe,
4 Taunt. 738. ||
1 Salk. 257.
M. 31 G. 4.
4 T. Rep. 1.
E. 48 G. 3.
1 Taunt. 317.

In country causes, though the declaration be delivered before the essoign day of *Easter* or *Michaelmas* term, yet the tenant, in both courts, is allowed till four days after the next issuable (that is, *Hilary* or *Trinity*) term to appear, and if the cause arise in *Cumberland*, or in any other county where the assises are holden only once a year, the tenant is not compellable to appear till four days after the term preceding the assises. But in the King's Bench, the plaintiff must move for judgment the same term in which the tenant has notice to appear; though the practice is different in the Common Pleas, for there he may move for judgment at any time during the next issuable term. By a late rule of the court of King's Bench, which has been adopted by the court of Common Pleas, the clerk of the rules is, for the future, to keep a book, in which are to be entered all the rules which shall be delivered out in ejectments, instead of that formerly kept, which contained a list of the ejectments moved. The entry

is to specify the number of the entry; the county in which the premises lie; the name of the nominal plaintiff; the *first* lessor of the plaintiff, with the words "*and others,*" if more than one; and also the name of the casual ejector. And unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules within two days after the end of the term in which the ejectment shall be moved, no rule is to be drawn up, or entered, nor any proceeding had in such ejectment.]

If on the trial the defendant will not appear and confess lease, entry, and ouster, the course is to call the defendant and his attorney, if he be within the rule, and then to call the plaintiff himself and nonsuit him, and then, upon the (a) return of the *postea* (b) judgment will be given against the casual ejector.

(a) But the judgment against the casual ejectment, or cannot be entered till the *postea*

be returned, on which is indorsed, that the nonsuit was for want of confessing lease, entry, and ouster; for it does not appear that the defendant has not complied with the rule till after the assises at which the cause was to have been tried, and therefore the judgment cannot be entered till the next term after such assises. [And such is the practice of the court of King's Bench. Doe on the dem. of Lord Palmerston v. Copeland, 2 T. Rep. 779. But in the court of Common Pleas, the plaintiff may, in this case, enter up judgment against the casual ejector, and take out execution, immediately after trial. Throgmorton on the dem. of Fairfax v. Bentley, C. P. Hil. 27 G. 3. *Ibid.*] (b) Of which judgment the defendant cannot bring a writ of error, for he was no party thereto; and if he brings such a writ in the name of the casual ejector, the casual ejector being a friend to the plaintiff's lessor, may either release the errors, or upon a motion for a *non pros.* the court will order it to be entered. — But, if an infant be tenant in possession, and the plaintiff obtain judgment against the casual ejector for want of confession of lease, entry, and ouster, and the infant bring a writ of error in the casual ejector's name; and the defendant in error set up a release from the casual ejector; upon making this out to be the case of the infant, on motion on the writ of error, the court will not suffer such a release to be pleaded in bar to such writ of error, because no laches can be imputed to the infant for want of confession of lease, entry, and ouster. See *infra* n.

If the plaintiff in ejectment, who is but a nominal person, dies, yet the action shall not abate; for if there be any other person of the same name, the court will intend him to be the person mentioned in the declaration, because he is only nominal, and therefore while there is any person of the name living, the lessor of the plaintiff, who is only concerned in the interest, may proceed in the suit.

3 Keb. Rep. 372.

Also if plaintiff, who is only a trustee for the lessor, releases the action, he may be committed for the contempt.*

Salk. 260.
* The constant mode

now is, to declare in a fictitious name, such as *John Doe*, &c. for the lessor of the plaintiff is the real party.

The rule in the Common Pleas is, that the tenant in possession shall forthwith appear and receive a declaration; and this supersedes the necessity of an original writ, because the tenant is to appear and receive a declaration, and therefore cannot take any advantage for want of an original, unless a writ of error; but when a writ of error is brought, they must file an original, unless it be after a verdict, when it is helped by the statute 18 Eliz. c. 14.

Carth. 288.

Also in the King's Bench, where a person may proceed as well by original as by bill, there is no need of an original nor

2 Show. Rep. 249.
of Boucher and

Friend.
5 Mod. 333.

of a *latitat*, or bill of ejectment; but before there be any proceedings, common bail must be filed for the casual ejector. But in case of a writ of error, the party must file a bill of ejectment, besides the plea-roll, before the errors are assigned.

Sid. 24.

(a) In Carth. 3.
Comb. 13. 50.
it is said, that
the court will

The court hath changed the plaintiff in ejectment after the declaration delivered, and hath (a) enlarged the term where the cause hath been long in agitation, and judgment entered against the plaintiff after he is dead.

enlarge the term; but in Carth. 401, 402. 6 Mod. 130. Comb. 110. Salk. 257. it is said that it cannot be done without consent of parties, although the plaintiff is hung up by an injunction in Chancery, or delayed by a writ of error brought in the Exchequer-chamber, for that this would be altering records; and it was the party's fault in not delivering a declaration of a term long enough to get judgment. [However, in a subsequent case, the term was enlarged without consent, from five to ten years. *Oates v. Shepherd*, 2 Str. 1272. And as the demise is now considered to be mere matter of form, the courts feel no difficulty in altering it, where the justice of the case requires it. *Doe v. Pilkington*, 4 Burr. 2447. *Small v. Cole*, 2 Burr. 1159. *Goodright v. Strother*, 2 Bl. Rep. 706. *Roe v. Ellis*, *Id.* 940. *Vicars v. Haydon*, Cowp. 841.]

2. Of adding proper Parties.

By Holt C. J.
Comb. 209.

(b) To make
the landlord a
defendant in
ejectment, is
of right; for
otherwise he
might be pre-
judiced in his
inheritance,
by combina-
tion between
the plaintiff
and tenant

No person is admitted to defend in ejectment unless he be tenant, and is or hath been in possession, or (b) receives the rent, because it is an act of champerty for any person to interpose to cover the possession with his title. To make any person defendant with another, who was not concerned in the possession of the tenements, was a mischief at common law, because, if the plaintiff recovered against one of the defendants, the stranger, who was acquitted, had no remedy for his costs. But that is remedied by 8 & 9 W. 3. c. 11. whereby costs are given to the persons "so acquitted," unless the judge certifies immediately on the trial, that the plaintiff had a probable cause for making him a defendant.

in possession. Salk. 257. So, the landlord, though a peer. Comb. 339. or a member of parliament, must be joined, if he applies for it; for every person, who has any privilege, has it by law, which the courts cannot compel him to waive. Salk. 256. — [Such, it seems, was the right of the landlord at common law: yet, by stat. 11 G. 2. c. 19. § 13. it is enacted, "that the landlord may, by leave of the court, make himself defendant with the tenant in possession, in case he appear; and in case such tenant shall refuse or neglect to appear, judgment shall be signed against the casual ejector. But, if the landlord shall desire to appear by himself, and consent to enter into the like rule as the tenant, in case he had appeared, ought to have done, the court shall permit him" (as the court often did permit before the passing of this statute, see the authorities collected in 3 Burr. 1290.) "so to do, and order a stay of execution upon such judgment until further orders." And by the same statute, § 12. "the tenant being served with a declaration in ejectment must give notice thereof to the landlord, under the penalty of three years' improved rent." This penalty, however, does not attach on the tenant of a mortgagor who omits to give notice of an ejectment brought by the mortgagee in order to enforce an attornment. *Buckley v. Buckley*, 1 T. R. 647. A lord, claiming by escheat, or it seems a mortgagee, who is out of possession, (though as to the latter it hath been holden otherwise formerly, *Jones v. Williams, Barnes*, 194.) may be admitted to defend. *Fairclaim v. Shamtitle*, 3 Burr. 1299. So, the immediate heir of the person last seized, or remainder-man claiming under the same title with the original landlord. *Heblethwaite v. Roe*, 3 T. R. 783. n.; or, a devisee in trust, *Lovelock v. Doncaster*, 4 T. R. 122.; though they have never been in possession. But, if the person who wishes to defend, be neither tenant, nor actual landlord, but have some interest to sustain, he must move the court, on an affidavit of the fact, to be made defendant instead of, or with the casual ejector, which may now be done without the consent of the tenant. Sty. 368. 3 Burr. 1290. And such new defendant may give a rule to reply, and *non pros.* the plaintiff,

plaintiff, but cannot have costs. *Goodright v. Badtitle*, 2 Bl. Rep. 763. And in no event will it be permitted to a lessee to defend *alone* against his landlord, or those who claim under him on a supposed defect of title. *Driver v. Lawrence*, 2 Bl. Rep. 1259.] — But a landlord may refuse to be made defendant. *Salk.* 256. pl. 6. — Where it was moved, that the wife of the lessor of the plaintiff might be made defendant, the plaintiff's title being by a pretended marriage, which was controverted, and the court inclined accordingly; but perceiving it to be a trick to gain time, and so to put off the trial, it was refused. *Salk.* 257. — One who is only a trustee need not be joined. *Comb.* 332. — If a material witness is also made a defendant, the right way is for him to let judgment go by default; but, if he pleads, and by that means admits himself tenant in possession, the court will not afterwards upon motion strike out his name. *Dormer v. Fortescue*, Mich. 9 G. 2.

In ejectment, where there are two defendants for the same premises, and one appears and confesses lease, entry, and ouster, and the other does not, the plaintiff cannot proceed against the other, but he must be nonsuited, because both the defendants not admitting the demise, and the plaintiff not proving an actual entry and demise, he cannot maintain his declaration (a). But, if there appeared any covin between such person not appearing, and the lessor of the plaintiff, the court will stop the judgment against the casual ejector, for the part of him who appeared, and oblige him who did not, to release the costs, because a declaration was delivered to each of them for their respective parts; and therefore, where one does not pay obedience to the rule, the plaintiff has judgment against the ejector for his part only.

titles the plaintiff to judgment against the casual ejector. *Claxmore v. Searl*, 1 Ld. Raym. 729. *Thrustout v. Foot*, Barnes, 149. *Ellis v. Knowles*, *Id.* 174.

And where there are several defendants to whom the plaintiff delivers declarations, that are severally concerned in interest, and the plaintiff moves to join them all in one declaration, yet the court will not do it; but the plaintiff must deliver several declarations to each of them; because each defendant must have a remedy for his costs, which he could not have if they were joined in a declaration, and the plaintiff prevailed only against one of them. And by this means the plaintiff might have a tenant of his own, defendant with others, in order to save the costs.

shall be without prejudice; *Doe v. Roe*, Anstr. 86. or the confessing of ouster omitted in the rule. *Doe v. Roe*, 2 Taunt. 397.||

[But, where several ejectments are brought for the *same premises*, upon the *same demise*, the court on motion, or a judge at his chambers, will order them to be consolidated.]

Vent. 255.
2 *Vent.* 195.
(a) [The practice in this case is now to proceed against the one who does appear, and to enter a verdict against the other, indorsing on the *postea* the cause of such verdict, which as to that defendant en-

2 *Keb.* 524.
|| In the case of joint-tenants, tenants in common, or coparceners, where *actual* ouster is denied, they may confess it, under a special order of the court, that it may be wholly

Grimstone v. Burgers, Barnes, 176.

3. Of the Costs.

The parties by entering into the common rule are under the power of the court, by virtue whereof the court awards costs, which being taxed by the master, if demanded of the party, and he refuses to pay them, the court on affidavit thereof will grant an attachment.

Salk. 251.
[If a verdict be given for the defendant, or the plaintiff be nonsuited for any other cause

cause

cause than the want of confession of lease, &c. the defendant must tax his costs on the *postea*, as in other actions; and sue out a *capias ad satisfaciendum* for the same against the plaintiff, which he must shew, under seal, to the plaintiff's lessor, and at the same time serve him with a copy of the consent-rule; and if the lessor, being required, refuse to pay the costs, the court, on motion, will grant an attachment against him. *Tilly v. Baily*, M. 6 G. 2. — If the lessor of the plaintiff die before the commission-day of the assises, and the plaintiff be afterwards nonsuited, because the defendant did not confess lease, &c. the executor of the lessor of the plaintiff is not entitled to costs. *Thrustout v. Badwell*, 2 Wils. 7. *Doe v. Ford*, 2 Smith, 407. But, if he die after the trial of the cause, the executor shall have the costs, which had been taxed on the consent-rule. *Goodright v. Holton*, Barnes, 119. || This case, it is observed by Mr. Adams, in his Treatise on Ejectments, pag. 262., is rather unintelligible, unless it means that the lessor of the plaintiff had waived his right to a *Ca. sa.* or *Fi. fa.* on the judgment, and, at the defendant's request, had taxed his costs on the consent-rule in lieu thereof. || — If the tenant appear, confess lease, &c. and a verdict be given against him on the trial, the judgment thereupon is entered against the tenant, on which the plaintiff may take out execution, as in ordinary cases; for this is not a case provided for by the rule. *Runningt.* 415.]

2 Lev. 66.
6 Mod. 309.
12 Mod. 318.
Str. 402.

And although the plaintiff in ejectment be but a nominal person, yet if he be not to be found, or if he be not able to pay the costs, the attorney or solicitor is liable, or may be committed until he pay the costs, or produce a plaintiff that is able to pay them.

So, if a stranger carries on a suit in another's name, who has a title, and yet is so poor that he cannot pay costs; in case he fails, upon affidavit of this matter, the court will order such person, who carries on the suit, to pay costs to the defendant.

Str. 694.
2 Str. 932.
2 Barnard.
K. B. 140.
2 Kel. 55.
pl. 17. [Ca.
temp. Hardw.
56. 1 Wils.
130. Previ-

If an infant delivers a declaration to the defendant, some friend or guardian must be set up as plaintiff to answer the defendant's costs; but, if such person dies insolvent, so that the defendant has no remedy, by this rule the infant himself must answer the costs, because the rule was entered into for the infant's benefit; and even infants must not disturb the possession of others by unlawful entries, without being punished with costs. *Thrustout v. Grey*, 2 Str. 1046. So, where an ejectment was brought on the demise of a person residing at *Antigua*, *Cusack v. Jones*, H. 33 G. 3. B. R.; and in another case, where the lessor of the plaintiff resided in *Ireland*, the plaintiff was compelled to give the defendant a similar security. *Denn v. Fulford*, 2 Burr. 1177. In the latter case, the ejectment was brought under the direction of the court of Chancery, where the bill was retained till after trial of the ejectment, and security had been there given to the amount of 40*l.* But excepting such instances, and that of a former ejectment, the court will not compel the lessor of the plaintiff to give security for the costs. *Doe v. Alston*, 1 T. R. 491.]

1 Keb. Rep.
327. pl. 1.

If there be baron and feme lessors in ejectment, and one dies after entering into the rule, the surviving person is liable to pay costs.

If ejectment be brought to be tried at bar to bring a matter in question, as the validity of a will, and a parcel of land be inserted in the declaration, which is not concerned in the question, but to which the plaintiff hath undoubted right, and the defendant confess lease, entry, and ouster of the whole, not observing this part, the plaintiff shall not on this account be excused from the costs;

costs; but the court will give the defendant leave to retract his confession as to this parcel. The like was done in (a) a case where a parcel of copyhold land was inserted in the declaration, which was not touched by the will, no surrender being made to the use of the will.

(a) Mich.
27 Car. 2.
B. R. between
Oddye and
Preston.

¶ If the lessor of the plaintiff abandon the action after the appearance of the tenant or landlord, and refuse to join in the consent-rule, he is holden not liable for the defendant's costs, because, until he has put his signature to the rule, he is not considered as consenting to proceed against the new defendant.

Smith v. Barnardiston,
2 Bl. Rep. 904.

If the lessor of the plaintiff sue *in formâ pauperis*, he will be dispaupered in case of vexatious delay; though, it would seem, not compelled to pay the defendant's costs.

Doe v. Trusael, 6 East, 505.

Where there are several defendants, the lessor of the plaintiff may pay costs to which of them he pleases.¶

Taylor v. Horde, 1 Burr.
60. 88. Anon. 2 Sid. 165.

(C) In what Case the Ancient Form is still to be adhered to.

WHERE the houses or things for which the ejectment is brought are (b) empty, in such case no declaration can be delivered, nor affidavit made thereof, by reason of which the court cannot proceed to give judgment against the casual ejector; and therefore it is necessary to proceed the old way, by sealing a lease on the land, and giving rules to plead, and when these rules for pleading are out, affidavit must be made of the whole matter; upon which the court grants judgment. But (c) there can be no judgment against the casual ejector without moving the court for that purpose, though the rules for pleading are out, because the court will not grant any judgment against the casual ejector, who is only nominal, without such proper affidavit, lest otherwise a third person should be tricked out of his possession.

(b) But by
4 G. 2. c. 28.
in all cases
between land-
lord and ten-
nant, in case
there be no
person re-
siding in the
house, or in
case the decla-
ration cannot
legally be
served, it is
sufficient to
affix it to the
door of the

house or on some notorious place on the lands, in case the ejectment be for lands. [But a very little matter is sufficient to retain the possession; and therefore where the tenant had left some beer in the cellar, and the landlord proceeded as on a vacant possession, the judgment was set aside. *Savage v. Dent*, 2 Str. 1064.] (c) Salk. 255.

So, if the tenant in possession kept his door shut, it was thought the best way to seal a lease on the land, and proceed in the old way: but in this case it seems, that if the practice and fraud of the tenant be made appear to the court by affidavit, the court will grant judgment against the casual ejector *nisi*.

It has been held, that where a corporation is lessee of the plaintiff, they must give a letter of attorney to some person to enter and seal a lease upon the land, for a corporation cannot make an attorney or bailiff but by deed, nor can they appear but by making a proper person their attorney by deed. They cannot therefore enter and demise upon the land in person as natural persons can; nor can they substitute an attorney to enter into

(a) But in Carth. 390. Patrick v. Balls, in ejectment, where the plaintiff declared upon

into a rule for their costs; nor will an attachment go against them for disobedience to that rule, and, by consequence, they are put to make an (a) actual lease upon the land, which lease must try their title, and then the attorney may proceed in the common method, which is not altered by the said statute.

a demise made to him by the aldermen and burgesses — without setting forth that it was by deed, or under the seal of the corporation; on a writ of error, it was held well enough; and that this being a fictitious action to try the title, the demise need not now be set out to have been by deed. 1 Ld. Raym. 136. [And the law is the same before verdict; for in *Farley* on the demise of the Mayor, &c. of Canterbury v. Wood, Kent Summ. Ass. 1794, where the declaration stated the lease to have been made to the plaintiff under the common seal of the corporation; it was objected that the lease ought to be proved; but Lord Kenyon said, that by the common rule and appearance the lease was admitted as stated. Runningt. 150. If a corporation be aggregate of many, they may set forth the demise in the declaration without mentioning the christian names of those who constitute the corporation; but, if the corporation be sole, the name of baptism must be inserted; because in the former case, the name wholly consists in its character; in the latter, in the individual person; therefore, there cannot be a sufficient specification of that person without mentioning his name. Dy. 86.]

(b) [But there seems to be no necessity for so doing, even in this case; inasmuch as by the com-

Another instance, where the old method is still to be observed, is, where the several interests of the lessors of the plaintiff are not known: and there it is a good way to seal a lease upon the premises, lest they should fail in setting out in their declarations the several interests which each man passes. (b)

mon rule, according to the modern practice, the lease would, of course, be admitted: and though there be several defendants, yet each appears and defends only for such part of the premises as is in his possession. Runningt. 151.]

So, where the proceedings are in an inferior court, there, they must proceed by actually sealing a lease, because they cannot make rules to confess lease, &c. in as much as such courts have not an authority to imprison for disobedience to their rules. And the reason is, the inferior courts having but a limited authority cannot make any new rules to bind persons that do not come in by proper process of such courts; but the courts above, having an unlimited authority in every thing within their jurisdiction, shall bind any person that consents to their rules: and therefore in such inferior courts, the lease is sealed on the land, and the defendant tries the title in the name of the casual ejector, to save expence.

If an ejectment be brought in an inferior court, and a *habeas corpus* be brought to remove it, and the plaintiff in ejectment declare against the casual ejector, there may be a rule to confess lease, &c. as if he had originally declared in the court above, and the court will not grant a *procedendo*.

2 Keb. 119.
* Sed. qu. as to a *procedendo*, if the inferior court has not an exclusive jurisdiction?

If a *habeas corpus* be brought to remove a cause in ejectment out of an inferior court, and the lands lie within their jurisdiction, and the lessor of the plaintiff seal a lease on the premises, the courts above will grant a *procedendo*, because the title of the land is a local matter, properly within the jurisdiction of the court below, where, if they proceed regularly, they shall not be prohibited; but, if the lessor has not sealed a lease on the premises, they will not.*

But,

But, if the lands lie partly within the *Cinque Ports* and partly without, the defendant cannot plead above the jurisdiction of the *Cinque Ports*; for though the land be local matter, yet the demise is transitory and triable any where; therefore, though the plaintiff may lay his action for that which lies within an inferior jurisdiction in the court below, if he takes proper measures for that purpose; yet, if he will lay it above, since the demise is transitory, the defendant cannot stop his proceeding, because the courts above for such transitory matters have a proper jurisdiction.

Hall v. Hughes,
2 Keb. 69.

If the defendant in an inferior court enter into a rule to confess lease, &c. and the cause be removed by *habeas corpus*, and the judge of the inferior court grant an attachment against the defendant for disobedience to the rule, the superior court will grant an attachment against such judge for compelling obedience to their rules, and thereby obstructing the business of the superior courts, since the defendant is not bound by the rule he entered into in the inferior court, such rule being only the practice of the superior courts.

Moore, 86.
Keb. 785.

(D) Of the Declaration in Ejectment: And herein,

1. Of what Things an Ejectment will lie.

AN ejectment does not lie for a rent or common appendant, or other things that lie merely in grant, because these, being (a) incorporeal things, are in their nature invisible, *quæ neque tangi nec videri possunt*; and therefore not capable of being delivered in execution. (b)

Cro. Car. 202.
Cro. Ja. 146.
(a) Co. Lit. 9. a.
[(b) But for common appendant or appurtenant

ejectment will lie, because the sheriff may give possession of such common, by giving possession of the land to which it belongs. *Newman v. Holdmyfast*, Str. 54. Andr. 107. So, it will lie for so many acres of land with common of pasture, *cum pertinentiis*. *Baker v. Roe*. Ca. temp. Hardw. 127.]

So, an ejectment does not lie *de quodam rivulo, &c. aquæ cursu*, called *locar* in *L.*, for *rivulus sive aquæ cursus* lies not in demand; for *non moratur*, but is always flowing; nor (c) can execution by *habere facias seisinam* be made thereof, and therefore the action ought to be of so many acres of land *aqua coopert*: but if the land under the river does not belong to the plaintiff, but the river only, then upon a disturbance the remedy is by action upon the case only.

Challener v. Thomas, adjudged,
Yelv. 143.
Brownl. 142.
S. C. Poph. 167. S. C. cited, & vide Godb. 157. which seems con-

trary. (c) For this reason an ejectment does not lie *de piscariâ* in such a river more than of a common appendre or rent: adjudged upon a writ of error upon a judgment out of *Ireland*, and the judgment for this reason reversed. Cro. Car. 492. 8 Mod. 277. But *Jones* said, perhaps an assise would lie for it, because it is *proficuum in certo loco capiend.* & vide Cro. Ja. 146. [And in the case of the *King v. Old Alresford*, 1 T. R. 364. *Ashhurst J.* is reported to have said, "there is no doubt but that a fishery is a tenement. Trespass will lie for an injury to it, and it may be recovered in ejectment."] An ejectment lies *pro stagno*, because in law the word *stagnum* comprehends both land and water. Yelv. 143. Co. Litt. 5. Regist. 227. — So, *de gurgite* is good for the same reason. Co. Litt. 5.

So,

Pemble v.

Stern, ad-
judged. 1 Lev.

212. Sid. 416.
S.C. adjudged.

So, an ejectment does not lie *de pannagio*, because this is only the masts that fall from the trees which the swine feed on, and not part of the soil itself, as the herbage is.

Cro. Ja. 150.

said to have
been adjudged.

Sid. 161. Lev.

114. S. P. ad-
mitted.

But an ejectment lies of a boilary of salt; that is, where a man hath no inheritance in the soil in which there is a well of salt-water, but only a lease or grant of so many buckets of the water as will arise, (which are called the boilaries,) and these are withheld from him, he may bring his ejectment for so many boilaries as his grant was.

Comyn v.

Kinto, ad-
judged. Cro.

Ja. 150. Noy,

121. S.C. Ro.

Rep. 483. S.C.

cited. Hard.

57. S. C. cited

to be ad-

judged, Carth.

So, an ejectment lies for a coal-mine, because it is not to be considered as a bare profit *apprender*; but a coal-mine comprehends the ground or soil itself, which may be delivered on the execution; and though a man may have a right to the mine without any title to the soil, yet the mine itself being fixed in a certain place, the sheriff has a thing certain before him to deliver in execution.

277. 4 Mod. 143. Comb. 201. Show. Rep. 364. Salk. 255. 1 Burr. 627.

Ward v. Pe-

tifer, Cro. Car.

262.

An ejectment lies *pro primâ tonsurâ*, that is, if a man hath the grant of the first grass that grows on the land every year, he may recover it in ejectment of him that withholds it from him; for the first grass, or *primâ tonsurâ*, is the best profit and grant of the property; and therefore he that hath it shall be esteemed the proprietor of the land itself till the contrary be proved; for the after-grass or feeding is in the nature of commonage. As, therefore, he that hath the first grass, or *tonsurâ*, has the most signal profit of the land, and may keep it longer or shorter on the land, according to the seasonableness of the year, it is but reasonable to give him this remedy against the person that ousts him of it, especially, when it is a fixed determinate thing, which the sheriff may put him in possession of, which distinguishes it from a right of common or other profit *apprender*: for the commoner cannot assign any one acre which he hath a right to separate from the rest of the commoners; whereas the grantee of the first grass has in reality a right to the land itself till the crop be taken off; for no man can enter on the land till that be off, without being a trespasser.

Wheeler v.

Thompson,

Hard. 303.

401.

So, an ejectment lies *pro herbagio*, because the herbage is the most signal profit of the soil, and the grantee hath at all times a right to enter and take it.

Rex v. Stoke,

2 T. R. 453.

|| So, an ejectment, it seems, will lie on a demise of the hay-grass (before severance) and aftermath. ||

Dal. 95.

(a) In Hard.

58. a case is

cited to have been adjudged, that ejectment lay not *de pasturâ*; [but see Rex v. Piddlerent-bide, 3 T. R. 772. Rex. v. Tolpuddle, 4 T. R. 671. Burt v. Moore, 5 T. R. 329.]

So, an ejectment lies (a) *pro pasturâ centum ovium*; that is, for so much land as will feed one hundred sheep.

Although

Although tithes are esteemed part of the incorporeal inheritance, and by the common law were only of ecclesiastical consequence, yet being in the hands of lay proprietors, they are now considered as a temporal estate: for by the 32 H. 8. c. 7. it is provided, that every (a) lay person having any estate of inheritance, freehold, right, term, or interest in tithes, and being thereof disseised, ousted, wronged, or otherwise kept from the same, shall have his remedy in the courts of law for them in like manner as for lands; and hence it is that an ejectment lies for tithes.

Cro. Car. 301.
Jon. 321. 2 Ld.
Raym. 789.
3 Wils. 30.
(a) This remedy is given only to lay-impropriators, and therefore the act of parliament leaves spiritual persons to pursue their old remedy in the spiritual court. Co. Litt. 159. Dyer, 116.

their old remedy in the spiritual court. Co. Litt. 159. Dyer, 116.

An ejectment lies *pro rectoria*, because a rectory consists of a church, glebe-lands, and tithes. Latch. 62.

It was formerly held, that an ejectment did not lie *pro capella*, because it was *res sacra*, which was not demisable; but now since it is become a lay inheritance, it is recoverable in ejectment, as other lay estates; but it must be demanded by the name of a messuage, or it is not formal.

11 Co. 25.
Style, 101.
Doct. Pl't
191. Salk.
256. [In an ejectment for a chapel

and lands in *Hampstead*, the court refused to make the chaplain a defendant, *quoad* his right of entry into the chapel to perform divine service. *Martin v. Davis*, 2 Str. 914. 2 Barnard. K. B. 28. — In the case of the *King v. Bishop of London*, it was said (in argument), that an ejectment would lie for a prebendal stall, after collation or admittance; for then it becomes a freehold. 1 Wils. 14.]

2. What shall be a sufficient Description of those Things for which an Ejectment will lie.

In this action the law requires, that the thing demanded be so particularly specified, that the sheriff may certainly know what to give the possession of, if the plaintiff should recover (b); for the judgment is in order to execution, and the judgment would be vain, if execution could not be had of the thing specifically demanded. But the judges did not confine themselves to those rules which govern the *præcipe*, but allowed some things to be recovered in this action, which could not be demanded in a *præcipe*; because, since the establishment of that real action (c), many things have been added and improved by art, and acquired new appellations that are perfectly understood now by the law, which are not found in the ancient law-books; and as men began to contract by new names which were not known in the old law, so it was reasonable to suffer the remedy to follow the nature of such contracts.

(b) [At this day, however, the practice is otherwise. The sheriff, now, delivers possession according to the direction of the plaintiff, who therein acts at his peril. The plaintiff himself must now shew the sheriff that which under the writ he is to deliver

possession of; and is to take possession, at his peril, only of what he has title to; for if he takes more than he has recovered, and proved title to, the court will, in a summary way, set it right. 1 Burr. 629. 5 Burr. 2673.] (c) Hence it is said in *Palm*. 337. by *Noy, arguendo*, that an ejectment will lie of a hop-yard. [So, it will lie for *alder car*; a well-known term in Norfolk for land covered with alders. *Barnes v. Peterson*, 2 Str. 1063. So, for a *beast-gate*, a provincial term in *Suffolk*, importing land and common for one beast. *Bennington v. Goodtitle*, *id.* 1083. *Andr.* 106. S. C. So, for a *cattle-gate*, a *Yorkshire* term, said to be synonymous with *beast-gate*. *Metcalf v. Roe*, *Ca. temp. Hardw.* 106. 1 T. R. 137.

Dyer, 84.

pl. 85. (a) And therefore it hath been held, that an ejectment will

not lie *decrofto*, though an assise will. Style, 30. [But in Sty. 194. *Roll C. J.* said, that an ejectment would lie in this case: and according to positive law (4 & 5 Ann. c. 16. § 3. 3 G. 2. c. 25. § 14.) and modern practice, a view may (on motion in the usual manner) be had of the *locus in quo* in ejectment, as well as in the ancient assise, or any other action.] — But, if an ejectment be brought for a *croft* and an acre of meadow, and the plaintiff have a verdict, he may have a special judgment for his acre of meadow, releasing the damages for the rest. Lev. 58. — Also, an ejectment will lie *de unocrofto vocat.* B. Lev. 58. *per Twisden.*

Wright v.

Wheatley,

adjudged,

Noy, 37. Cro.

Eliz. 854. S. C.

adjudged, be-

cause but a personal action, wherein damages are the principal. Ro. Rep. 55. S. C. Cro.

Ja. 654. Palm. 337. S. P. adjudged. Hard. 55. S. P. by Baldwin, *arguendo*. Lev. 58. S. P.*per Twisden.*

But the judges did not extend this action as far as they went in an (a) *assise*, because the recognitors having the view of the thing demanded in the assise, must have more certain knowledge of the thing demanded than could be given in ejectment.

An ejectment lies of an *orchard*, because it is a word of a certain signification, though in a *præcipe* it must be demanded by the name of a garden; and it being well enough understood, the sheriff may with certainty deliver it upon an execution.

Lev. 58. Lady

Dacres's case,

adjudged upon

view of several

precedents of recoveries *de stabulo*. (b) So, an ejectment lies of a cottage. Cro. Eliz. 818.

Cro. Car. 555. Hardr. 57.

So, an ejectment lies of (b) a stable, because it is a word of a determinate signification, and may be delivered by the writ of execution.

Royston v.

Eccleston, ad-

judged, Cro.

Ja. 654. Palm.

337. S. C. ad-

judged, & *vide*

3 Lev. 97.

Hard. 76.

An ejectment of a house is good, though in a *præcipe* it ought to be demanded by the name of a messuage; because the ejectment is an action of trespass in its nature; and as a trespass, *wherefore he broke into the house* has been allowed; so it has been allowed to be good in ejectment: and the import and certain signification of the word *domus* or house is well enough understood in the law; for in waste the thing itself is recovered, besides damages, and yet the action of waste is given *de domibus*.

3 Leon. 210.

Noy, 109.

Hard. 57. S. P.

[So, an eject-

ment for part

of an house in *A.* hath been adjudged to be well enough. *Sullivan v. Sea-**grave*, 2 Str. 795. *Rawson v. Maynard*, Cro. Eliz. 286.]

So, an ejectment of a chamber in the second story of such a house was held good, there being certainty enough to direct the sheriff in the execution.

Ford v. Lerk,

adjudged.

Noy, 109.

But an ejectment *de coquina*, *Anglicè* a kitchen, is naught; for though the word is well enough understood, yet because any chamber in the house is applicable to that use, the sheriff hath not certainty enough to direct him in the execution, in regard the kitchen may be changed between the judgment and execution.

Godb. 53.

11 Co. 55.

Ro. Rep. 55.

Bridg. 56. ad-

judged, being

of an uncer-

tain extent,

An ejectment lies not of (c) a close, because it is of an uncertain extent; nor will it mend the declaration, though the close be called by a particular name, because that also leaves the extent of it uncertain, so that the sheriff cannot tell what quantity of land to deliver in execution; and though the number of acres contained in the close should be mentioned in the declaration, and

and be set forth to belong to a messuage for which the ejectment was also brought; yet even that hath been (*d*) held too general, because the nature and quality of the land is thereby left uncertain, so that the sheriff is still at a loss what to deliver the possession of, whether meadow, pasture, &c.

and that the giving it a name did not help it; but *vide* Cro. Eliz. 235. 339. Cro. Ja. 654. which

seem contrary. (*c*) An ejectment of a piece of land called *D.*, without shewing the contents, Palmer's case, Owen, 18.: the court was divided, but after adjudged that it was well enough, because it was but an action of trespass, and damages were the principal, though it would be otherwise in a *præcipe*; but upon a writ of error in the Exchequer-chamber, this judgment was reversed. Hetl. 176. Moore, 422. (*d*) So, adjudged in Savil's case, 11 Co. 55. and the S.P. held and admitted to be law, in Style, 164. Lev. 212. Bridgm. 56. Hardr. 133. Palm. 102. 3 Lev. 97. Salk. 254. where Savil's case is affirmed to be law by Holt Ch. J.

But an ejectment for a close called *D.*, containing three acres of land, is good, because the quality of the land is mentioned, the word *terra* signifying in law arable land.

Cro. Ja. 573. Palm. 102. 4 Mod. 98. [Cowp. 349.]

An ejectment does not lie for a messuage and forty acres of land, meadow and pasture thereto belonging, (*a*) without distinguishing how much of one sort, and how much of the other.

Goodier v. Platt, Cro. Car. 471. Martin v.

Nichols, adjudged, *Id.* 573. S. P. adjudged, Hard. 59. S. C. cited. (*a*) So, where an ejectment was brought for five closes called *Furlong*, containing ten acres of arable and pasture, it was held naught, because not specified how many acres of each there were, so that the sheriff had no rule to govern himself by in the execution. Knight and Syms, adjudged, Salk. 254. Holt, 263. Show. 338. Carth. 204. 4 Mod. 97. Comb. 198. S. C. — But an ejectment of twenty acres *jamorum & bruer.* is well enough, because intended of lands of the same nature, *viz.* heath, on which *gorse* and *furze* grow. Cro. Car. 179. Mod. 90. [So, in modern times, it hath been holden, that it will lie for fifty acres of furze and heath, and fifty acres of moor and marsh. Connor v. West, 5 Burr. 2672.]

An ejectment *de uno messuagio sive tenemento* is naught for the (*b*) uncertainty of the word *tenement*; for being of a more extensive signification than the word *messuage*, it is uncertain what is demanded by the ejectment.

Wood v. Pain, adjudged, Cro. El. 186. 3 Leon 228. S. C. Poph. 197. 203.

Noy, 86. Cro. Ja. 125. Style, 364. S. P. Sid. 295. S. P. adjudged. [Barnes, 173. 2 Str. 834. 3 Wils. 23.] (*b*) For this *vide* Cro. Eliz. 116. Marsh, 96. 2 Ro. Abr. 80. [After verdict an ejectment for a messuage and tenement hath been holden good. Doe v. Denton, 1 T. R. 11.] || But this determination was afterwards over-ruled, "for that it passed by surprize, and "was not law, being contrary to adjudged cases." Doe v. Plowman, 1 East, 441. However, in a later case, Goodtitle v. Otway, 8 East, 357., where the plaintiff had declared for a messuage and tenement, the court permitted the lessor (pending a rule *nisi* to arrest the judgment for this uncertainty) to enter the verdict according to the judge's notes for the messuage only, and that without releasing the damages.||

But an ejectment for a messuage or tenement called the *Black Swan* is good, because the addition reduceth it to a certainty of a dwelling-house.

Sid. 295. 3 Mod. 238. 4 Mod. 136.

So, an ejectment for a messuage or burgage in *H.* is good, because both signify the same thing in a borough.

Danvers v. Wellington, Hard. 173.

Rochester v. Rickhouse, Poph. 203.

An ejectment does not lie *de repositorio*, because it signifies a voider or cupboard, as well as a warehouse, and therefore uncertain what is demanded; but, if it had been with an *Anglicè*, a warehouse; this had confined it to that particular thing.

Cro. Car. 555. Jon. 454. S. C.

Hard. 57.
Hancock and
Price, ad-
judged, be-
cause it may
contain land
of any quality.
(a) Palm. 100.

An ejectment for one hundred acres of waste, or *pro centum acris (a) montis*, was held naught for the uncertainty, because both waste and mountain comprehend several sorts of lands; but an ejectment for one hundred acres of (b) *bog* is good in Ireland, because the word *bog* there hath but one signification, and comprehends but one sort of land.

Stafford and Macdonnough, adjudged upon a writ of error out of Ireland, and the first judgment reversed accordingly. Ro. Rep. 166. S. C. But both are denied to be law in 9 Vin. Abr. 336. pl. 19. and Stra. 71. (b) Cro. Car. 512. Mulcahy and Eyres adjudged. Palm. 100. S. P. Salk. 254. Show. 338. S. C. cited, and admitted to be law. [So, it will lie for mountain in Ireland, because there, the word "mountain" is rather descriptive of the quality, than of the situation of the land. Lord Kildare v. Fisher, 1 Str. 71. So, for a "quarter" of land in Ireland; for it may be a term as well known there as mountain is; and that the courts will intend. 1 Burr. 623. 627. 629. 630. Cowp. 348. So, "20 villis et terris" in Ireland. 2 Keb. 745. 1 Burr. 627. In the case of Cottingham v. King, 1 Burr. 623, the following description was holden to be sufficient on a writ of error, after judgment in the Common Pleas, affirmed by the King's Bench in Ireland; viz. "5000 messuages, 1000 cottages, " 10,000 acres of land, &c. in all those the lordships, manors, and late dissolved abbey or " monastery of Boyle and Insemaeranaw, and quarter of land of Tallagh, with the town and " tenement of Boyle, and fairs and markets thereunto belonging, in the county of Roscom- " mon: and all those the lands and hereditaments called Grangemore, and part of Sumternat, " &c. a large deer-park, &c. and the parsonage of Longford, &c. in the county of Roscom- " mon: and a small park or field in the possession of, &c." This case was after verdict; and after verdict an ejectment may be presumed to have been brought for such things only of which it will lie. 1 Str. 54.]

Yelv. 166.
4 Mod. 143.
Show. 364.

The plaintiff in ejectment declared upon the lease of a house, ten acres of land and twenty acres of meadow, by the name of a house and ten acres of meadow, be the same more or less, and had a verdict, but the judgment was arrested; for the declaration was so repugnant and uncertain, that even the verdict could not help it, in regard the land mentioned in the declaration is of a different nature from that mentioned in the *pernomen*. Besides, the number of acres is so different, that the words more or less cannot reduce it to any certainty, for it were unreasonable to extend them to twenty acres more than was mentioned in the *pernomen*.

Hetl. 146.

Lit. Rep. 301.
Latch. 61.

An ejectment for a manor seems ill, without describing the quantity and species of the land contained therein.

See Runningt. 129. An ejectment lies for a garden, by the name of three roods of land, for it may be sometimes used as a garden, and at other times ploughed. Godb. 6. adjudged, though it was said it might more properly have been demanded by the name of a garden. An ejectment *pro quatuor molendinis* is good, without saying wind-mills or water-mills, because both are comprehended under that name in the Register. 1 Mod. 90. — An ejectment *de decem acris pisarum* was held good; for the court held ten acres of peas and ten acres sowed with peas to be all one, and therefore certain enough. 1 Brownl. 150.

2 Ro. Rep.
482. Warren
and Wakely.
[In the case of
Savile v. Bor-
lace, Dom.
Proc. 1735, it
was decided,
that *bis peti-
tum* was no
objection in
ejectment.
1 Burr. 626.

An ejectment was brought for ten acres of (c) wood, and ten acres of underwood; it was insisted (in error) that this was a *bis petitum*; but the objection was disallowed, because plainly they are of different natures; and those who argued for the error seemed by their argument to have admitted it themselves, because they insisted that no ejectment lay of underwood, which shews it must be of a different nature from the wood: but that objection was also disallowed, because the nature of underwood is so well understood in the law, that the sheriff will have certainty enough to direct him in the execution.

638. See too *Harebotle v. Placock*, Cro. Ja. 21.] (c) Where the declaration among other things was of so many *acres ligni* instead of *bosc*, it was moved to amend it before the trial came on at bar; but it was denied, and the jury directed to find separate damages as to that particular. Carth. 402. cited to have been so ruled in the case of *Thompson and Leech*.

[An ejectment will lie for part of a highway; for though the publick have a right to pass over it, yet the freehold and all the profits belong to the owner of the soil, subject to the publick servitude or easement attached to it. But it must be described as *land*; and though it be built on, such a description will be sufficient.]

An ejectment was brought *de castro, villâ & terris*, without expressing the number and certainty of acres; and it was held ill on a verdict, and a writ of error brought thereon, because it was too generally demanded, and it was impossible for the sheriff to know what quantity of land he must deliver upon the *habere facias possessionem*.

An ejectment *de omnibus & omnimodis decimis in decem acris in D.*, without saying *garbarum fœni, lanæ agnelloꝝ* or some other certainty of the nature or quality of the tithes, is ill, as it would be for one hundred acres of land, without expressing the several natures and qualities of the land; for in this action the plaintiff must be as particular and certain in his demand, as he would be of land.

But in this action the plaintiff is not obliged to set forth the quantity of every sort of tithe, as he must do of every sort of land, because it is in its nature uncertain, the quantity depending entirely on the goodness and fruitfulness of the land and seasons; and, therefore, an ejectment *pro quâdam portione granorum & fœni* was held good, because impossible to say how much the quantity would be.

¶ Where the plaintiff declared on a lease of tithes belonging to the rectory of *D.* in *R.* and that the defendant entered upon him, and took *such* tithes severed from the nine parts in *R.*, without saying that they belonged to the rectory of *D.*, the description was holden ill, because it did not confine the ouster to the tithes laid in the declaration; for the defendant might have ousted the plaintiff of tithes in *R.* which did not belong to the rectory of *D.* ¶

demised lands lay was omitted, it was adjudged after verdict that it might be the vill in which the ejectment was laid.

An ejectment for a certain place called the *Vestry* in *D.* is well enough, because that place belonging to a church is perfectly known by that name, and therefore the thing demanded is sufficiently described to have execution thereof.

In ejectment in the county palatine of *Durham*, the plaintiff declared upon a demise *de mineriis carbonum in parochia de D.* generally, not saying how many mines, and had a verdict, and judgment: upon a writ of error brought in *B. R.* the error assigned was in the declaration, because of the uncertainty thereof, for not setting forth the number of coal-mines, so as the sheriff might

Goodtitle v. Alker, 1 Burr. 133.

Yelv. 118. adjudged upon a writ of error out of *Ireland*.

Harpin's case, 11 Co. 25. *Moore*, 837. pl. 1130. Ro. Rep. 68. S. C. *Palm.* 101. S. C. cited.

11 Co. 25. *Hard.* 57. *Dyer*, 116.

Baldwin v. Wine, Sir W. Jones, 321. But *qu.* this case, and see *Goodright v. Strother*, 2 Bl. Rep. 706. where the vill in which the collected from

3 Lev. 26. *Hutchinson and Puller*, adjudged.

Andrews v. Whittingham Carth. 277. 4 Mod. 143. Comb. 201. Show. 364. Salk. 255. S. C.

might know of how many to give possession; and for this reason the court inclined, that the judgment was erroneous; but then the plaintiff producing several precedents in *Durham*, and alleging that all the entries there in ejectments for coal-mines were the same as in this case, the judgment was affirmed.

3. Of the Demise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster.

(a) *Stone v. Grubham*.
Ro. Rep. 3.

* But *A.* may maintain an ejectment, if the person who ousted *B.* refuses to deliver up the possession to *A.* See the next note.

Although by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule of lease, entry, and ouster, which he is obliged to enter into; yet that being only designed for expedition in the trial of the right, and not to give the plaintiff a right of action which he had not at law; therefore it must appear by the declaration, that the plaintiff had actually the possession, and was ousted thereof by the defendant. Hence it is, (a) that if *A.* a lessee for years, makes a lease to *B.* at will, and *B.* is ejected, *A.* cannot have this action upon that ouster, because though the possession of *B.* was in law the possession of *A.*, yet the trespass *vi & armis*, which is complained of in this action, must be against the actual possession, and that was in *B.**

So, if *A.* be lessee for years, the remainder to *B.* for years, and *A.* be ejected, and then his term expire, *B.* shall not have an ejectment on the ouster of *A.*, because the possession was not actually in him, and therefore he cannot complain of a trespass done to another.

Also, the lessor of the plaintiff must have a right of entry when this action is brought; for if his entry were taken away he is a disseisor, and cannot enter to make a lease to try the title; and therefore where tenant in tail makes a discontinuance, the issue in tail is put to his *foremedon*, and cannot have his ejectment, because his entry by the discontinuance is taken away.

Vide tit.
Discontinuance.

(b) Where the plaintiff was nonsuited, because not able to prove that he had been in possession

Also, by the statute of limitations 21 Ja. 1. c. 16. none shall make an entry into lands, but (b) within twenty years after their right or title, which shall first descend or accrue to them; but this act hath the usual savings for infants, feme-coverts, &c. which *vide* under title *Limitations*.

for twenty years. *Keb.* 681. *Hard.* 461. This statute shall not affect the king or his tenant. *Hard.* 176. 2 *Leon.* 206. *Cro. Eliz.* 331. Nor a common person, whose tenant has been in possession, and has paid the rent, for the possession of the tenant is the possession of the landlord. 2 *Keb.* 127. — So, the possession of one joint-tenant is the possession of the other, so as to prevent the statute from being a bar in the ejectment. So, of coparceners. *Salk.* 283. [Twenty years adverse possession is not only a negative bar to the action or remedy of the plaintiff, but takes away his right of possession, and gives a positive title to the defendant: for the plaintiff must shew a right of possession as well as of property; and therefore, the defendant need not plead the statute of limitations, as in other cases. 1 *Burr.* 119. And by *Holt C. J.* "a possession for twenty years is like a descent which *tolls* entry, and "gives a right of possession which is sufficient to maintain an ejectment:" as, where *A.* had the possession of lands for twenty years without interruption; *B.* then acquired the possession, on which *A.* was put to his ejectment: here, though *A.* was plaintiff, yet his possession for twenty years was deemed a good title, and he recovered accordingly. *Stokes v. Berry*, 2 *Salk.*

a Salk. 421. For, if no other title appears, a clear undisturbed possession for twenty years, is evidence of a fee. *Cowp. 597.* || It would seem also, that this doctrine holds between the party having had the adverse possession for twenty years and the legal owner of the lands, though the party having had such possession afterwards desert the premises, and the right owner peaceably enter thereon. *Doe v. Reade, 8 East, 353.* But note, a possession will not be considered as adverse, when it can be reconciled with the title of the other party, or he has never, in contemplation of law, been out of possession. *Bull. N. P. 102. Co. Litt. 212. b. Doe v. Brightwen, 10 East, 583. Doe v. Danvers, 7 East, 299. Keene v. Deardon, 8 East, 248. Hatcher v. Fineux, 1 Ld. Raym. 740. Roe v. Ferrers, 2 B. & P. 542. Reading v. Rawsterne, 2 Ld. Raym. 829. Ford v. Gray, 1 Salk. 205. Smales v. Dale, Hob. 120. Doe v. Keen, 7. T. R. 386.*||

If a rent be granted in fee, or otherwise, to *B.*, with a clause or proviso, in case it be in arrear, to enter and hold the land till the arrears be satisfied out of the profits thereof; if the rent be in arrear *A.* may recover the possession in an ejectment; for this proviso creates an interest in the land to answer the rent. And regularly, whoever hath an interest may demise the same to another, and, consequently, the person claiming under such demise may maintain an ejectment. And this is now a settled point, whether the rent be created by grant at common law, or by way of use. But in this case there must be an (*a*) actual entry made, because the title of the land accrues by the grantee's entering.

Cro. Ja. 511. Lev. 170. Sid. 223. 262. 344. Saund. 112. Raym. 135. (*a*) For it seems now clearly agreed that the confession of lease, entry, and ouster, is not a confession of any entry sufficient

to make out the plaintiff's title, where an entry is necessary thereto, but the party must actually enter, as appears by *Saund. 319. Sid. 233. Mod. 10. Vent. 42. 332. 3 Keb. 218. Salk. 246. Skin. 424.* But by the stat. 4 Geo. 2. c. 28. in all cases between landlord and tenant, the landlord for non-payment of rent may deliver a declaration in ejectment, or serve the same, as by the statute is prescribed, and such serving shall be sufficient without a demand or re-entry. || To avoid a fine levied with proclamations, (for it is otherwise in the case of a fine at common law, or where all the proclamations have not been made; *Doe v. Watts, 9 East, 17. Jenkins v. Pritchard, 2 Wils. 45.*; but see *Tapner v. Merlott, Willes, 177.*) there must be an actual entry, and the action must be commenced within a year afterwards, and the demise must be laid subsequently to the entry. *Oates v. Brydon, 3 Burr. 1897. Ber- rington v. Parkhurst, 2 Str. 1086. Andr. 125. S. C. 13 East, 489. S. C. 4 Br. P. C. 353. S. C. Tapner v. Merlott, Willes, 177.*|| If a man enters and delivers a declaration in behalf of the lessor of the plaintiff; this is no entry to avoid a fine, unless an express authority was given for that purpose, because the entry must be pursuant to the intention, and that was to deliver a declaration in order to try the plaintiff's title, and not to make any title to the lessor of the plaintiff. *Clark v. Rowell, 1 Mod. 10. 1 Saund. 319. S. C. 1 Ventr. 42. S. C. 2 Keb. 555. S. C.* [But, if a man enter on the premises, on behalf of the lessor of the plaintiff, though without any previous authority for that purpose, and the lessor afterwards assent to the entry, before the day of the demise laid in the declaration, such assent will be equal to an actual entry, and need not be either by deed or in writing; *Fitchet v. Adams, 2 Str. 1128.*] || provided it be given within the five years. *Pollard v. Luttrell, Poph. 108. Moore, 450. S. C. Audley's case, Moore, 457. Podger's case, 9 Co. 106. Audley v. Pollard, Cro. El. 561.* If a tenant for life levy a fine with proclamations, an actual entry is necessary by the remainder-man or reversioner, before he can maintain an ejectment. *Doe v. Hicks, 7 T. R. 433.* So, if a lessee for years make a feoffment, and then levy a fine, an actual entry is necessary. *Hunt v. Bourne, Salk. 339. Pomfret v. Windsor, 2 Ves. 472.* But it would seem that no entry is requisite to avoid a fine with proclamations levied by a tenant for years without a previous feoffment, and Lord *Kenyon* has said, that in this case no entry by the landlord will be necessary to enable him to maintain an ejectment at the end of the term. Peaceable v. Read, 1 East, 574. However, Lord *Ellenborough* has declared, that there is no case which establishes a difference between tenant for life and tenant for years, as to the necessity of an entry to avoid their estates, in case of a forfeiture incurred by the levying of a fine, but that an entry is necessary in both. *Fenn v. Smart, 12 East, 451.* An actual entry is not necessary to maintain an ejectment on a clause of re-entry for non-payment of rent. *Goodright v. Cator, Dougl. 477.*||

Cro. Eliz. 800.
Noy, 33.
Note: That
in these cases
the usual me-
thod now is,
to apply to a
court of
equity.

A. covenanted to stand seised of land to the value of 100*l.* per ann. to the use of himself for life, and after to the use of his daughters, who should be unmarried at the time of his death, till they severally should receive and levy 500*l.* a-piece, the remainder to his son; *A.* died the 30 Eliz. and the eldest son entered 42 Eliz.; the eldest daughter (there being four of them) brought her ejectment, but did not recover the lands, because her entry was taken away, she having passed the time allowed her to enter and receive the profits; otherwise she might keep the other daughters out of the perception of the profits: for if the eldest daughter lets the son enjoy during the time the profits may be levied, she lapses her time, and must therefore have remedy against the son who received the profits in her prejudice, and cannot charge the land with her portion which is then onerated with portions to be raised for the younger sisters.

Law Ejectm.
76.

(a) Yelv. 182.

The plaintiff must lay the commencement of his supposed lease in his declaration to have been preceding the ouster and ejectment by the defendant; for though such ouster be a wrong, yet it can be no wrong to the plaintiff if it was done before his title commenced; (a) as, where the plaintiff declared on a lease made the 27th of *April anno primo regis*, and laid the ouster by the defendant to be the 26th of *April anno primo prædict.*, this was held bad, because it was plain the plaintiff had no title till the 27th, and therefore that ouster the 26th was no trespass or injury to him.

1 Sid. 8.

3 Mod. 198.

Cro. Ja. 135.

258. Cro. Ja.

96. 2 Bulstr.

29. cont.

Cro. Ja. 258.

5 Co. 1. [As

the lease is

now consider-

ed as a fiction,

these cases

cannot have much (if any) weight at present.]

So, if the lease had been made 27 *April, habend. a dict. 27 April. virtute cujus* the plaintiff entered and was possessed till the defendant *postea eodem 27 die Aprilis* did eject him; this is bad; because the ejectment was before the plaintiff's title commenced, for the lease did not commence till 28 *April*.

But, if the lease be made the 27th, *habend. from thenceforth*, there, the ejectment may be laid the 27th, because the lease commences the 27th, and an ejectment may be the same day the plaintiff's title commences.

Merrel v.

Smith, Cro.

Ja. 311.

But the law doth not necessarily oblige the plaintiff expressly to mention the day of the ouster, so it appear to be after the term commenced, and before the action brought; for where the declaration was on a demise the 25th of *March primo regis*, for three years, by virtue whereof the plaintiff entered and was possessed, until the defendant *postea, viz. anno supradict.* entered and ejected him, without specifying the day of the ejectment; this was held good in error; for the action being commenced *secundo regis*, and the ejectment laid to be *primo*, it was plain from the declaration, that the ouster and ejectment were after the plaintiff's title commenced, and before the action brought.

2 Ro. Rep.

466. Latch.

199.

Neither is the plaintiff, as it seems, necessarily obliged to allege the particular day of his entry in the declaration; and therefore where the plaintiff declared on a lease to commence at a future day, *virtute cujus* he entered, and was possessed till ejected by the

the defendant; this was held good on a writ of error, because it is said he entered by virtue of the lease, which could not be before it commenced, for he could not enter by virtue of the lease till the lease commenced: *aliter*, if the declaration had been *pretextu cujus* he entered, for the plaintiff might enter unlawfully, or before his time, under a pretence of the lease.

The plaintiff declares in ejectment in the Common Pleas, and after an imparlance (as the course of the court is) makes a second declaration; if in such case the plaintiff by the first declaration should lay the ejectment and ouster before the commencement of his term, or omit any matter of substance in the first declaration, though the second were right, and the ouster were laid after his term commenced, yet the plaintiff shall not recover, because the declaration on the imparlance-roll is the material one on which the action is grounded, and must be supported by it, and the plea-roll is but a recital of the other, and therefore ought to begin with an *alias prout patet, &c.*

Law Ejectm.
78. Cro. Ja.
311.

And though the declaration in law relates to the first day of the term, because the term is in law considered as one day, yet the plaintiff may declare on a lease made some time after the first day of the term, and shall recover thereon. But then it must appear to the court that the declaration was filed after the day of the commencement of the supposed lease, for otherwise the plaintiff complains of an ejectment before he had title; and if the time of filing a bill were not examinable, the act of law, which makes the relation of bills to the first day of the term, would be an act of injury to the plaintiff, and delay his right; for then a man ejected out of a lease made in term-time could not complain till term was over.

2 Vent. 174-
Sid. 432.

The plaintiff declares on a lease made the 6th of *May anno 7* of the king, &c. setting forth, that the plaintiff was possessed *quousque postea* the defendant the 18th day *ejusdem mensis anno sexto supradict.* ejected him: it was objected in arrest of judgment, that the ejectment was laid to be *anno sexto*, which was the year before the commencement of the lease, that being laid to begin the 6th of *May anno septimo*; but the declaration was allowed to be good by the court, because the ejectment was laid to be the 18 *ejusdem mensis*, which could not be if it were done in the 6th year, and therefore they rejected the word *sexto* as inconsistent and void.

Law Ejectm.
79, 80. but
vide Carth.
401, 402-

So, where the declaration was of a lease 22 *May, habendum a primo die Maii* for three years, *virtute cujus* the plaintiff entered and was possessed *quousque postea*, viz. *eodem die & anno*, the defendant ejected him; this on a writ of error was allowed a good declaration, though it was insisted, that *eodem die & anno* must refer to the first day of *May*, which was the last antecedent, and then the ejectment was laid to be twenty-one days before the lease was made.

Rutter v.
Miles, Cro.
Ja. 662.

The plaintiff in ejectment declared, that whereas *J. S.*, by indenture the 9th day of *June* (without saying when it was made or delivered), did demise, &c. *habend. a die dat. sigillationis & deliberationis*

Law Ejectm.
81.

deliberationis indenturæ prædict., *virtute cujus* the plaintiff entered and was possessed till the defendant the same day ousted him. It was moved in arrest of judgment, that it was uncertain by the declaration when the term began, neither the day of the date, nor of the sealing and delivering, being mentioned in the declaration: yet judgment was given for the plaintiff, because after a verdict the lease shall be intended not only to bear date, but also to be sealed and delivered the day mentioned in the declaration, which was the 9th; for all deeds are presumed to be delivered the day that they bear date, till the contrary appear.

Law Ejectm.
81.

But, where the limitation of the lease is altogether uncertain, the plaintiff cannot recover, because where the commencement of the lease is uncertain, the lease is void in itself, and then the plaintiff cannot have a title: besides, the court cannot possibly perceive whether the ejectment was before or after the plaintiff's title accrued, if such uncertain lease could give him one. Otherwise it is, where the limitation or commencement is impossible; for in such case the lease commences from the delivery, as if it had no date, and then the court may judge whether the ejectment is laid to be before or after the commencement. But there is this further reason for the difference; for the impossible limitation is rejected, because it could not be part of the agreement or contract; but an uncertain limitation is part of the contract, and vitiates the whole agreement, because the court cannot reduce it to any certainty.

Brady v.
Johnson,
Hctl. 63.

Thus, where the plaintiff declared on a lease, *habend. a die datús indenturæ prædict.* without mentioning an indenture before; this was held bad, for the uncertainty when the lease commenced.

Vent. 137.
2 Keb. 796.

But, if the plaintiff had declared on a demise to him *per quoddam scriptum obligat. habend. a die datús indent. prædict.* this had been good, because the *scriptum obligatorium* shall be intended an indenture.

Law Ejectm.
82, 83.

The plaintiff declared on a lease of the fourth part of a house, in four parts to be divided, by force of which he entered *in tenement. prædict.* and was possessed till the defendant ejected him *de tenementis prædictis*. It was objected in error, that the plaintiff laid the ouster to be of more than by his lease he had a title to, for the ouster was *de tenementis prædict.* which at least must be understood of the whole house, and the lease was only of the fourth part: but the objection was over-ruled, because *de tenementis prædict.* shall be intended only of the fourth part of which the lease was made. Besides, it was but just he should recover as much as he had title to, though he laid his ejectment for more.

Crc Eliz. 890.
Law Ejectm.
83.

The plaintiff declared on a demise the sixteenth day of *January*, by an indenture dated the second day of *January*, without saying *primo deliberat.* the sixteenth; yet the declaration was held good; for though all indentures shall be presumed to be delivered the day they bear date, unless the contrary be shewn, and that therefore this lease must commence the second day of

January,

January, which, if true, would be a different lease from what the plaintiff declared upon; yet in regard he declared on a demise the sixteenth, it must necessarily be intended that it was delivered on the sixteenth, because it cannot possibly be a demise before a delivery, and therefore the delivery must necessarily be intended the day the demise is said to have been made, and not the day of the date of the indenture.

But, where the plaintiff does not make mention of any particular day when the demise was made, but only in general says, that *J. S.*, by his indenture bearing date 1st *January*, did demise to him, so that it doth not appear by the plaintiff's own shewing, when the lease commenced, the law in such cases construes the delivery to have been the day it bears date; and so the declaration is held to be good, and not void for the uncertainty of the commencement of the lease.

Though by the modern practice the plaintiff is not obliged to prove the lease mentioned in the declaration, for that is confessed by the rule, and by that means the mischief of any variance between the lease declared on and the lease produced and proved on the trial is avoided, which was a danger the plaintiff was exposed to, and often miscarried in by the old method of proceeding; yet in the modern practice the plaintiff must take care to declare on such a lease as suits with his lessee's title. And therefore (a) if there be several lessors, and you lay the declaration *quod demiserunt*, you must shew in them such a title that they might demise the whole, for the word *demiserunt* must be taken in pleading, according to the legal sense it bears; so that, if any of the lessors have not a legal interest in the whole premises, he cannot in law be said to demise them, for it is only his confirmation where he is not concerned in interest; and therefore the confession of this joint lease doth not help, because you do not confess the title by the rule.

So, where the plaintiff declared on a lease made by *A.* and *B.*, and it appeared on the trial that *A.* was tenant for life, remainder to *B.* in fee; this on a special verdict was adjudged against the plaintiff, because it could not be the lease both of *A.* and *B.*, to pass the land *in præsentia* to the plaintiff, for during the life of *A.* it could be his lease only, because he was the tenant in possession, and *B.*'s joining in the lease amounted only to a confirmation, but could pass no interest during the life of *A.*; and therefore the allegation of the plaintiff, that *A.* and *B.* did demise, was not proved.

If the plaintiff declares on a lease made by *A.* and *B.*, and on the trial it appears that they are (b) tenants in common, the plaintiff cannot recover; but, if *A.* and *B.* had been joint-tenants, a joint lease to the plaintiff had been good, and he might have declared *quod demiserunt*. And the reason of the difference is, that tenants in common are in of several titles, and therefore the freehold is several; and if they be disseised they shall be put to their several actions: as therefore the lands of tenants in common are to be considered as different estates depending upon different

Cro. Eliz. 773.
Law Ejectm.
83, 84.

Law Ejectm.
84.

(a) Cro. Jn.
613. 2 Kelt.
376.

Treport's case,
6 Co. 14. b.
15. a.
King v. Bery,
Poph. 57.

Show. Rep.
342. 2 Vent.
214. Comb.
190. Carth.
224. [Heather-
ley v. Weston,
2 Wils. 232.
acc.]
(b) Where
ejectment is
brought by

one tenant in common against another, there must be an actual ouster of one by the other, else he shall not be compelled to confess lease, entry, and ouster. *Per Holt C. J.* 7 Mod. 39. (c) [Yet in the old case of *Milner v. Robinson*,

different titles, the plaintiff shall not recover; because that were to allow the plaintiff to try two several and different titles in one issue at the same time; so that the plaintiff to make out his title must shew and prove that each demised the whole to him, else he doth not prove the declaration; whereas the discovery of the tenancy in common proves the contrary; for as they have different titles to a moiety only, so they could not each of them demise the whole. But joint-tenants are seised *per my & per tout*, and they derive by one and the same title, and therefore each may be said to demise the whole; and as they must join in an action for any violation of their possession, so for the same reason must their lessee on their joint demise. And coparceners seem to stand on the same foundation and reason, because both coming in as one heir, the possession must be joint as that of joint-tenants. (c)

Moore, 682. it was allowed a good exception to the declaration, that the plaintiff declared that two coparceners *demiscrunl*. Heretofore, to avoid difficulty in such cases, the way was for coparceners, joint-tenants, and tenants in common to join in a lease to a third person, and for that lessee to make a lease, after the ancient course, to try the title.] || It seems, however, from modern cases, not to be compulsory upon joint-tenants, or parceners, to allege a joint demise: for if a joint-tenant, or parcener, bring an ejectment without joining his companion in the demise, it is considered as a severance of the tenancy, and he will be allowed to recover his separate moiety of the land; and if all the joint-tenants, or parceners, join in the action, but declare upon separate demises by each, they may recover the whole premises, because, by the several demises the plaintiff has the entire interest in the whole subject-matter, though the joint-tenancy is severed by the separate letting. *Doe v. Pearson*, 6 East, 173. *Denn v. Judge*, 11 East, 288. *Roe v. Lonsdale*, 12 East, 39. *Doe v. Read*, *Id.* 57. If joint-tenants may sever, why may not tenants in common join, as each may still be taken to have demised according to his legal interest? ||

Furden v. Moore, adjudged in B.R. upon a writ of error. *Carth.* 224. *Comb.* 190. S. C. adjudged. 2 Vent. 214. S. C. adjudged in C.B.

In ejectment the plaintiff declared upon two demises of several lands by several parties, but laid only one *habendum*, viz. *habendum tenementa prædicta* so demised by the aforesaid several parties for seven years, and lays in his declaration, that the defendant entered into all the aforesaid tenements, & *ipsum* (the plaintiff) *a firmâ suâ prædictâ* (in the singular number) *ejecit, expulit & amovit*; and it was assigned for error, that the declaration was ill for want of another *habendum*, for that the verdict is general, and it is uncertain to which demise this single *habendum* relates: but the court held, that *reddendo singula singulis* it was well enough.

Raym. 463.

If the heir brings an ejectment, and pending the suit his ancestor dies, yet he shall not recover, because every man must recover according to the right he had at the time of the action brought; for during the lifetime of the ancestor the ejectment was done to him only, and therefore to be punished by the ancestor; for one man cannot complain in a court of justice of an injury done to another.

Right v. Proctor, 4 Burr. 2208.

[A plaintiff cannot recover *against* his own covenant; and a licence to inhabit amounts to a lease.]

Hard. 330. *Vide Parry v. Hodgson*, 2 Wils. 129.

A lease made by a guardian to try the title of an infant seems good; for though such lease may be voidable as to the infant, yet a stranger cannot defeat it: and if the lessee should not be allowed

allowed to maintain his ejectment on such lease, the infancy would deprive the minor of that remedy of punishing the trespasser, which persons of full age are entitled to; which were to deny the minor the common right and privilege of other subjects.

long settled, that an infant himself may make a lease without rent to try his title. 3 Burr. 1806. 2 T. R. 161. 5 Br. P. C. 570.

¶ The committee of a lunatick is but a bailiff, and has no interest in the land, so that the demise must be in the name of the lunatick. ||

Drury v. Fitch, Hutt. 16. Cocks v. Darrson, Hob. 215. Knipe v. Palmer, 2 Wils. 130. But see 43 G. 3. c. 75.

A man may bring an ejectment on a joint lease made by baron and feme, of the lands of the wife, if the lease were made by herself in person, whether it be by parol or indenture; for the contracts of the wife relating to her own estate are but voidable during the coverture, that she may have the benefit of them after the death of her husband, if it shall be for her interest to confirm them: but the husband ought to join in the lease, because they are considered in the law but as one person, and he having, during the coverture, an interest in the property of his wife, the whole proprietor would not join in the lease without the husband: and as on such joint lease each may be said to demise the whole, the lessee might, according to the ancient practice, maintain his ejectment on such demise. [But it is not necessary that the husband and wife should join in a lease to try the title to her estate; he alone might make a lease for that purpose;] because during the coverture he hath the power of her property; and therefore all his contracts relating to it are good during his life, because his pleasure must determine her who hath resigned her will to him; though after his death she may avoid the lease.

But, if the plaintiff declares on a joint lease by baron and feme, and the lease appears on the evidence to have been executed by a third person, by virtue of a letter of attorney from the husband and wife, such evidence will not maintain the declaration, because she cannot delegate a power to a third person to act for her, having already devolved all power and authority on her husband. But the letter of attorney, though void as to the wife, remains as to the husband; and hence it hath been held, that the lessee might, in this case, declare on that lease as the lease of the husband only.

the lease of them both, during the husband's life. But see Wilson v. 1 Brownl. 134. S. C. Plomer v. Hockhead, 2 Brownl. 248. Noy, 133 *contr.* ||

[A copyholder may declare on a lease for any number of years without forfeiture: and the lessee of a copyholder for a year, may sustain an ejectment; for his estate is warranted by law, and it is the most easy way for him to recover the possession.

|| An 4 Co. 26. a.

135. Bedel v. Constable, Vaugh. 177. Doe v. Bell, 5 T. R. 471. — It has been title. 3 Burr.

2 Co. 61. Cro. Ja. 332. 417. 617. Cro. Eliz. 470. 488.

See Cowp. 201. Dougl. 53.

Cro. Ja. 332. Hob. 5.

Gardiner v. Norman, Cro. Ja. 617. || In Hopkins's case, Cro. Car. 165. all the court conceived it was a good letter of attorney for both, and the lease well delivered; it is Rich, Yelv. 1.

Cro. Eliz. 469. 535. Owen, 18. Latch. 199. Hardr. 330. 1 Lutw. 803. Co. Litt. 398. a. 4 Co. 26. a.

Doe v. Rosser,
3 East, 15.

¶ An award, under a submission to arbitration, will give a good title on which to maintain an ejectment; for though it cannot have the operation of conveying the land, yet the defendant is concluded, by his own agreement, from disputing the title of the lessor of the plaintiff. The parties consent that the award of an arbitrator chosen by themselves shall be conclusive as to the right of the land in controversy between them; and this is sufficient to bind them in the action of ejectment.

Goodtitle v.
Jones, 7 T. R.
43. 47. Doe
v. Wharton,
3 T. R. 2.
Doe v. Lux-
ton, 6 T. R.

The plaintiff must recover on a legal title. A trustee therefore may maintain the action against his own *cestuy que trust*, (a) and an unsatisfied term outstanding in trustees will bar the recovery of the heir at law, even though the claim only subject to the charge. (b)

289. (a) Roe v. Read, 8 T. R. 118. (b) Doe v. Staple, 2 T. R. 684.

Adams's
Ejectments,
88.

Doe v. Staple,
2 T. R. 684.
Doe v. Sy-
bourn, 7 T. R.
2. England v.
Slade, 4 T. R.
682.

But a jury may in some cases presume a regular surrender to have been made by the trustees of their estate, and thereby clothe the *cestuy que trust* with the legal title, and enable him to maintain this action. Thus a surrender will be presumed, if the purposes of the trust-estate have been satisfied; or, if the beneficial occupation of the estate by the possessor may have induced a supposition, that a conveyance of the legal estate has been made to the party beneficially interested; or, when the trust is a plain one, and a court of equity would compel the trustees to make a conveyance. But the presumption will not be made if the surrender be a breach of the trust; nor, in any case, where the title of the party, for whom the presumption is required is a doubtful equity only, until a court of equity has first declared in favour of the equitable title. If the presumption be not made in point of fact, although the circumstances of the case should warrant it; as, if it should appear on a special verdict, or special case, that the trust-estate, though satisfied, is still outstanding, the *cestuy que trust* will not be able to recover in the ejectment, unless his trustees be made the lessors of the plaintiff.

Keene v. Dear-
don, 8 East,
248.

Goodtitle v.
Jones, 7 T. R.
43.

Doe v. Hall,
16 East, 208.
Roe v. Hicks,
2 Wils. 15.
Holdfast v.
Clapham,
1 T. R. 600.

The surrenderee of a copyhold, if admitted before trial, may maintain ejectment brought by him before admittance upon a demise laid between the time of surrender and admittance. The title is perfected on admittance by relation, and then, and not before, the courts of law will look at it. ||

Vaughan v. Atkins, 5 Burr. 2764.

(E) Of the Plea and General Issue in Ejectment.

Law Eject. 39.

THE general rule in the issue of this action is, that whatsoever bars the right of entry is a bar to the plaintiff's title: therefore the plaintiff must prove seisin within twenty years in himself or his ancestors, or must prove a seisin in the person that has a particular estate in the land, and that he claimed within twenty years after the reversion accrued, or that he was an infant, *non compos*, imprisoned, beyond the sea, or, if a woman, under coverture, at the time when the title accrued, [and that he claimed within twenty years after he came of age,

&c. for

§c. for every plaintiff in ejectment must shew a right of possession, as well as of property; and therefore the defendant need not plead the statute of limitations, as in other actions.]

Fine and nonclaim, or a descent cast, which takes away the entry, are good pleas in this action in bar of the plaintiff's right of entry

Accord is a good plea in ejectment, as is also ancient (a) demesne.

9 Co. 77.

Petoe's case.

(a) But this

cannot be pleaded without leave of the court, || which must be applied for within the four first days of term upon an affidavit, that the lands are holden of a manor which is ancient demesne, that there is a court of ancient demesne regularly holden, and that the claimant has a freehold interest. *Hatch v. Cannon*, 3 Wils. 51. *Doe v. Roe*, 2 Burr. 1046. *Denn v. Fenn*, 8 T. R. 474. Where the application was made on the last of the four first days of the term, the court directed the defendant to plead *instantly*, and granted him a rule calling on the plaintiff to shew cause why the plea should not be allowed. *Doe v. Roe*, 10 East, 523. To this plea the plaintiff may reply, that the lands are pleadable at common law, and traverse that the manor is ancient demesne. But the court will not reject the plea, upon a counter affidavit, that great part of the lands are copyhold. *Ibid.*||

|| When the party appearing has entered into the consent-rule and pleaded, he may move for a rule to reply, before the lessor of the plaintiff has joined in the consent-rule, and the plaintiff may be non-prossed thereby; but, as the plaintiff is only a fictitious person, the defendant will not be entitled to costs.||

Goodright v. Badtittle, 2 BL Rep. 763.

(F) Of the Verdict and Judgment in Ejectment.

AS the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of: but a variance between the verdict and judgment, occasioned by the misprision or default of the clerk in entering the judgment, is not fatal, but hath been amended by the court after a writ of error brought. As, where the plaintiff had judgment *quod recuperet terminum* of a messuage and ten acres of land, and the verdict acquitted the defendant *quoad* the land; here, though the judgment was larger than the verdict, yet, because it appeared to be the misprision of the clerk, who had not pursued the verdict, which ought to have been his guide in making up the judgment, and no mistake in point of law in giving the judgment, therefore the party ought not to suffer for such misprision, since the statute of 8 H. 6. c. 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their discretion seems to be the misprision of clerks.

Mason v. Fox, Cro. Ja. 631.

|| Where two demises were laid by different lessors of the same premises for the same term, both as to commencement and duration, and the judgment was, that the plaintiff recover his terms in the premises; and it was objected that both lessors could not have a title to demise the whole; and that therefore there was an inconsistency in the judgment, and that it did not appear which of the lessors' rights was established; the court affirmed the judgment; because after a verdict a bare possibility of title consistent with the judgment is sufficient, and the two lessors might have been joint-tenants, and yet refuse to join in a lease.

Morres v. Barry, 2 Str. 1180. 1 Wils. 1. S. C.

So,

Rowe v.
Power,
2 N. R. 1.

So, where the declaration contained two distinct demises by two different lessors of two distinct undivided thirds, and judgment was given, that the plaintiff "*do recover his said terms*," and on error it appeared, (from the facts stated in a bill of exceptions to the judge's directions on a point of law,) that the ejectment respected only one undivided third, the judgment was holden well enough, when the point was raised only on a bill of exceptions; and it seems that it would have been well enough even on a special verdict.

Worral v.
Bent, 2 Str.
335. Fitzg. 83.
S. C.

So, where in an ejectment on two several demises of two separate parcels of lands, the judgment was entered, that the plaintiff do recover his term, and it was objected, that it should have been, that plaintiff do recover his *terms*, the court said, that they would extend the word *term* to his *term* in *A.* and his *term* in *B.* and affirmed the judgment.

Fisher v.
Hughes, 2 Str.
908. 1 Bar-
nardist. 464.
& 2 Barnardist.
10. S. C.

So, where the ejectment was upon two demises by different lessors, and the second demise was "*of the aforesaid premises*," and judgment was entered for the plaintiff as to the first demise, and for the defendant as to the other; and it was objected, that by not stating the second demise to be of "*other premises*," the judgments were contradictory to each other, inasmuch as the defendant was put without day as to the same premises for which the plaintiff recovered; the court affirmed the judgment, and construed the *aforesaid premises which the second lessor demised* to mean the term in the premises.

Slabourn v.
Bengo, 1 Ld.
Raym. 561.
Moore, v.
Fursdon,
2 Vent. 214.
Carth. 224.
S. C. Comb.
190. S. C.

So, where the plaintiff declared upon two demises of several lands by several parties, but laid only one *habendum*, namely, *habendum tenementa prædicta* so demised by the aforesaid several parties for seven years, and it was assigned for error, that the declaration was ill for the want of another *habendum*; for that the verdict was general, and it was uncertain to which demise the single *habendum* related; the court held, that *reddendo singula singulis* it was well enough.

Newman v.
Holdmyfast,
1 Str. 54.

So, where the declaration was for lands and common of pasture generally, without stating it to be appendant or appurtenant, it was intended after verdict, on a writ of error, to be that common for which an ejectment would lie.

Wood v.
Payne, Cro.
Eliz. 186.

So, where the ejectment was for one messuage or tenement and four acres of land to the same belonging, the words "*to the same belonging*" were held to be void, for land cannot properly belong to a house; and then it is a declaration for a messuage or tenement and four acres of land, which, though it be void for the tenement, is good for the land, for which the plaintiff, upon releasing the damages, had judgment.||

F. N. B. 220.
Cro. Eliz. 144.
(a) But it
seems, that

If the plaintiff hath a verdict for all, the entry of the judgment is, that the plaintiff *recuperet terminum versus def. de & in tenementis prædict. & (a) quod def. capiatur.*

since the statute 5 & 6 W. & M. c. 12. which takes away the *capias pro fine*, no judgment of *capiatur* shall be entered against the defendant, nor any thing in lieu thereof, but the clause shall be totally left out of the judgment: but then the plaintiff is to pay the officer, in lieu of the fine, six shillings and eight-pence, which is to be allowed the plaintiff in his costs. Linsey v. Sir Talbot Clerk, Carth. 390. 5 Mod. 285. S. C. 1 Salk. 54. S. C.

But, if the judgment in ejectment be entered *quod recuperet possessionem termini prædict.*, this is as well as if it had been *recuperet terminum præd.*, because both signify the same thing, the possession itself being to be recovered on the *habere facias possessionem*. Law Ejectm.

And hence it is, that if the term expires pending the suit, the plaintiff cannot recover the possession, because the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record, that his title to it is determined; yet he (a) shall have his judgment for damages, because the trespass still remained. Sav. 28. (a) Co. Litt. 285.

In ejectment against baron and feme, the husband was acquitted and the wife found guilty; the judgment was *quod capiuntur*; and held good, because that is only for the fine, which the husband must pay, for the wife cannot. Mayo v. Cogshill, Cro. Car. 406.

If the defendant be acquitted of part, and judgment be entered *quod def. sit quietus quoad* that part whereof he is acquitted; this is error, because the judgment in this action is not final, as in the writs of right, and doth not protect the defendant from any further suit, but only acquit him against the title set up by the plaintiff in the action. But since it appears that the plaintiff's demand was groundless as to that part whereof the defendant was acquitted, the judgment as to that part must be set down to be *quod def. eat inde sine die*; the plaintiff as to that having no farther cause to detain him longer in court. Cro. Eliz. 672.

If one of the defendants die after a verdict, the plaintiff shall have judgment against the survivors, on his suggesting the death on the roll, but then the judgment must be entered as to the person deceased *quod quer. nil capiat, &c.* (b) (b) [This latter part of the judgment hath been holden to be unnecessary; be-

cause on suggesting the death, it is awarded by the court, "that further proceedings shall stay against the person deceased." 1 Burr. 363.]

¶ It seems, that if the defendants make a joint defence for the whole land demanded, and one of them die, execution may be given of the whole, because the whole interest comes by survivorship to the others, and therefore the plaintiff hath still persons before the court to defend the whole; but that where each of the defendants defends for part only, the plaintiff, upon the death of one of them, must not take out execution for the part in his possession, because they are in the nature of distinct defendants, and, consequently, as to that part which was defended by the person deceased, there is no person in court against whom judgment can be given, or execution taken out. || Gilb. Eject. 98.

If an ejectment be brought against baron and feme, and the plaintiff have a verdict against both, and before judgment the husband die, the plaintiff may on the suggestion have judgment against the wife, not only because this is a trespass committed by the wife, and that therefore she is punishable for her own act, which is injurious to another; but because where the wife is found Leev. Rowkeley. Ro. Rep. 14. Rigley v. Lea, Cro. Ja. 356.

found guilty of the ejectment, she must have obtained that unlawful possession, either jointly with her husband, and then it survives, or, she had the whole possession in her own right; and in either case the plaintiff may punish her, and recover the possession, which is wholly in her on the death of her husband.

(G) Of the Writ of Execution: And herein,

1. Of the Time when the Writ is to be sued.

Vide tit.

Sci. Facias.

(a) Where the defendant in ejectment dying, a *scire facias* went out against

the terre-tenants of the lands, the writ was demurred unto; for that the heir was not named, nor was it alleged that any strangers had intruded; but the court ruled it well, for the heir may come in as a terre-tenant. Sid. 317. 2 Keb. 143. But for this *vide Eyres v. Taunton*, Cro. Car. 295. 312. Cro. Ja. 506. 2 Brownl. 145. — Where in ejectment there was judgment against the testator, and a *scire facias* against the executor, without naming him terre-tenant; it was objected, that in ejectment the defendant is supposed to be a dis-seisor, and that the lands descend to his heir at law; the plaintiff took out a new *scire facias* and amended the fault. Carth. 2. — Where judgment in ejectment was for two messuages, and after a year a *scire facias* upon it recited a judgment of one messuage only, to which *nul tiel record* being pleaded, it was moved to amend it, but denied, for there may be such a judgment; and this does not appear to be erroneous on the face of it. 6 Mod. 310. (b) It seems to have been doubted, whether a *scire facias* lay to revive a judgment in ejectment after the year, because by the common law it lay only in real actions; and at the time of Westm. 2. c. 45. which extends it to personal actions, the term or possession was not recovered in this action; but it seems now agreed, that a *scire facias* lies to revive the judgment in this action after the year, as well as in any other. Okey v. Viccars, Sid. 351. || Clerk v. Withers, 1 Salk. 258. 2 Ld. Raym. 806. S. C. As the lessor of the plaintiff is not a party to the judgment, it would seem not to be necessary, in case of his death before execution, to revive the judgment by *scire facias*, although the case of *Doe v. Roe*, 4 Burr. 1970. has left this point somewhat doubtful. Adams's Eject. 274.||

2 Inst. 471.

2 Leon. 77.

Runningt.

Eject. 429.

Runningt. *ibid.*

14 H. 7. 16.

Doe v. Roe,

4 Burr. 1970.

[But, if execution be taken out within, and continued beyond, the year, there is no necessity for a *scire facias*. No presumption can then arise, that the plaintiff hath released the execution; because, having been duly taken out, it may be owing to the neglect of the sheriff that it was not executed.]

If the plaintiff die within the year and day, his executors cannot take out execution without a *scire facias*; for they are not parties to the judgment: though if execution has been regularly sued out in the lifetime of the testator, the sheriff may execute it after his death; because the authority is from the court, and not from the party. The writ of possession has relation to its *teste*; therefore, though it be not actually sued out till after the death of the lessor of the plaintiff, yet, if it be *tested* before his death, it is regular.]

But,

But, if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage and at his instance. 6 Mod. 288. Ro. Rep. 104.

But it seems this delay of execution, being only the compromise or agreement of the parties, is never entered on the roll; and therefore after the year the plaintiff ought to move the court for the *scire facias*, lest the execution should be suspended *quia erroneè emanavit* after the year without the *scire facias*. Keb. 785. 6 Mod. 288. and the above authorities.

So, if the defendant brings a (a) writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuit, or the judgment affirmed; the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce till he hears the judgment above. Besides, while the cause is depending on the writ of error, it is still *sub judice*, whether the plaintiff shall recover the land or not. 5 Co. 88. a. Cro. Eliz. 416. 2 Inst. 471. 6 Mod. 288. (a) But, if the party be tied up by an injunction out of Chancery for a year, he cannot take out execution

after the year without a *scire facias*, because the courts of law do not take notice of Chancery injunctions as they do of writs of error: besides it might be no breach of the injunction to take out execution within the year, and continue it down by *vic. non misit breve*, [which, it seems, cannot be done in the case of a writ of error, because that removes the record out of the court where judgment is given; and therefore there can be no proceedings below, till it be affirmed and returned to the inferior court.] Salk. 322. 6 Mod. 388. S. C. Stra. 301. — *But now, according to the case of Michel v. Cue, *et Ur.* in B. R. 32 Geo. 2. 2 Burr. 660. if a delay of execution for a year hath arisen from the defendants, by bills for injunctions, and by obtaining time for payment, execution may be sued out without a *scire facias*: and if a rule to shew cause why it should not be set aside is obtained, the court will discharge it with costs. And this seems founded on reason; and *qu.* if this doctrine will not extend to cases in ejectment? — A *scire facias* lies upon a judgment in ejectment where a stranger enters after judgment. R. Lut. 1268. 3 Lev. 100. Clift, 676, 677.

[Tenant for years had judgment in ejectment: the term incurred: then he brought a *scire facias quare executionem habere non debet of the land*, and his damages and costs. The defendant demurred. It was holden by the court, that though the defendant might have a *scire facias* for the damages and costs, yet this being for the term likewise, which was incurred, it was ill; and a new *scire facias* ought to issue. It was afterwards argued by Holt, that the *scire facias* was good for the damages; but the court thought otherwise, and a new *scire facias* was granted.] Sedgwick v. Goston, Skin. 161.

2. How the Writ is to be executed.

[As execution should be issued according to the right and justice of what has been really recovered, the plaintiff must be careful not to take out execution for more than he had a right to recover. And that the sheriff may not labour under any difficulty in executing the writ of possession, the practice now is, (different indeed from what it was formerly,) for the plaintiff himself 1 Burr. 366. Runningt. Eject. 432. 1 Burr. 629.

5 Burr. 2673.
3 Wils. 49.

Doe v. Wand-
lass, 7 T. R.,
118. *in notis*.
Brookes v.
Baldwyn, Barnes, 468.

5 Co. 91. b.

self not only to point out to the sheriff that which, in execution of the writ, he is to deliver him possession of; but to take possession, at his peril, of only that which he has title to: for should he take possession of more than he has recovered and proved title to, the court will, in a summary way, interpose and set it right.] ¶ They will also, if necessary, interfere before the execution of the writ, and restrain the lessor of the plaintiff from taking possession of more than he is entitled to.¶

1 Ro. Abr. 886.

The words of the writ are *quod habere facias possessionem*, so that there must be a full and actual possession given by the sheriff, and, consequently, all power necessary for this end must be given him. If, therefore, the recovery be of a house, the sheriff may justify breaking open the door, if he be denied entrance by the tenant, because the writ could not be otherwise executed.

Ro. Abr. 886.

If the plaintiff recover several messuages in the possession of different persons, the sheriff must go to each house and deliver the possession thereof; and this is done by turning the tenants out of each of the houses: for the delivery of the possession of one messuage, in the name of all, is not a good execution of the writ, because the possession of one tenant is not the possession of the other, but each hath his several possession.

Leon. 145.
Upton and
Wells. [*Qu.*
Whether the
courts would
not now hold
it to be a full
execution of
the writ.]

But it seems by *Rolle* that if all the messuages had been in possession of one tenant, it had been sufficient to give possession of one in the name of all; but without doubt the surest and best way is, for the sheriff to remove all the tenants entirely out of each house, and when the possession is quitted, to deliver it to the plaintiff.

If the sheriff turns out all persons he can find in the house, and gives the plaintiff, as he thinks, quiet possession, and after the sheriff is gone there appear some persons to be lurking in the house; this is no good execution, and therefore the plaintiff shall have a new *habere facias possessionem*, because he never had execution.

(a) Ro. Abr.
886.

Where the recovery was of land, and there was more demanded than recovered, as suppose the demand for 500 acres, and a verdict and judgment only for 100 acres, it seemed doubtful formerly how the sheriff was to give execution. (a) *Rolle* says, it is sufficient to give the plaintiff possession of two or three acres in the name of the whole. And this indeed seems the safest way for the sheriff, when he executed the writ at his peril; for if he gave possession of any land not recovered, and not in the *habere facias possessionem*, he was a trespasser, and punishable in an action of trespass. But, because the *habere facias* is to give the plaintiff the benefit of his judgment, and that cannot be done without an actual possession be given of the whole quantity, it hath been held by (b) others, that the sheriff does not discharge his duty by giving one acre in the name of all;

(b) Palm. 289.

but he ought in such case to set forth all the acres particularly, otherwise it would leave the execution uncertain, and, consequently, not give the plaintiff the full benefit and advantage of his judgment. But *note*, (a) at this day the practice is for the plaintiff to give the sheriff security to indemnify him from the defendant, and then the sheriff to give execution of what the plaintiff demands. (a) [1 Burr. 629. 5 Burr. 2673.]

If the execution be for twenty acres, it seems the sheriff must give twenty acres, according to the common estimation of the county where the lands lie. Ro. Rep. 410.

3. *How the Plaintiff is to be quieted, and what Relief he has when his Possession is disturbed.*

And here it is further observable, that this writ of execution is only returnable at the election of the plaintiff; and the court, at the instance of the defendant, will not direct the writ to be returned. This seems to be left to the choice of the plaintiff, that he may take what is most for his advantage, in order to have the full benefit of his judgment: the best way to effect that is, to suffer him to renew the execution at his pleasure till full execution be had. For the plaintiff cannot renew execution after one *habere facias* is returned and filed, because it then appears on record, that the plaintiff hath had the benefit of his suit; and then the new execution is but *actum agere*, and, consequently, superfluous; and therefore the court will not oblige the sheriff to make any return, but at the desire of the plaintiff. Ro. Abr. 886. 2 Keb. 245. Ro. Rep. 353. Palm. 289. 2 Brownl. 253. 6 Mod. 27.

If the writ be returned by the sheriff, though not filed, it seems no new *habere facias* shall issue, because when the return is made, it becomes a record, which the court is entitled to. 2 Brownl. 216.

But, where the writ is neither returned nor filed, there is then no act of record, by which it appears to the court that the plaintiff hath had any benefit by his judgment; and there upon a suggestion, *vic. non misit breve*, the plaintiff is entitled to a new writ, because the omission of the officer shall not turn to the plaintiff's delay or prejudice. But the new writ cannot issue till the return of the first writ be out; because till the return be past, *non constat* to the court, but the sheriff may do his duty, and the plaintiff thereby have the full benefit of his judgment; in which case there can be no occasion for a new *habere facias*. Palm. 289.

If the officer be disturbed in the execution of the writ, on an affidavit the court will grant an attachment against the party, whether he be the defendant or a stranger: for the writ is the process of the court, and any disturbance given to the execution of it is a contempt of the authority of the court from whence it issues, and as such will be punished. The process is not understood to be executed, nor the execution complete, till the sheriff and his officers be gone, and the plaintiff left in quiet possession. 6 Mod. 27.

But after the possession given, either on the *habere facias possessionem*, or agreement of the parties, the law seems to make a difference where the plaintiff is turned out of possession by the defendant, Radcliff and Tate, 1 Keb. 779. || Where the lessor of

the plaintiff had been put into possession by virtue of a writ of *habere facias possessionem* on the 22d day of February 1806, which writ had never been returned, and on the 10th day of October 1807, whilst he continued in possession, the person, against whom he had recovered the premises, entered into the house by force, and resisted with violence all his attempts to regain the possession; and upon these grounds a new writ of possession was moved for, and this case of *Radcliffe v. Tate* was cited; the court denied the authority of it, and held, that possession having been given under the first writ, the sheriff ought to have returned "that he had given possession," and that the plaintiff could not afterwards have had another writ: an *alias* cannot issue after a writ is executed. If it could, the plaintiff, by omitting to call upon the sheriff to make his return to the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass which the same tenant might commit within twenty years next after the date of the judgment. The rule was refused. *Doe v. Roe*, 1 Taunt. 54.]

(a) *Style*, 318.

Thus in the case of (a) *Fortune and Johnson*, the court was moved for an attachment against *Johnson*, for ejecting one who had been put into possession by an *habere facias*: but because it appeared that *Johnson* claimed under an elder judgment, the court would not make any rule in it, because it was title against title, and therefore left them to take their course at law.

2 Bl. Rep. 892.

[But in the case of a tenant, (who cannot be considered as a mere stranger,) it is otherwise. As in *Davis v. Doe*, an attachment was granted, and that absolute in the first instance, against the tenant in possession, on an affidavit that he had been served with a rule of court, (which had been made absolute,) for delivering up the possession, and had refused so to do.]

Style, 408.

Law Ejectm.

113.

(b) [This decision is not entitled to much, if to any attention. For in the case stated, nothing can be more evident than that the execution was issued contrary to good

The plaintiff had judgment in ejectment, and by agreement afterwards, the defendant was to hold the land for the residue of his term, and held it accordingly for some time, when the plaintiff took out an *habere facias* and executed it. The defendant moved the court for restitution on ground of the agreement; but the court would not grant it, but left the defendant to his action on the case on the agreement, for the judgment was entered absolutely (b). But, if the judgment had been entered with a *cesset executio* for such a time, and the plaintiff had taken out execution within the time, the defendant might have had restitution, because the judgment was entered with this limitation, that the plaintiff should not have the fruit of it till such a time. But *quære*, how could that appear to the court? since it seems

the

the *cesset executio* is not entered on the roll. The difference seems to have been between a judgment by confession, and a judgment on verdict. Where the former is given with a *cesset executio*; if the execution be afterwards taken contrary to the agreement, the court will set it aside, and lay the attorney by the heels: but where judgment is given on verdict, there, the verdict is the foot and ground of the judgment, and the court will not take notice of the subsequent agreement of the parties, but leave them to their remedy (a).

(a) Yet according to the modern practice, if the truth be manifested to the court by affidavit, the party may obtain relief from its summary jurisdiction.]

(H) Of the Mesne Profits, and how to be recovered.

ALTHOUGH in ejectment the plaintiff, if he prevails, is to recover damages, yet the damages which he hath sustained by being kept out of the mesne profits are not (b) recoverable in this action; because it is never laid with a (c) *continuando*, and therefore comprehends only the damages sustained in the particular act of ouster complained of. [Indeed, the action of ejectment, as now conducted, is altogether a mere fiction, brought by a *nominal* plaintiff against a *nominal* defendant, for a *supposed* ouster, and of course for mere *nominal* damages. The object at this day proposed to be recovered by it is quite changed from what it was in its original state; for, as formerly, damages only were recoverable by it, and not the term; so now the term only is sought for by it, and not damages. For a satisfaction in damages, therefore, a subsequent action is to be brought, which subsequent action is in *form*, an action of trespass, *vi et armis*, but in *effect* to recover the rents and profits of the estate. It is *in form* an action of trespass, because it is consequent and as it were, supplemental to the action of ejectment, and therefore must necessarily be of the same species with it. It may be brought by the lessor of the plaintiff in his own name, or in the name of the nominal lessee; but in either shape it is equally *his* action; for it is not in any manner affected by the fiction in the ejectment. And it may be brought in the name of the nominal lessee as well where the judgment is by default, as where it is upon a verdict; for there is no distinction between a judgment by default, and upon verdict; in the one, the right of the plaintiff is tried and determined against the defendant; in the other, it is confessed.

will take notice that the proceedings in ejectment are merely fictitious, and only to enable the plaintiff to get possession, and that it is never usual to recover more than small damages for the ouster, without any consideration had of the mesne profits. And it is certain the courts do frequently take that into consideration; otherwise the lessor would not be entitled to recover at all for the time laid in the declaration, since, by his own shewing, his lessee, and not himself, was entitled to the action. But if the plaintiff were, upon the judgment in the ejectment being affirmed in error, to have a writ of inquiry, it would probably, if rightly pleaded, prevent him from recovering any thing in a subsequent action of trespass; and therefore, if the demise were laid any time back, it would be adviseable for the plaintiff in ejectment to take (as he may) judgment for his costs on the

faith; and whenever that appears, the court in the conscientious exercise of its summary jurisdiction, will interpose and correct it. Runningt. Ejectm. 437.

Pract. Reg. C. P. 62. [3 Wils. 128. 2 Burr. 688. 3 T. R. 17. 547. (b) It seems certain, that the plaintiff may recover the whole mesne profits in the ejectment; and that is apparent from 16 & 17 Car. 2. which enacts, that in case the judgment be affirmed on the writ of error, the court may award a writ of inquiry as well of the mesne profits, as of the damages by any waste committed after the first judgment. Perhaps it may be answered, that the court

writ of error, without having any writ of inquiry. Bull. Ni. Pri. 88. In *Traherne v. Grestingham*, Barnes, 87. it is said by the court, that the actions for mesne profits (which are grown very fashionable) tend to create double expence: that the plaintiff should be ready at the trial of the ejectment to prove his damages, which may be recovered in that action, without bringing a second for mesne profits. (c) But it was formerly thought, that *antecedent* profits were not recoverable at law; and therefore it was usual for the plaintiff to go into equity for an account of the mesne profits. 1 Vern. 105. 3 Wils. 118. 2 Burr. 688. 3 T. R. 17. 547.]

Runningt.
Eject. 439.
Skin. 247.
Salk. 260.

If the action be in the name of the nominal plaintiff, the court, upon application, will stay the suit, till security be given for answering the costs; and if such a plaintiff release the action, his release will be set aside, as a contempt of court.

Lill. Pr. Reg.
499. 2 Str.
960.

It was formerly holden, that if the action for mesne profits were brought in the name of the lessor of the plaintiff, or after a judgment by default, the defendant in such action was at liberty to controvert the plaintiff's title; the lessor of the plaintiff in the one case, and the tenant, who had never appeared, in the other case, being no parties to the record, and therefore no estoppel arising either against, or in favour of either of them. But it is now settled, that after a recovery in ejectment, the tenant is estopped from controverting the title in a subsequent action for mesne profits; provided the plaintiff proceed only for those profits from the time of the ouster complained of in the ejectment: but, if he proceed for *antecedent* profits, he must prove his title to the premises whence they arose, to shew his right to receive them.

Dacosta v.
Atkins,
Hil. 4 G. 2.
Bul. Ni. Pri.
87. 2 Burr.
688. Barnes,
472.

Bull. Ni. Pri.
87.

Hence it should seem, that in order to prove the plaintiff's title in an action for the mesne profits, it is only necessary to produce the judgment in ejectment; and so is the practice, where the judgment is after verdict: but after judgment by default, the practice is different: then, it is usual not only to produce the judgment, but also to prove a writ of possession executed. This latter proof, however, does not seem to be necessary; for if the tenant be concluded by the judgment in ejectment from controverting the plaintiff's title, he is, consequently, concluded from controverting his possession, because possession is part of his title. || If, however, the plaintiff have been let into possession by the defendant, it will not be necessary to prove the execution of the writ of possession. ||

Runningt.
Eject. 442.
Aslin v. Par-
kin, 2 Burr.
667.
Calvart v.
Horsefall,
4 Esp. 67.

Bull. Ni. Pri.
87.

But, if this action be brought against a precedent occupier, the judgment in ejectment is no evidence against him; and therefore in such case, it is necessary for the plaintiff to prove his title, and also an actual entry; for trespass being a possessory action cannot be maintained without it. But it may admit of doubt what proof of an actual entry will be sufficient. It has been said, that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession; and therefore if a man make his will and die, the devisee will not be entitled to the profits till he has made an actual entry. Others have holden, that when once he has made an actual entry, that will have relation to the time his title ac-
crued,

Stanynough
v. Cousins,
Barnes, 456.

1 Ro. Abr.
tit. Trespass
per Relation.

crued, so as to entitle him to recover the mesne profits from that time, and they rely on the case in 1 Sid. 239. which was trespass brought for the mesne profits *devant le lease*, and nothing said in the case about proving an actual entry antecedent to it. They say too, that if the law were not so, the courts would never have suffered plaintiffs in ejectments to lay their demises back in the manner they now do, and by that means entitle themselves to profits they would not otherwise be entitled to. However, supposing a subsequent entry has relation to the time the plaintiff's title accrued, yet certainly the defendant may plead the statute of limitations, and by that means protect himself from all but the last six years.

In this action the plaintiff must prove the value of the mesne profits; for the judgment in ejectment does not prove any thing as to that. In estimating it, however, the jury are not confined to the mere rent of the premises; they may give *extra* damages, and the costs in ejectment are recoverable; whether the judgment be by default against the casual ejector, or upon a verdict against the tenant or landlord, and are therefore usually declared for as damages, in the action for mesne profits.

Bankruptcy is no plea in bar to this action. || And the action being for a tortious occupation, the defendant cannot pay money into court.

The defendant may plead the statute of limitations, namely, *not guilty within six years* before the commencement of the suit, and thereby protect himself for all but that time, should the plaintiff declare for a longer period.

If the plaintiff recover less than forty shillings, and the judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages; and this is the case whether the action is brought in the name of the lessor of the plaintiff, or in that of the nominal lessee.

Upon the general issue in this action, not guilty, evidence that the plaintiff had accepted the rent of the premises for the time in dispute, and had agreed to wave the costs of the ejectment, is not admissible.

The defendant in this action must be the person in actual possession and trespassing; so that a tenant, whose under-tenant retains the possession after the term, would seem not to be liable.

If in an ejectment there be a verdict for the plaintiff, and the defendant bring a writ of error, and enter into a recognizance to pay costs in case of nonsuit, &c. pursuant to 16 & 17 C. 2. c. 8. and he be nonsuited, &c. the defendant in error needs not bring a *scire facias*, or debt on the recognizance, but may sue out an *elegit*, or writ of inquiry, to recover the mesne profits since the first judgment in ejectment.

As it is competent to the nominal plaintiff in ejectment to maintain the action for mesne profits, so it is also competent to him

Goodtitle v. Tombs, 3 Wils. 121. Gulliver v. Drinkwater, 2 T. R. 261. Doe v. Davis, 1 Esp. 358. Utterson v. Vernon, 3 T. R. 547.

Goodtitle v. North, Dougl. 584. Holdfast v. Morris, 2 Wils. 115. B. N. P. 88.

Doe v. Davies, 6 T. R. 593.

Doe v. Lee, 4 Taunt. 459.

Burne v. Richardson, 4 Taunt. 720.

Short v. Heath, 2 Crompt. Pr. 223.

Doe v. Jones, 2 M. & S. 473.

him to sue for an escape of the defendant in execution for such mesne profits.

Denn v.
White, 7 T.R.
112.

A judgment recovered in ejectment against the wife cannot be given in evidence in this action against the husband and wife. ||

Birch v.
Wright, 1 T.
R. 386.

A plaintiff may, if he pleases, waive the trespass, and recover the mesne profits in an action for use and occupation. But in the action for use and occupation he cannot recover the profits any farther than to the time of the demise in the ejectment; for this action does not spring out of the ejectment as the action of trespass does, but, when applied to the same thing, is totally inconsistent with it, this being founded on a contract, that on a tort; in the one, the plaintiff says the defendant is his tenant, and therefore must pay him rent; in the other, he says he is no longer his tenant, and therefore must deliver him up the possession.]

(I) Of bringing a new or second Ejectment.

ONE of the advantages attending this action is, that a man may have a remedy *toties quoties*, he being allowed to bring as many ejectments as he pleases (a). But this has sometimes proved a very great mischief, and yet it seems to be without remedy: for though it has been attempted in Chancery, after three or four ejectments, by a bill of peace, to establish the prevailing party's title; yet it hath been always denied to alter the course of the law, for that every termor may have an ejectment, and every new ejectment supposes a new demise; and the costs in ejectment are a recompence for the trouble and charge to which the possessor is put. But, where the suit begins in Chancery for relief touching pretended incumbrances on the title of lands, and that court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right settled to the satisfaction of the court, it hath ordered a perpetual injunction against the defendant; because there the suit was first attached in that court, and never began at law; and such precedent incumbrances appearing to be fraudulent and inequitable against the possessor, it is within the compass of the court to relieve against them. (b)

(b) It would not seem, that

the distinction here made as to the originating of the proceedings at law or in equity, obtains at present; for the courts of equity will interfere alike in either case, and after repeated trials, and satisfactory determinations of questions, will grant perpetual injunctions to prevent further litigation, and thus in some degree put that restraint upon litigation which is the policy of the common law in the case of real actions. *Earl of Bath v. Sherwin*, 1 Br. P. C. 217. 266. S. C. *Gilb. Eq. Rep.* 2. S. C. *Pr. Ch.* 261. S. C. *Barefoot v. Fry*, Bumb. 158. *Leighton v. Leighton*, 1 P. Wms. 671. 1 Str. 404. S. C. 2 Eq. Cas. Abr. 523. S. C. 2 Br. P. C. 217. S. C. *Goodright v. Harwood*, 3 Wils. 497. 2 Bl. Rep. 937. S. C. *Cowp.* 87. S. C. *Dom. Proc.* 9th May 1775, S. C. 2 Selw. N. P. 692. S. C. *Mitf. Eq. Pl.* 116. But a court of equity has never, it would appear to be the result of all the cases, considered a right as determined with a view to a perpetual injunction by any one trial at law, unless upon an issue sent out by such court for the purpose. *Robinson v. Lord Byron*, 2 Cox's Rep. 4.

If a man has (a) a verdict in ejectment, and costs are taxed, and an attachment issues for non-payment of them, the defendant shall not have an ejectment against the plaintiff in the same court till he hath paid those costs; but he may proceed in ejectment in another court without costs paid: the reason is, because the same court will see an obedience paid to their rules before they will suffer the disobedient person to proceed in a cause of the same kind; but one court cannot take cognizance of the rules of another court. [But this distinction now no longer prevails; and the courts of *Westminster Hall* consider a former ejectment in another court in the same light, as a former ejectment in the same court, and will in either case equally stay the proceedings in a new ejectment, till the costs of a former be paid.

A former ejectment had been brought in the King's Bench, where the defendant, in *Hilary* term 13 *Geo. 3.*, obtained a rule for costs for not proceeding to trial, which were taxed at 85*l.* 8*d.* after which the cause was tried in the same term by a special jury, and a verdict for the defendant; and his costs were taxed on the *postea* on the 11th *June* 1777, at 273*l.* 10*s.*; total 358*l.* 10*s.* 8*d.*; no part of which was paid. It was moved in *C. P.* to stay the proceedings in this cause till the costs of the former were paid. For the plaintiff it was urged, that the application came too late. The declaration was delivered before the *essoign-day* of *Easter* term 1777. Notice of trial was given for the sittings after *Trinity* term, viz. the 19th of *June* 1777. The plaintiff had been at the expence of preparing for trial, and bringing his witnesses to town; and the motion was not made till *Friday* the 13th of *June*. In support of the motion it was alleged, that the cause was so clear at the last trial, and the parties had rested so long, that the defendant did not think them in earnest till notice of trial was given. He then proceeded to tax his costs in order to ground this application, which otherwise he would not have done, the lessor of the plaintiff being insolvent. The court, on considering all the circumstances, made the rule absolute.

|| Although the two ejectments be brought on different demises, against different defendants, for different premises, provided they are to try the same title; though the situation of the parties be reversed, the defendant in the first ejectment being the lessor of the plaintiff in the second, (circumstances these which have heretofore been considered as (b) material;) yet the courts will now stay the proceedings in the second till the costs of the first are paid. ||

Roberts v. Cook, 4 *Mod.* 379. *Tredway v. Harcourt*, *Comb.* 106. *Dence v. Doble*, *Id.* 110.

[An ejectment brought by the *fraudulent* assignee of an insolvent was stayed, till the costs of former ejectments, which had been brought by the debtor himself, were paid.]

|| The length of time which elapses between the two actions is no bar to the rule; for many good reasons may exist for such delay;

Sid. 279.
(a) So, if the plaintiff is nonsuit, he cannot bring a second ejectment, without paying the costs of the first. *Salk.* 255. *Comb.* 110. [1 *Salk.* 255. *Burnes*, 155.]

Doe v. Law,
2 *Bl. Rep.*
1158.

Doe v.
Hatherly,
2 *Str.* 1152.
Thrustout v.
Holdfast,
6 *T. R.* 223.
Keene v. Augel, *Id.* 740.
(b) *Doe v. Roe*,
8 *T. R.* 645.

Doe v. Law
2 *Bl. Rep.*
1180.

Keene v. Augel, *ubi supra*.

delay; as the poverty of the other party, or a wish to end the controversy.||

Smith v. Barnardiston,
2 Bl. Rep. 904.

[Where there is manifest vexation and oppression, the court will stay the proceedings in a second ejectment, even though the lessor of the plaintiff did not enter into a consent-rule in the former cause.]

Doe v. Hatherly,
2 Str. 1152.

|| So, where the first ejectment was on the demise of the husband and wife, but the husband alone entered into the consent-rule, and judgment was given in *C. P.* for the defendant, which judgment was afterwards affirmed in *K. B.* and the House of Lords, and after the death of the husband the wife brought a second ejectment on her own demise; the court would not suffer her to proceed until the costs of the first ejectment were paid.||

Benn v. Denn,
Barnes, 180.

But, where the lessor of the plaintiff was in custody, under an attachment for non-payment of costs in a former ejectment, and brought a new ejectment upon the same demise, the court refused to stay the proceedings therein, till the costs of the former should be paid.

Salk. 258. *per Holt C. J.*

But no new ejectment shall be brought by the defendant after recovery against him, till he has quitted the possession, or the tenants have attorned to the plaintiff; so that he be in possession, and the defendant out.

Fenwick v. Grosvenor,
1 Salk. 259.
Dormer v. Parkhurst,
cited in Andr. 298. Grumble v. Rodilly,
1 Str. 554.

|| Where the party against whom judgment has been obtained, brings a writ of error, and pending that writ, commences a new action, the court will stay the proceedings on the second ejectment, till the error is determined. So they will pending a special verdict. And it seems also, that if it do not appear to the court, that the writ of error was brought with some other view, than to keep off the payment of costs, they will stay the proceedings until the costs of the first action be paid, notwithstanding such costs are suspended by the writ of error.

Doe v. Roe,
4 East. 585.

And the court have ordered the proceedings in a second ejectment to be stayed until the costs of an action for mesne profits, (upon which the lessor in the second ejectment, who had been the defendant in the first, had brought a writ of error), as well as the costs of the first ejectment, were paid.||

ELECTION.

- (A) In what Cases an Election is given.
 (B) To what Person : And herein of him that is to do the first Act.
 (C) Where it shall be said to continue, or be determined.
 (D) What shall be said a sufficient Election.
 ||(E) Where a Party shall be put to his Election, or not.||

(A) In what Cases an Election is given.

IF a man grants twenty acres, parcel of his manor, without any other description of them; yet the grant is not void, for an acre is a thing (a) certain, and the situation may be reduced to a certainty by the election of the grantee. Keilw. 84. 2 Co. 36. (a) But if a man sells 20^l. worth of his land, parcel of a manor; this is void, it being neither certain in itself, nor reducible to a certainty; for no man is made judge of the value. 2 Co. 36. Keilw. 84.

So, if one being seised of a great waste (b) grants the moiety of a yard-land lying in the waste, without ascertaining what part, or the special name of the land, or how bounded; this may be reduced to a certainty by the election of the grantee: but it is otherwise in the case of the king's grant, for there can be no election in his case, and therefore the grant is void for incertainty. Leon. 30. Noy, 29. 1 Co. 86. (b) But if A. seised in fee of 100 acres makes feoffment of eighteen, without any description of their situation, &c. it is void, and no election can reduce it to a certainty, because a feoffment with livery cannot operate in futuro. Ro. Abr. 725. N. Bendl. 148. And. 11. Hob. 174. Moore, 181. S. C. & vide tit. Feoffment.

So, if a man levies a fine *come ceo que il ad de son done* of an house and an hundred acres of land in D. where he hath there an house and 118 acres, (c) the conusee may elect which 100 acres he will have; (d) for the election is given to him (e) by the fine. Ro. Abr. 725. (c) Moore, 84. 102. S. P. N. Dyer, 280. Murgin, S. P. (d) That cestui

que use shall have it. Moore, 102. pl. 247. 602. pl. 832. adjudged. — Where the devisee of two acres not ascertained shall have the election. N. Dyer, 280. margin. — Upon a covenant, in consideration of marriage, to stand seised of so much land as shall be of the yearly value of forty marks; it hath been a question, whether they to whom the assurance was made, might enter into any part of the land of the value of forty marks, at their election, and hold the same in severalty; or if they should be only tenants in common with the other; and whether they may chuse one acre in one place, and one acre in another; and so through

through the whole land where they please? 3 Leon. 27. & vide Keilw. 84. Dyer, 280. Ro. Rep. 187. Lit. Rep. 218. (e) But, if the conusee renders it back to the conusor for a certain number of years, the conusor hath the election given him, which hundred acres he will have, and he may elect. Ro. Abr. 725.

5 Co. 24. If a man grants 600 cords of wood out of a large wood, the grantee hath election to take them when and in what part of the wood he pleases, without any appointment of the grantor, and, consequently, may assign his interest in them to a third person, who shall have the like election.
Palmer's case. Cro. Eliz. 819.
S. C. Noy, 32.
S. C. Moore, 691.
S. C. Jon. 276.
S. C. cited. Hob. 174. like point.

5 Co. 24. in But, if one grants to me 1000 cords of wood, to be taken at Palmer's case. my election, and the grantor or a stranger cuts down part of the wood, I can take no part of that which is cut down, but must supply myself out of the residue still remaining.

Vent. 271. But, if *A.* covenants with *B.* that he shall have twenty of the Motteram and Jolly. best trees in the wood of *A.* to be taken at the election of *B.* 2 Lev. 142. within such a time; it is a breach of the covenant in *A.* to cut S. C. by the report of down any trees within that time, because the latitude of election which *B.* had is thereby abridged.

granted twenty of his best trees, &c. and adjudged the grantor should not take any in the mean time, at least without request to the grantee to make his election; and so it was not like Palmer's case, for that being only of so many loads of wood, it was sufficient if so many were left for the grantee.

2 Ro. Abr. If rent be reserved payable at the church of *S.* or *D.* upon 428. but for condition, &c. the lessee hath his election to pay it at either this vide head of *Rent.* place; and therefore to take advantage of the condition, the lessor must demand it in such places, where by his own agreement he has permitted the tenant to pay it.

Benson v. [Where money is agreed by articles to be laid out in land, Benson, 1 P. the party, who would have the sole interest in the land, when Wms. 129. bought, may elect to have the money paid to him, and that it shall not be laid out in land.]

Short v. So, if the party being adult, could by fine levied acquire the Wood, 1 P. entire interest in the lands when settled (as tenant in tail with the Wms. 471. immediate remainder to himself in fee): but otherwise, if a recovery would be necessary, as in case of a tenant in tail with remainder over.

2 P. Wms. 173. Oldham v. Hughes, 2 Atk. 453. Trafford v. Boehm, 3 Atk. 447. Cunningham v. Moody, 1 Ves. 176. Countess of Holderness v. Marquis of Caermarthon, 1 Br. Ch. Rep. 377. *Contra*, Eyre's case, 3 P. Wms. 13. and Mr. Onslow's case mentioned in the note to Eyre's case.

Earlom v. But this rule will not apply where an infant becomes so entitled; for an infant is incapable of making an election to vary Saunders, Ambl. 242. the nature of his estate.] Carr v. El-lison, 2 Br. Ch. Rep. 56.

(B) *To what Person*: And herein of him that is to do the first Act.

[T is laid down as a general rule, that in case an election is given of two several things, he who is the first agent, and ought to do the first act, shall have the election. Co. Litt. 145. 2 Co. 37. a. [Doug. 14. 15.]

As, if a man grants a rent of 20s. or a robe to one and his heirs, the grantor shall have the election, for he is the first agent by payment of one or delivery of the other. Co. Litt. 145. a.

So, if a man makes a lease, rendering a rent or robe, the lessee shall have the election. Co. Litt. 145. a.

But, if I contract with you to pay you a robe, or twenty shillings, at *Easter*, you may, after the feast, bring debt for the one or the other. Co. Litt. 145. a.

So, if a man leases lands for years, reserving weekly nine quarters of wheat, or the value thereof, as it shall then be sold in the market of *W.*, if the lessee pays neither of these at the time appointed, the lessor may have his action, at his election, for the wheat only; for though the lessee might have paid any of them at his election at the day, yet, after the day, the law gives the election to the lessor. Roll. Abr. 725. Denny and Parnell.

If *A.* gives one of his horses in his stable to *B.*, *B.* hath the election which horse to take, for he is the first agent by taking the horse. Co. Litt. 145. Moor, 82. Dyer, 91.

If one grants to another twenty loads of maple to be taken in his wood of *D.*, there, the grantee shall have the election, for he ought to do the first act, *viz.* fell and take the same. Co. Litt. 145. a.

If one seised in fee of a manor aliens the manor, except one close called *N.* part of the manor, and there are two closes called *N.* which are part of the manor, and one contains nine acres, and the other but three acres, the alienee shall not chuse which of the closes he will have; but the alienor shall have the election which of them shall pass. Leon. 268. Sir Thomas Lee's case.

If I have three daughters, and I covenant that *J. S.* shall dispose of one of them in marriage, it is at my election of which, and after request, I am bound to deliver her to him. Moore, 72. pl. 197. Dal. 73. S. C.

If an obligation be conditioned to pay *B.* or his heirs annually 12*l.* at *Midsummer* and *Christmas*, or to pay him or his heirs at either of the said feasts 15*l.*, the obligor hath election to pay the 12*l.* or the 15*l.* but he ought to continue the payment of the 12*l.* annually, until he pays the 15*l.* Though he may at any time determine the payment of the 12*l.* by payment of the 15*l.* Abbot v. Rookwood, Cro. Ja. 594.

If *A.* covenants with *B.* that *A.* or his son *C.* or either of them, shall work with *B.* at the grinding and polishing of glass, *B.* paying to each of them so much, &c. and *B.* requests *C.* to work with him, &c. if he doth not, the covenant is broken, for *B.* had the election to require both or either of them to work with him. Sir Paul Neele v. Reeve, 2 Sid. 107.

Sayer v. Glean,
1 Lev. 54.
1 Sid. 27. S. C.

In debt on an obligation, that if a ship put to sea, and either the goods or the obligor come safe, he should pay such a sum over and above the use allowed by the statute; the defendant pleaded, that the obligor died before he returned, and insisted, that he, as his executor, had an election to pay at which of the contingencies he pleased, and that therefore, the testator never returning, no action accrued: but it was resolved, that the payment should arise on either of the contingencies; and that this being agreeable to the intention of the parties, the law supplies the words, *which should first happen*.

(C) Where the Election shall be said to continue, or be determined.

Co. Litt. 145. a.
2 Co. 37.
Moore, 85.
Keilw. 78.

WHERE the things granted are annual, and to have continuance, the election (where the law gives it him) remains to the grantor, as well after the day as before; otherwise, when to be performed *unicâ vice*.

Co. Litt. 145. a.
(a) Yet it seems that if a lessor reserve yearly a rent, or a pair of spurs, and the lessee fail of payment at the day, the lessor may distrain for either of them; for in this case the lessee loses his election only *pro hac vice*.
Roll. Abr. 725.

As, if I grant to another for life an annuity or robe at *Easter*, and both are behind, the grantee ought to bring his writ of annuity in the disjunctive; for if he should bring it for the one only, and recover, this judgment would (a) determine the election, for ever; for he should never have a writ of annuity afterwards, but a *scire facias* upon the judgment; which reason *Fitzherbert* (b) in his *Natura Brevium* not observing, held an opinion to the contrary.

Co. Litt. 90. b. (b) Fol. 152. II.

Co. Litt. 145. a.
2 Co. 37. a.
(c) When election creates the interest, nothing passes till election.

When nothing passes to the feoffee or grantee (c) before election to have the one thing or the other; there, the election ought to be made in the lifetime of the parties; and the (d) heir or executor cannot make the election.

Hob. 174. — As, if a man grants one of his horses in a stable, the election must be made in the time of the parties. Co. Litt. 145. — But, if a man gives one of his horses to *A.* and *B.*, and after *A.* dies, yet *B.* may elect, because this was a thing in interest in them, and no express election limited. Roll. Abr. 725. — But, if a man gives one of his horses to be elected by *A.* and *B.*, if *A.* dies before election, *B.* cannot elect. Roll. Abr. 725—6. (d) For if he should, he should take as a purchaser, where named only by way of limitation. Leon. 254.

Co. Litt. 145.
2 Co. 36. a. 37.
a. Lutw. 803.

But, where an estate or interest passes immediately to the feoffee, donee, or grantee; there the election may be made by him, or his heirs or executors.

Co. Litt. 145. a.

When one and the same thing passeth to the donee or grantee, and the donee or grantee hath election in what manner or degree he will take this; there, the interest passeth immediately, and the party, his heirs or executors, may make election when they will.

If *A.* being seised in fee of a manor, part in demesne, and part in a lease for years rendering rent, and part in copyhold, in consideration of a sum of money, by indenture grants, bargains, and sells it to *B.* to hold for seventeen years from the death of *A.*, and after *A.* covenants to stand seised thereof to the use of himself and the heirs of his body, and dies, and *B.* enters; (*a*) he may elect whether he will take by the common law, or by bargain and sale, for *A.* had power to pass it either way; and if he should be obliged to take by demise at common law, then *B.* would lose the rents reserved upon the lease for years for want of an attornment. It was also holden, that this election remained notwithstanding the alteration of the estate by the second indenture, and the death of the lessor.

to take by one or the other. 4 Co. 72. a. and for this *vide* 3 Leon.

2 Co. 35. Sir Rowland Heywood's case. 2 And. 202. S.C. adjudged. Poph. 95. S.C. Hob. 159. S.C. cited. (*a*) *A.* bargain and sale is enrolled *quind. pasch.* and at the same time the bargainor levies a fine to the bargainee, he may elect 16. 2 And. 161.

If a man levies a fine *come ceo*, &c. of an house and 100 acres of land in *D.* (and he hath there 118 acres), and the conusee renders to the conusor for 100 years, and after the conusor dies, his executor may elect which of the 100 acres he will have, because this was a thing in interest in the testator.

Ro. Abr. 725.

[*A.* died indebted by one bond to *B.*, and by another bond to *C.*, and left *B.* and *J. S.* executors. *B.* intermeddled with the goods, and died before probate, and before any election made to retain. It was insisted, but the point was afterwards waved, that as *B.* might have retained the goods in his hands, his executors had now the same power. However, in a preceding case, where *A.* lent money on bond to *B.* who dying intestate, *C.* took out administration to him, after which *C.* dying, *A.* took out administration *de bonis non*, &c., to *B.* it was determined (*inter al.*) that *A.* might, out of the assets of *B.*, retain for such bond-debt contracted before he took out administration; and though *A.* happened to die before he had made any election in what particular effects he would have the property altered; yet the court said, it must be presumed he would elect to have his own debt paid first, and this being presumed, there would be no difficulty as to altering the property; for as the executors of *A.* were to account for the assets of *B.*, they must, on that account, deduct the amount of the money lent by *B.* to *A.*]

Croft v. Pyke, 3 P. Wms. 183.

Weeks v. Gore, Mich. 1720, cited *ibid.*

There was a composition between the prebendary of *A.* and the abbot and convent of *B.*, that the prebendary of *A.* and his successors, for all time to come, should have their election yearly, either to receive tithes in kind of corn or grain arising within certain lands of the abbey, or else to receive five marks to be paid by the said abbot and convent in lieu thereof; so as such election was notified to the abbot, or any of the monks or porter of the abbey, &c. The lands came to the king by the 31st of H. 8. and from him to the defendant, and the prebend came to the king by the 1st of Edw. 6. of chantries, &c. and from him to the plaintiff. Upon admitting the composition good, it was adjudged that the power of election was gone, because it cannot now be made according to the composition: but

Sir William Ingolsby and Wivel, Hardr. 381.

(a) Which
vide in Poph.
91.

Co.Litt.145.a.
2 Co. 37. a.
S. P.

Tyssen v.
Benyon, 2 Br.
Ch. Rep. 5.

in this case, it was said by *Hale* Ch. Baron, that in (a) one *Southwell's* case, in 44 Eliz. where an abbot had a quantity of wood, to be taken yearly in such a wood, or a sum of money at his election; it was held, the election was transferred to the king by the statute of dissolution of monasteries.

If one enfeoffs another of two acres, to hold the one for life, and the other in tail, and he before election makes a feoffment of both; in this case, the feoffor shall enter into which of them he will, for the feoffee, by this wrongful act, hath lost his election.

[By settlement, previous to the marriage of the plaintiffs *Samuel Tyssen* and *Sarah* his wife, bearing date 24th September 1779, *Francis John Tyssen* deceased, the plaintiff's father, agreed to convey certain lands and other estates, and it being, among other parcels, recited, that certain farms, &c. at *Foulden* in *Norfolk*, were of the rent of 550*l.* he covenanted before the end of twenty-four calendar months, to purchase lands in the county of *Norfolk*, sufficient to make up, with the farms at *Foulden*, the sum of 500*l.* a year, and to convey the same to uses, or to convey other farms, &c. at *Hackney* in *Middlesex*, of sufficient value to make good so much as the farms, &c. in *Norfolk*, should be deficient of 500*l.* a year. By an indorsement on the deed (before the execution thereof,) it was agreed by the parties, that it should be at the option of *Francis John Tyssen*, within twenty-four calendar months after the marriage, either to convey the lands according to the covenant, or to pay the trustees 12,000*l.* to be laid out in the purchase of other lands to be settled to the like uses; and in the mean time to be placed out at interest, and the interest to be received by the persons entitled, according to their respective interests. The marriage took place, and there was no issue, except a daughter, who was one of the plaintiffs. *Francis John Tyssen* died 9th September 1781, having made his will, bearing date the day of his death, whereby he gave annuities charged upon his estates in *Middlesex*, *Essex*, *Norfolk*, and elsewhere, and gave and devised all his manors, &c., to trustees for payment of debts and legacies, and for other purposes, and to allow the plaintiff *Samuel*, such some of money yearly during his life, as they should think proper, the remainder to accumulate during his life, and after his death to be laid out to certain uses therein declared. The conveyance, covenanted to be made by the settlement, having never been made, nor the money paid, the plaintiffs filed their bill, praying that *Francis John* might be declared to have made his election to pay the 12,000*l.* or that an election might now be made: and if the persons interested should elect to pay the 12,000*l.* it should now be raised; and, if the election should not be considered as having been made, and should not be now made, that a proper part of the testator's estate in *Norfolk* should be conveyed upon the trusts in the marriage articles. The plaintiffs, by the bill insisted, that *Francis John Tyssen*, by the devise of the premises covenanted to be conveyed, (included in the general devise,) had made his election

election to pay the 12,000*l.* and if not so, that the defendants by letters and acts stated in the bill, had made such election. The heir at law and executors submitted the question of election, and said that the testator's debts having exceeded his personal estate, they had no fund out of which to pay the 12,000*l.* but the real estate. Lord Chancellour said, that although the testator had covenanted to convey in twenty-four months, and therefore, after that time he had lost his election; yet, after that time, as it lay in recompences, the court would have permitted it to be made good, and, after his decease, he having given both his real and his personal estate to the same person, that person might perform either part of the covenant, and the court would not hold the devisee bound by the testator's not having made his election within twenty-four months: but in the events which had happened, his Lordship decreed the estate at *Foulden*, to be conveyed to the uses of the settlement, and to be made equal to 500*l.* *per annum*, by the conveyance of other parts of the estates.

If a testator is bound to settle within four months after his marriage lands of 100*l.* *per annum* upon his wife, or to leave her 2000*l.*, and die within the four months, and the four months elapse without any election being made by the executors; yet, under such circumstances, a court of equity will enlarge the time, and relieve against the lapse.]

¶ If lessee for years assign over his term, the lessor may refuse to accept the assignee to be tenant at one time, and yet accept him at any time after he pleases; and for rent arrear after the assignment it is in his election, notwithstanding he so refused to accept the assignee, to sue the assignee or the lessee.

A person, who is indebted to another on two several accounts, may, on paying him money, ascribe it to which account he pleases, except where the debt is payable out of a different fund; and his election may be either expressed or inferred from circumstances. But, if he do not pay specifically on one account, the receiver may afterwards apply the payment to the discharge of either of the accounts he pleases; and if he sue on each account, it seems, that he thereby declares his election, and the defendant cannot, by a subsequent notice of set-off, elect to which account he will ascribe the payment.¶

Eastwood v. Vinke,
2 P. Wms.
617.

Devereux v. Barlow,
2 Saund. 184.

Peters v. Anderson,
5 Taunt. 596.
Newmarch v. Clay, 14 East,
239. *Anon.*
Cro. El. 68.
Hawkshaw v. Rawlins,
1 Str. 24.
Goddard v. Cox, 2 Str.
1194. *Meggott*
v. Mills, 1 Ld. Raym. 286.

(D) What shall be said a sufficient Election.

IF a man gives two acres to another, to hold the one for life and the other in fee, and the donee after makes a feoffment of one acre; (a) this is an election to have the fee in that acre. both executor and devisee enters generally, without claim or demonstration of election, he shall have the thing devised, as executor, which is his first and general authority. 10. Co. 47. b. & *vide* Plow. 520. *Cro. Eliz.* 223. 2 Co. 37. b.

Plow. 6.

Ro. Abr. 726.

If a man leases two acres for life, the remainder of one acre in fee, and after licenses the lessee to cut trees in one acre; this is an election that he shall have the fee in the other acre.

Co.Litt. 145. a.

2 Co. 37. a.
same rule.

When the election is given to several persons, there, (a) the first election made by any of the persons shall stand.

(a) Where an election made by tenant for life shall bind him in remainder. Moore, 102.

2 Co. 36. b.

As, if a man leases two acres to *A.* for life, the remainder of one acre to *B.*, and of the other acre to *C.*, *B.* or *C.* may elect which of the acres they will have, and the first election by one binds the other.

||(E) Where a Party shall be put to his Election, or not.||

2 Ves. jun.

370. 560. 696.

3 Ves. 385.

2 Ves. 13.

Ambl. 330.

3 Br. Ch.

Rep. 287.

THE doctrine of election, as far as it may be considered under this head, is grounded upon this broad principle, that no man shall claim in repugnant rights; a principle of more frequent application, perhaps, in courts of equity, but yet equally recognized in courts of law. A court of law will not allow a tenant to set up a title against his landlord: it will not allow a man to affirm an act as to one part, and disaffirm it as to other part; to treat the same act as lawful, and as injurious. If a man, either in a court of law or equity, claims under a deed, he must claim under the *whole* deed; it shall not be permitted to him to take one clause and reject the rest; he must confirm the whole, or abandon the whole. The principle indeed is universal: it prevails in the laws of all countries; is applicable to all interests; to the interests of married women, and of infants; to interests immediate, remote, contingent, of value and of no value; to copyhold as well as freehold estates, (b) and to deeds as well as to wills. (c) He who will take the benefit, shall not dispute the title. If a testator devises an estate the property of *Titius*, and by another clause of his will gives *Titius* a legacy, *Titius* shall not hold the estate, and claim the legacy. He shall not take the benefit under the will, unless he suffers the whole instrument to take effect. It is immaterial whether the testator (d) thought he had a right to dispose of the estate of *Titius*, or whether he meant by an arbitrary exertion of power to exceed the extent of his authority, — if *Titius* will avail himself of the testator's bounty, he shall not disturb his will. If he chooses to keep his own estate, the disappointed devisee shall have compensation out of the other.

(b) Rumbold

v. Rumbold,

3 Ves. 65.

Wilson v.

Mount, Id.

191. Petti-

ward v. Pres-

cot, 7 Ves. 541.

(c) Moore v.

Butler, 2 Scho.

& Lef. 249.

(d) At one

period it was

holden, that

where a per-

son supposes

he has lawful

power to dispose of an interest, and this appears on the face of the will, it is not a case of election; as it could not be proved that he meant to dispose of the estate if he had known that he had no power to dispose of it. Cull v. Showell, Ambl. 727. But this construction has been very properly over-ruled, upon the ground of the danger of speculating upon what the testator would have done had he known the fact. Whistler v. Webster, 2 Ves. jun. 367. and see Wright v. Rutter, Id. 673. Rutter v. McLean. 4 Ves. 531. and Doe v. Lord George Cavendish, 4 T. R. 741. note.

In pursuance of this principle an heir shall be put to his election, where the estate is devised to him, although by the rule of law the devise is inoperative, and he takes by descent; as, if a man being seised of some lands in tail, and also of others in fee, devise the entailed lands to his youngest son, and the fee simple estate to his eldest, who is issue in tail; though the devise to the eldest is void, and he takes by descent, yet he shall be put to his election.

Noys v. Mor-
daunt, 2 Vern.
581. *Anon.*
Gilb. Eq. Rep.
15. *Welby*
v. Welby,
2 Ves. & Beam.
187. See
Rich v.
Cockell,
9 Ves. 374.

& *White v. White*, 2 Dick. 522. Reg. Lib. B. 1775, fol. 650—655. In the discussion of *Theilussou v. Woodford*, *Ronilly* put it as a doubtful point, whether the heir must elect where a legacy is given to him, and an estate to a stranger, and after the will a recovery is suffered by the testator, whereby the will is revoked, and the estate descends to the heir; and he thought, that the heir could not be put to his election; but *Alexander*, who was on the other side, thought it was a case of election, as was, he said, every case in which you can look at the will. The point however, as Mr. *Sugden* observes, seems very doubtful, for notwithstanding that the testator intended the estate to go to the devisee, yet *the will being revoked as to the devise*, although by construction of law, there seems to be no equity attaching on the conscience of the heir. Independently on the question of election, equity could not relieve the devisee against the revocation of the will. *Sugd. on Powers*, 375, 376. 2d Edit.

But this doctrine of election can never be applied, but where, if an election is made contrary to the instrument, the interest, that would pass by the instrument, can be laid hold of to compensate for what is taken away. In all cases therefore there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. If under a power to A. to appoint to two, he appoints to one only, and gives a legacy to the other, this is a case of election. But, (a) where under a power to appoint to children, the father appoints improperly, any child may set it aside, although a specific part is appointed to him; for there being no other fund than that appointed, there is nothing whereout compensation can be made.

Wollen v.
Tanner, 5 Ves.
218. See
Vane v. Lord
Dungannon,
2 Scho. &
Lefr. 118.
(a) *Bristow*
v. Warde, 2
Ves. jun. 336.

To raise a question of election, a clear intention to pass the particular estate must appear, (b) and it must appear on face of the instrument; it cannot be compelled on any thing *dehors*. (c) Still, extrinsic evidence has been allowed to shew what the testator considered as *his* estate, and, consequently, to determine what passed under a general devise, so as to put a party to his election. (d)

Sugd. Pow.
377. (b) *Dash-*
wood v. Pey-
ton, 18 Ves.
27. *Read v.*
Crop, 1 Br.
Ch. Rep. 492.
(c) *Stratton*
v. Best, 1 Ves.

jun. 285. *Finch v. Finch*, *Id.* 635. *Judd v. Pratt*, 13 Ves. 168. (d) *Pulteney v. Lord*
Darlington, 1 Br. Ch. Rep. 223. *Pole v. Lord Somers*, 6 Ves. 309. *Druce v. Denison*, *Id.*
385. *Wright v. Rutter*, 2 Ves. jun. 673. *Rutter v. McLean*, 4 Ves. 531. *Monck v. Lord*
Monck, 1 Ball & Beatty, 298. But see *Forrester v. Cotton*, *Ambl.* 389.

Nice distinctions have been made as to the legal capacity of the deviser, and the validity of the instrument to pass the interest in case he had actually been entitled to it in his own right. Where an infant having personal estate, of which she had ability to dispose, and a power over real estate, to which she was entitled in default of appointment, bequeathed the personality to her only child, and appointed the estate to strangers;

Sugd. Pow.
378.
Hearle v.
Greenbank,
3 Atk. 695.
1 Ves. 298.
S. C.

See Rich v.
Cockell,
9 Ves. 369.

(a) Carey v.
Askew, 8 Ves.
492. cited by
H. Milly.

1 Cox's Rep.

241. S. C.

(b) *Ex parte*
the Earl of
Ilchester,

7 Ves. 372. (c) *Sheddon v. Goodrich*, 8 Ves. 481. (d) *Buckeridge v. Ingram*, 2 Ves. jun. 666.

Boughton
v. Boughton,
2 Ves. 12.

(e) Carey v.
Askew, and
Sheddon v.

Goodrich, *ubi supra*. *Thellusson v. Woodford*, 13 Ves. 209. Sugd. Pow. 380. 1 Dow,
249.

4 Br. Ch.
Rep. 21.
2 Ves. jun.
572.

4 Br. Ch. Rep.
24. 2 Ves. jun.
562. Ambl.
727. 3 Wood-
des. Append. 1.
2 Ves. jun. 371.

Lord Hardwicke held the appointment to be void, and that this was not a case of election, because the will was void as to the real estate on account (as he observed in the case of *Boughton v. Boughton*, 2 Ves. 14.) of her infancy; as it would if she had been a feme sole. He said, it was like the case where a man executes a will in the presence of two witnesses only, and devises his estate from his heir at law, and the personal estate to the heir at law; this is a good will as to personal estate, yet, for want of being executed according to the statute of frauds, is bad as to the real estate; and he said he should in that case be of opinion, that the devisee of the real estate could not compel the heir at law to make good the devise of the real estate before he could entitle himself to his personal legacy, because here was no will of real estate for want of the proper forms and ceremonies required by the statute. This doctrine has been recognized, and acted upon by *Lord Kenyon* (a), *Lord Alvanley* (b), and *Lord Eldon* (c); for although the will cannot be read without the devise in it, yet, as *Lord Alvanley* correctly expressed it, a judge can say, for the statute of frauds enables him, and he is bound to say, that if a man by a will unattested gives both real and personal estate, he never meant to give the real estate at all. (d)

Lord Hardwicke, however, determined, that where an *express* condition is annexed to the personal legacy, the heir at law must make good the devise of the realty, or give up his legacy; a distinction which, (e) though constantly disapproved, has always been acted upon, and cannot now be disturbed. ||

Questions of election often arise in cases of dower, where a dowress claims also a benefit under her husband's will. The rights, however, under which the dowress claims in this case are not of themselves obviously inconsistent: a particular intent in the testator, therefore, that his wife should not have both must be made out, either from the words used by the testator in his will, or the striking inconsistency of her claims with the dispositions of it, before she can be put to her election: such intent, it seems, cannot be inferred from a testator's making a general disposition of all his property, because the estate is not his to give exempt from the claim of dower, the tenancy in dower being an estate in the land different from that of the husband, and equally firm.

The putting a devisee under a will to his election is said to be a strong operation of a court of equity: the calling upon him to elect is an argument addressed to his conscience in favour of a devisee whom he would otherwise disappoint: it is evident therefore that the obligation to elect can only be enforced at the instance of a person claiming a specific interest under the same will. Neither can it be enforced without a clear knowledge of the

the extent and amount of each of the funds between which the party is to elect.

And in order to enable him to make the election to advantage, he may file a bill to have the state of the fund ascertained. Where the state of the fund is free, and he has acquiesced a long time, he will be holden to have elected, although he may not have expressly done so; but, (a) where the fund is embarrassed, even a long acquiescence has been determined not to bind him, and *a fortiori*, (b) not the mere receipt of gifts under the will for a short period. Where a widow released her dower, and elected to take under her husband's will, and the provision for her was afterwards claimed by his creditors, she was allowed to resort to her dower (c), notwithstanding her election.

jun. 335. Rumbold v. Rumbold, 3 Ves. 65. (c) Kidney, v. Consumaker, 12 Ves. 136.

If the party has mortgaged the interest he takes in his own right, and then is suffered to elect to take under the will; the mortgage must be satisfied out of the interest provided for him by the will.

Where the claimant is an infant, or feme covert, it is usually referred to the master to see whether it will be more for their benefit to take under or against the will, unless the interest given by the will be manifestly the better.

Where interests are given to a person and to his children after him, the claim of the parent in opposition to the will, will not bind the children, who may elect for themselves.

445. In one case it seems to have been thought that an election could not be raised upon an estate settled with several limitations, on account of the confusion which would ensue, as the devise would sometimes be good, at other times not, just as the devisee in remainder submitted to the will or not: but this objection is not now attended to. Forrester v. Cotton, Ambl. 388. Sugd. Pow. 376.

Where a party elects to take in opposition to the will, the estate he so takes vests in him with all the legal consequences attached to it. Thus, where a tenant in tail devised away the estate, and gave the issue in tail, who was a married woman, and also her husband, other benefits by his will, and she elected to take her estate tail in opposition to the will, but her husband of course took under the will, and afterwards, upon her death, entered as tenant by the courtesy; it was contended, that as he took under the will, he could not claim in opposition to it; but it was ruled, that his wife took the estate with all its legal incidents, and that, consequently, he was entitled to be tenant by the courtesy in right of *her* seisin, although he claimed under the will in his own right.

Butrick v. Broadhurst, 1 Ves. jun. 171. (a) Beaulieu v. Lord Cardigan, Ambl. 533. 6 Br. P.C. 332. See 1 Ves. jun. 172. 336. Yate v. Mosely, 5 Ves. 483. 484. (b) Wake v. Wake, 1 Ves. 136.

Rumbold v. Rumbold, *ubi supra*.

Wilson v. Lord John Townshend, 2 Ves. jun. 693.

Ward v. Baugh, 4 Ves. 623. Long v. Long, 5 Ves.

Lady Cavan v. Pulteney, 2 Ves. jun. 544. 3 Ves. 384. Brodie v. Barry, 2 Ves. & Beam. 127.

Entry — see Forcible Entry

ERROR.

(a) Therefore differs from another writ or action. Jenk. Rep. 25. 2 Inst. 40. Yelv. 209.

A WRIT of Error is (a) a commission to judges of a superior court, by which they are authorised to examine the record upon which a judgment was given in an inferior court, and on such examination to affirm or reverse the same, according to law.

— But yet, if by the writ of error the plaintiff therein may recover, or be restored to any thing, it may be released by the name of an action. Co. Litt. 288. b. — In a writ of error to reverse a fine as cousin and heir of the conusor, it need not be shewn in the writ of error how he is cousin; for it is but a commission to examine errors, and needs not such certainty as other writs. Cro. Ja. 160.

Co. Lit. 289. b. This writ lies where a man is grieved by an error in the foundation, proceeding, judgment or execution of a suit.

Hale's Lords' Jurisdiction, c. 23. 25. [Writs of error or false judgment are of a higher nature than other kinds of civil suits. They are *quasi casus reservati* to the king's special cognizance. And therefore by the statute of Marlbridge, c. 20. *nullus excepto domino rege teneat placitum in curiâ tenentium suorum, quia hujusmodi placita specialiter pertinent ad coronam et dignitatem domini regis.*

And hence it is, that even in the greatest courts of ordinary jurisdiction, the King's Bench or Common Pleas, those courts cannot, barely by virtue of their ordinary jurisdiction, without the king's writ under the great seal, hold plea to reverse a judgment given in an inferior court of record; no, not so much as a judgment in a court-baron, or hundred-court, though no courts of record. And the reasons are these two principally; 1st, In respect of the king—all jurisdiction is mediately or immediately derived from him; and the courts of all kinds are his courts, and have that style, (unless in counties palatine where the lord hath *jura regalia*, and yet even that is derived from the crown,) and, consequently, judgments there given are virtually given by the king; and therefore it is not reasonable to have them examined but by the king's writ or commission derived from him specially. 2d. In respect of the subject—who having run his course to obtain or defend his right in the ordinary courts of justice, it is not reasonable, after his long expectation and expence, to turn all about again, without the solemnity of the king's special writ or commission.]

(A) In what Cases a Writ of Error will lie: And herein,

1. In what Cases a Writ of Error is the proper Remedy to be relieved against an erroneous Judgment.

2. *On what Judgments a Writ of Error will lie.*
3. *In what Court the Judgment must be given on which a Writ of Error will lie.*

(B) Who may bring a Writ of Error, and against whom : And herein of the Persons necessary to be made Parties thereto.

(C) Of the Time of bringing a Writ of Error.

(D) Of the Manner of bringing it : And herein,

1. *Of the Form of the Writ, and where the Record shall be said to be removed.*
2. *What is necessary to be removed ; and herein of removing the Record, or a Transcript.*

(E) Of alleging Diminution and granting a *Certiorari*.

(F) Of the *Scire Facias*.

(G) Of the Proceedings after the Record removed : And herein of the Abatement of the Writ of Error.

(H) How far the Writ of Error is a *Supersedeas*.

(I) To what Court a Writ of Error lies : And herein,

1. *Of Writs of Error into Parliament.*
2. *Of Writs of Error into the Exchequer-Chamber.*
3. *Of reversing Judgments in the Court of Exchequer.*
4. *Of Writs of Error into the King's Bench.*
5. *Of Writs of Error in the Common Pleas and other Inferior Courts.*
6. *Where a Writ of Error lies in the same Court in which the Record is.*

(K) Of assigning Errors : And herein,

1. *Of the Manner of assigning Errors.*
2. *Of assigning Errors in Fact and in Law.*
3. *Of assigning that for Error which appears contrary to the Record.*
4. *Of assigning that for Error which is for the Party's Advantage.*
5. *Where the Matter assigned for Error is aided by the Appearance of the Party, and in not being taken Advantage of in proper Time.*
6. *Where Matters which might be assigned for Error are aided by a Release, and the Consent of Parties.*

(L) What Defence the Defendant in Error may make :
And herein of pleading a Release.

(M) Of the Judgment to be given on the Writ of
Error : And herein,

1. Where on a Writ of Error, Part only, or the whole Judgment shall be reversed.
2. What Judgment shall be given on the Reversal of the first.
3. To what the Parties shall be restored on the Reversal of the first Judgment.

(A) In what Cases a Writ of Error will lie : And
herein,

1. In what Cases a Writ of Error is the proper Remedy to be
relieved against an erroneous Judgment.

(a) When a statute is erroneously acknowledged, as, before one that has no authority, or, if a statute merchant has but one seal, &c. an *audita querela* lies, and not a writ of error; but, if a statute is well acknowledged, and the execution erroneous, a writ of error lies. Cro. Eliz. 233. 810. Owen, 142. Dyer, 35. Leon. 233. — A judgment in a copyhold court reversed upon petition to the lord, and the party restored to his damages by *audita querela*. 4 Co. 30. b. — Where the fact assigned for error is in the suggestion of the writ itself, and not in any of the proceedings in the cause, no writ of error lies, but the party must bring an *audita querela*. Carth. 282. 4 Mod. 314. Salk. 262.; but for this *vide tit. Audita Querela*.

REGULARLY, an erroneous judgment given in a court of record can (a) only be reversed by writ of error.

28 Ass. 17. Therefore, if the tenant in a *cui in vita* dies seised (b) pending the writ, and after judgment is given against him, which is erroneous, and after the recoverer sues execution against the heir, and he brings an assise; he shall not avoid this judgment against his father, by saying, that his father died pending the writ; for the judgment is not void, but only voidable. Ro. Abr. 742. — Note, that this is aided by 16 & 17 Car. 2. c. 8. and cannot be taken advantage of on a writ of error; for which *vide tit. Amendment and Jeofail*.

Ro. Abr. 742.
Cole and
Lowe, ad-
judged.

In an action upon the case, if the plaintiff be nonsuit, and after it be entered, that he *reliquit actionem suam*, & *fateatur se nolle ulterius prosecui*, upon which costs are assessed; though it be admitted, that this judgment is erroneous, because this is not any nonsuit, as it is entered; yet in an action of debt for the costs, the defendant shall not avoid it by plea without a writ of error; for it is a judgment *de facto* not void, but only voidable by Writ of Error.

¶ If a mandamus be directed to an inferior court to give judgment on an indictment, and the return to it state an erroneous judgment; the return will not therefore be quashed, but a writ of error must be brought to reverse the judgment. ||

R. v. Justices of Yorkshire,
7 T. R. 467.

If a man recovers against the principal, and sues a *scire facias* against the bail, they cannot say the principal died before the judgment, and (a) so avoid the judgment by plea, for it is against the record.

Ro. Abr. 742.
Cro. Eliz. 119.
S. C. Leon.
101. S. C.

(a) But it is a good plea by

way of excuse for not bringing in the body, but not to avoid the judgment, which must be avoided by writ of error. 2 Mod. 308. & vide Godb. 377. and tit. *Bail in Civil Causes*. [But by stat. 17 Car. 2. c. 8. the death of either party between verdict and judgment shall not be alleged for error, so as the judgment be entered within two terms after the verdict.]

If a fine is levied without an original, or of more than is contained in the original, it is not void, but only voidable by writ of error.

2 Inst. 513.
but for reversing erroneous

finer and recoveries, vide head of *Fines and Recoveries*.

If an infant suffers a common recovery, in which he comes in as vouchee in his proper person, and not by attorney or guardian; though this shall not bind him, but that he may in a writ of error avoid it, because it is error in law; yet at his full age he cannot enter into the land, and avoid it by his entry, before he has reversed it in a writ of error; because he himself is privy to the judgment, and may reverse it by such means; for judgment ought not to be subverted by matter *in pais*, without matter of record, as a recognizance or fine by an infant where he appears by attorney, and not by guardian.

Ro. Abr. 742,
743. Style,
246. S. C. for this vide head of *Infancy and Age*.

If A. levies a fine to B., who grants and renders to A. and his wife, and the heirs of the body of A., this is not void as to the wife, though she is no party to the original, but only voidable by writ of error.

3 Co. 5. a

By the practice of the court of (b) Common Pleas, a defendant coming in by *capias utlagatum* the same term in which an exigent is returnable, may avoid the outlawry without writ of error, by shewing that he purchased a *supersedeas* out of the same court, and delivered it to the sheriff before the *quinto exactus*, &c. or by shewing any other matter apparent on record, which makes the outlawry erroneous; as the want of an original, or the omission of process, or want of form in a writ of proclamation, &c. or a return by a person appearing not to be sheriff, or a variance between the original and exigent, or other process, or the want of such addition as required by 1 H. 5. c. 5.

2 Hawk. P. C. c. 50. § 1. Ro. Abr. 742, 743.
(b) But, whether an outlawry on the crown side of the King's Bench can be reversed in the same or a different term with a writ of error, vide

2 Hawk, P. C. *ibid.* and tit. *Outlawry*.

If one be attainted upon an erroneous indictment, he cannot be relieved but by writ of error; for the judgment being *quod suspendatur*, &c. which is the judgment of law due for the offence, it must be presumed to have been given, for that he was guilty of the offence. But, if judgment of acquittal is given upon such indictment, the king need bring no writ of error; but the offender may be newly indicted, for the judgment being *quod cat sine*

3 Inst. 214.

sine die, &c. may be given as well for the insufficiency of the indictment as for the party's innocence.

3 Inst. 231.
Hawk. P. C.
c. 50. § 3.

(a) A judgment in the Marshalsea, where none of the parties

were of the king's hostel, was void, and being *coram non iudice* might be avoided by plea. 10 Co. 77. a. Brownl. 24. & vide Lev. 23. 204. 234. Yet a writ of error also lies to reverse such judgment. Cro. Eliz. 502. 6 Co. 20. Ro. Abr. 744. Sav. 36. 2 Jon. 209.

6 Co. 5. a.

(b) So, if a fine imposed in a leet be unreasonable

or against law,

as joint, where it should be several, it may be avoided by plea and judgment of the court in which the suit is depending; for there is no other remedy. 11 Co. 44. Godfrey's case resolved. Ro. Rep. 75. S. C.

2 Mod. 308.

Randal's case, & vide Vaugh.

94. Gilb. Eq. Rep. 308.

* Qu. If this could be done now, since the statute of 8 &

9 W. 3. c. 11. § 6. if there was an interlocutory judgment against the intestate in his lifetime, and final judgment after?

Cro. Eliz. 489.

If a man is found guilty upon an indictment of felony, and prays his clergy, and it is allowed him, and he is burnt in the hand; he cannot avoid this by writ of error, because he is convicted only, and not attained. But the record being removed by *certiorari* into the crown-office, if there be a fault in the indictment, it may be discharged, and restitution awarded to the party of his goods seised for that cause.

Raym. 433.
Phorbes's
case.

If a man had been indicted upon the statute of 3 Ja. 1. c. 4. for absenting from his parish church, and thereupon proclamations had been made, that he should render his body, &c. which not being done, he had been convicted according to that statute; yet no writ of error would have lain thereupon; for by the statute, after proclamations made and the default recorded, the same was a conviction of the offence; as, if the statute gave process for the forfeiture; and if there was a fault in the record, the party's remedy was in the Exchequer to quash it there.

Co. Litt. 259.

2 Hawk. P. C.
c. 50. § 6.

By the common law, *in favorem vitæ*, an outlawry of treason or felony might be avoided by plea, that the defendant was in prison, or in the king's service beyond the sea, &c. at the time of the outlawry pronounced against him. But it seems that no outlawry

outlawry for any other crime against a party rightly described can be avoided by the plea of any matter of fact whatsoever.

One who purchases land of a person who afterwards is outlawed of felony, or condemned upon his own confession, may falsify the record, not only as to the time wherein the felony is supposed to have been committed, but also as to the point of the offence: but where a man is found guilty by verdict, a purchaser cannot falsify any more than the party, as to the point of the offence, but only as to the time.

2. On (a) what Judgments a Writ of Error will lie.

No writ of error can be brought but on a final judgment, or an award in nature of a judgment, for the words of the writ are, *si judicium redditum sit, &c.*

ther it lies on a judgment given on a *habeas corpus*. *Salk. 504.*

If the plaintiff be (b) nonsuit at the *nisi prius*, upon which costs are taxed by the same jury, by the statutes 23 H. 8. c. 15. 4 Ja. 1. c. 3. and judgment given for them against the plaintiff, the plaintiff may have a writ of error upon (c) this judgment.

Kempland v. Macanley, 4 T. R. 436.] (b) A man may assign errors in law or fact, upon a judgment given against him by default. 19 Ass. 8. Ro. Abr. 675. S. C. (c) How upon a bill of exceptions, *vide* 2 Inst. 427. and *tit. Bills of Exception*.

If a man brings a writ of false judgment in the Common Pleas upon a judgment given in ancient demesne, and reverses the judgment there, a writ of error lies upon this judgment, for this is a matter of record.

If a man is indicted for felony, and thereupon a *capias* and *exigent* is awarded, but he dies before any attainder; his administrators may have error upon this award of the *exigent*, because by the award of the *exigent* his goods were forfeited; and this is *ad grave damnum, &c.* though the principal judgment can never be given.

If one be outlawed upon an indictment of treason, felony, or trespass, but the process and order prescribed by the statutes of 6 H. 8. c. 4. and 8 H. 6. c. 10. are not observed, the outlawry may be reversed by writ of error, which (d) *ex merito justitiæ* ought to be granted.

of them, that writs of error were *ex debito justitiæ*, and not *ex mera gratiâ*, except in treason and felony; but *Prie* and *Smith* held, that the subject could not of right demand them in any criminal case. 2 *Salk.* 504. but for this *vide* Ro. Rep. 175. 3 *Bulst.* 71. 2 *Leon.* 194. Sid. 69. — And note, that as the law is now settled, a person attainted of treason or felony, before he can have a writ of error to reverse his attainder, must assign his errors, and thereupon have leave from the court to prosecute his writ of error. 2 *Hawk. P. C.* c. 50. § 11. — Also, no writ of error for the reversal of an attainder of treason or felony is to be allowed without an express warrant from the king or the consent of the attorney general. 3 *Mod.* 42. Sid. 69. 2 *Hawk. P. C.* c. 50. § 12. *Ld. Raym.* 154. *Vern.* 170. 175.

A writ of error lies to reverse an attainder of high treason, though some have held the contrary, by reason of 33 H. 8. c. 20. that every attainder of treason by the common law should be as effectual

2 *Hawk. P. C.* c. 50. § 2.

Co. Litt. 288. b. *Samuel v. Judin*, 6 East, 333. (a) *Whe-* *Salk.* 504.

Ro. Abr. 744. [Newell v. Pidgeon, 1 Str. 235. *Box v. Bennett*, 1 H. Bl. 2452.

Ro. Abr. 744.

11 Co. 41. b. cited from the 18 H. 7. Rot. 3. *Eaton's case*. Cro. Ja. 359. Ro. Rep. 85. S. C. cited.

3 Inst. 31. (d) Upon a case stated and referred to all the judges, it was holden by ten

3 Inst. 315. & vide 3 *Bulst.* 71. *Raym.* 7, 2

effectual as if by authority of parliament; for the statute is to be intended of law attainders by due course of law, and not of erroneous or void attainders; and so it was held in a parliament held the 28 Eliz. when it was enacted, that no attainder of high treason, where the party was executed for the same, should be avoided by plea or error: but this act extended only to attainders before that time, where the party had been executed, not to attainders after.

Cro. Car. 504.

Marquis of Winchester's case, adjudged, and upon such error the judgment reversed accordingly, the king by his attorney

having signi-

fied his pleasure, that it should be reversed, if erroneous. Jon. 407. S. C. by which report, the writ of error was brought by the king; and there held, that a writ of error lay for the king; for he was not concluded by the words of the statute of 3 Ja. c. 4.

Style, 265.

(a) That it is

but an award,

vide Ro. Abr.

751. (b) Where

the judgment

was, that he should recover

super recuperationem.

Yelv. 157.

If one be convicted upon an indictment of recusancy for absenting from church for one month, upon which judgment is given that he shall forfeit 20*l.* but it is not *ideo capiatur*; this omission being apparently to the prejudice of the king, it was held a writ of error would lie notwithstanding the words of 3 Ja. c. 4. that no such indictment shall be avoided, discharged, or reversed, for want of form or other defect whatsoever, other than by direct traverse to the point of not coming to church.

If it be entered in an inferior court, that the plaintiff *recupere rare debeat*, whereas it ought to be *recupret*; this is (a) no judgment; so (b) no writ of error lies thereupon, for the words of the writ are *si judicium redditum sit*.

where it should have been *super recognitionem*. Yelv. 157.

17 E. 3. 5. b.

19. b. Ro.

Abr. 749. S. C.

In an assise of darrein presentment, if the parties demur upon the title, and it is adjudged for the plaintiff, and that he shall have a writ to the bishop; a writ of error lies upon this judgment before the damages inquired of, because there were no damages at the common law, and then the writ would lie presently; and the addition of damages given by the statute, to be inquired of by the sheriff, shall not stay the writ of error; and if it be affirmed, it may be inquired of the damages where it is affirmed.

17 E. 3. 21. 33.

Ro. Abr. 749,

750. S. C.

If a man recovers by default in a writ of *cosenage* or *aid*, a writ of error lies upon this before the damages are inquired of, because the damages are but an addition to the common law given by the statute; and so the judgment for the principal continues as it was at common law.

Ro. Abr. 750.

Lord Barkley

and Countess

of Warwick.

Cro. Eliz. 635.

Moore, 643.

Noy, 71. S. C.

adjudged.

Cro. Ja. 324.

2 Bulst. 104.

like case ad-

judged, & vide

2 Ro: Rep. 125.

In a writ of partition, if the judgment be given *quod partitio fiat*, and thereupon a writ be directed to the sheriff to make partition, no writ of error lies hereupon; for the judgment is not complete till the sheriff's return, and the second judgment, which the law requires herein, viz. *quod partitio præd. foret firma & stabilis in perpetuum*; for before that, the plaintiff may be nonsuit; or he may, upon the return of the sheriff, suggest to the court, that the partition is not equal, and so have a new partition, and may also release before the last judgment.

2 Bulst. 119.

So, if, in an action of account, judgment is given *quod computet*, and thereupon the defendant brings a writ of error; yet the record shall not be removed till the entire matter of the account be determined, *ne curia domini regis deficeret in justitiâ exhibendâ*. 11 Co. 39. b. Cro. Eliz. 636. 2 Leon. 68. 2 Bulst. 119, 120. 3 Bulst. 233. Cro. Ja. 224. 2 Ro. Rep. 125. Style, 290. Cro. Ja. 356. Ro. Rep. 85. Godb. 258.

But, if a woman recovers in a writ of dower, a writ of error lies before the writ of inquiry of damages awarded, and before the third part assigned by metes and bounds; for the judgment is perfect as to the realty, and the damages are given by the statute by way of addition. Ro. Abr. 750, but for this *vide* Brownl. 127. 11 Co. 40. Ro. Abr. 760. Style, 290. March, 88.

So, if the plaintiff recovers in an *ejectione firmæ* by confession, *nihil dicit, non sum informatus*, or demurrer, a writ of error lies before a writ of inquiry of damages executed (a); (b) for the judgment, *quod recuperet possessionem*, is perfect, and the plaintiff may presently have execution thereupon; and therefore, if the defendant were to be hindered from bringing a writ of error before a writ of inquiry executed, it might be in the plaintiff's power, by refusing to bring or execute the writ of inquiry, to delay the plaintiff for ever. Ro. Abr. 751. Cro. Eliz. 235. 636. Leon. 309. Latch. 212. Noy, 95. Leon. 193. Dyer, 291. 3 Bulst. 233. Palm. 6. 2 Ro. Rep. 126. Latch, 133. Style, 109.

And. 145. March, 8. Keb. 327. and Carth. 205. S. P. *per* Holt Ch. Just. (a) [If the defendant do not, at the trial, confess lease, entry, and ouster, according to the rule, he cannot have a writ of error; because, in such case, the judgment is against the casual ejector; and error cannot be sued in the name of the casual ejector, *Roe v. Doe*, Barnes, 181. *George v. Wisdom*, 2 Bur. 757. neither can it be sued, in such case, in the name of the defendant, for he has not made himself party to the record.] (b) So, in debt, but otherwise in trespass and case, where the damages are the principal. Cro. Eliz. 255.

So, if a man recovers in *quare impedit* upon a demurrer, the defendant may have a writ of error before the writ of inquiry of damages returned; for such writ may be awarded out of the King's Bench, if the judgment be affirmed there. Ro. Abr. 750, 751. *vide* March, 89. Noy, 66.

If a man recovers in a *quare impedit*, and after brings a writ *quare non admisit* against the bishop, a writ of error lies on the judgment in the *quare impedit*, and the record shall be removed, though the other writ of *quare non admisit* be not yet discussed. Ro. Abr. 751. Godb. 439.

If a *quare impedit* be brought against two, and one plead to issue, and the other confess the action upon which judgment is given, he shall not have a writ of error till the matter is determined as to the other; for the writ of error must rehearse all that are parties to the original; and as to one, judgment is not given; and if the record is removed before the entire matter is determined, there would be a failure of right. 11 Co. 39. a.

If in a *formedon* the tenant has judgment for part, no writ of error lies until the entire matter in demand is determined; for the judgment is, *si judicium inde redditum sit*, which word *inde* goes to the entire demand. 11 Co. 39. b. Dyer, 291.

If debt be brought against divers by several *præcipes*, and judgment given against one, he may have error before determination of the matter as to the others; for there being several counts, 11 Co. 41. a. 2 Ro. Rep. 125. Dyer, 291. March, 89.

counts, the record of his count and the pleading shall be severed from the original, and removed in *B. R.*, and yet the original shall remain in *C. B.*, for otherwise the court of Common Pleas could not proceed to determine the residue without the original. And my Lord *Coke* says, it seems to him that in this case, if there be error in the original upon a *certiorari*, the chief justice shall only certify the tenor of it.

Palm. 1, 2.
adjudged upon
a writ of error
upon a judgment given in
a *quo warranto*
against the corporation of *Dublin*. 2 Ro. Rep. 113. S. C.

If in a *quo warranto* judgment be given as to part of the liberties claimed, that they shall be seised, and that the defendants *capiantur pro fine*; and as to the other part, *curia advisari vult*; a writ of error lies before any judgment given for the other part.

R. v. Dean
and Chapter
of *Dublin*, 1 Str. 535. 8 Mod. 27. S. C. 2 Br. P. C. 554. R. v. *Hearle*, 1 Str. 625. 3 Br. P. C. 178. S. C.

|| A writ of error will not lie on a *mandamus*.||

3. In what Court the Judgment must be given on which a Writ of Error will lie.

(a) Not of a
judgment
given in an
inferior court,

No writ of error will lie of any judgment that is not given in a court of (a) record.

as the county-court, &c. Co. Litt. 288. b. Nor of a decree or sentence in Chancery proceeding according to equity. 37 H. 6. 14. Bro. Error, 95. Ro. Abr. 744. — But of a judgment given in the limited court of Chancery, called the petty-bag, which proceeds according to the common law, and holds plea of *scire facias* for repeal of the king's letters patent, petitions, *monstrans de droit*, traverses of offices, *scire facias* upon recognizances, executions upon statutes, and pleas of all personal actions by or against an officer or minister of the court, a writ of error lies in *B. R.* Ro. Abr. 744. Dyer, 315. 4 Inst. 80. Plowd. 395. & vide Ro. Rep. 287. Moore, 570. Vern. 131.

2 Inst. 540.
4 Inst. 186.

The authority of the justices of *Trailbaston* was by act of parliament and by the general rule of law, and if they erred in judgment, a writ of error lay in *B. R.* to reverse their judgment.

Ro. Abr. 743,
744. *Berry's*
case. 2 Jon.
167. S. C.
cited, and a
conviction
upon the
statute of

If a man be convicted (b) upon the statute of 7 Ja. 1. c. 11. by two justices of the peace, for killing partridges, upon proof or confession of the party, without indictment; this judgment may be reversed in *B. R.* being removed there by *certiorari*, without any writ of error. So, if the conviction had been on the (c) statute against shooting, or such like.

hunting in a park, being removed by *certiorari*, exceptions allowed to be taken thereto. (b) Vent. 33. Like point *per Cur.* vide Raym. 389. where error was brought upon a conviction of a riot before justices of peace, and sheriff, upon the view, upon 13 H. 4. 7. (c) Vide Jon. 171.

Cro. Ja. 404.
Rice's case
adjudged.

But, if an erroneous judgment be given upon an indictment of barratry at the sessions of peace, and the party fined thereupon, and committed till he pays it, and he remove the indictment and proceedings by *certiorari*, and himself by *habeas corpus*, yet he cannot be relieved, unless he brings a writ of error.

But a record of force made by justices of peace upon the view, may be quashed upon motion, without a writ of error. *Lev. 113. agreed per Cur. in the case of the King and Chaloner. Sid. 156. S. C. and S. P. per Cur. and said that a writ of error would not lie, because they were not a court.*

Wherever a new jurisdiction is erected by act of parliament, and the court, or judge, that exercises this jurisdiction, acts as a court or judge of record, according to the course of the common law, a writ of error lies on its judgment; but, where they act in a summary method, or in a new course different from the common law, there, a writ of error lies not, but a *certiorari*. *Salk. 263. pl. 5. Id. Raym. 213. 252. 454.*

(B) Who may bring a Writ of Error, and against whom: And herein of the Persons necessary to be made Parties thereto.

NO person can bring a writ of error to reverse a judgment, who was not (a) party or (b) privy to the record, or who was not (c) injured by the judgment, and therefore is to receive advantage by the reversal thereof. *Ro. Abr. 747. Dyer, 90. (a) Where in ejectment, error may be brought either*

by lessor or lessee. *Sid. 317. & vide ante.* (b) As heirs and executors; but, if an erroneous judgment be given against the parson, the patron cannot have a writ of error. *Godb. 377.* — That error and attaint always descend to such person to whom the land should descend, if no such recovery or false oath had been. *Leon. 261.* (c) Hence it is, that no man can have a writ of error to reverse a fine that took any estate by it. *5 Co. 39. Tey's case.* — And for the same reason the conusor cannot assign any error in the grant and render, because by that the estate which passed from him by his conusance is restored to him; and therefore he shall not be admitted to defeat the estate which by his own agreement he accepted. *5 Co. 39. b.*

So, a writ of error does not lie against any, but him who is party or privy to the first judgment, his (d) heirs, executors, or administrators. *9 H. 6. 46. Br. Error, 9. Ro. Abr. 749. S.C. (d) F.N.B.* 107. — If a man recovers land by judgment, and dies without heir, against whom the writ of error shall be brought, is left a *quare*. *9 H. 6. 49. Ro. Abr. 749.*

And therefore on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he hath nothing in the land, and not against the tenant; and on such writ the judgment may be reversed: but there must go (e) a *scire facias* against all the tertenants. *Ro. Abr. 749. Ro. Rep. 302. (e) That to reverse a fine or recovery, there must go a scire facias against all the tertenants. Carth. 112.*

Upon this rule, that none shall have a writ of error to reverse a judgment, but he who is privy to it, and hath some prejudice thereby; it hath been resolved, that if one hath lands on the part of his mother, and loseth by erroneous judgment, and dies, the heir of the part of the mother shall have the writ of error. *Leon. 261. 2 Sid. 56. & vide Owen, 68. Godb. 377.*

So the younger son, when entitled to the land by the custom of Borough-English shall bring the writ of error, and not the heir at common law; for this remedy descends with the land. *Owen, 68. Leon. 261. 4 Leon. 5. adjudged, & vide Bridg. 79. Ro. Rep. 311.*

So,

Dyer, 50.
Leon. 261.
Ro. Abr. 747.

So, if there be an erroneous judgment against tenant in tail female, the issue female, and not the son, shall bring the writ of error.

Dyer, 89. b.

So, if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who levies a fine, and dies without issue, and *J. S.* brings a writ of error as cousin and collateral heir of the daughter, yet he shall never reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder in fee was in the daughter as right heir; wherefore *J. S.* shall not reverse the fine, *quia de non apparentibus & non existentibus eadem est ratio*; especially, in a court of judicature, where the judges cannot take notice of any thing that does not come judicially before them, and appear in the pleading.

3 Co. 3. b.
agreed in the
Marquis of
Winchester's
case. [Tenant
in remainder
may bring
error of a
common re-

If there be tenant in tail, the remainder in fee, and in a *præcipe* brought (*a*) against tenant in tail, an erroneous judgment be given against him, and he after die without issue, he in remainder may have a writ of error; for when the statute *de donis* gave liberty to limit a remainder after an estate-tail, the law gave such actions to him in remainder as belonged to privies in estate.

covery where the tenant in tail, *vouchee*, dies before the judgment; and he need not set out a complete title, but only shew the connection and privity between him and the person against whom the recovery was had. *Sheepshanks v. Lucas*, 1 Burr. 410. In such case *scire facias*, or any warning to the *heir*, is not necessary. *Id.* (*a*) So, if tenant in tail levy a fine, and before proclamation passes, a *præcipe* be brought against the conusee, who vouches the tenant in tail, &c. for when the tenant in tail comes in as *vouchee*, it is as of his old estate; so that the privity between the tenant in tail and him in remainder continues. *Bridg.* 69. Ro. Rep. 311.

Henningham
and
ham's case,
Leon. 261.
Owen, 68. S.C.
Godb. 377.
S. C. cited.

If tenant in tail male have issue a son and a daughter by one venter, and a son by another, and die, and the eldest son make a feoffment, and a common recovery be had against the feoffee, in which the eldest is vouched, and he vouch over the common *vouchee*, and after the eldest die; the youngest son may have a writ of error; for though the eldest should have rendered a fee simple to the feoffee, according to his loss, yet he should have recovered but an estate-tail, *viz.* such an estate as he had when the warranty was made, which would have descended to the youngest, and, consequently, the writ of error shall be brought by him.

Ro. Abr. 747.
Dyer, 89.

If there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing; and this is said to be necessary only by way of conformity.

Leon. 317.
Cro. Eliz.
115. 124. S. C.
adjudged,
and the fine
reversed *quoad*
the infant only.

But, if tenant for life, and he in remainder in fee, (being an infant,) join in a fine, the infant alone may bring error; for the error is in respect of the person of the infant, which is the cause of the action for him, and for no other.

A writ of error may be brought by him that is made party by the law, though he was not originally party to the suit, as he who comes in as vouchee. Ro. Abr. 748. 755.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may assign this for error; for he is party in interest to the recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief of it, by taking advantage of any error in it. Ro. Abr. 755. 796.

If *A.* be tenant in tail, the remainder to *B.*, and *A.* suffer an erroneous recovery, and the common vouchee release to the recoverer; yet if *A.* die without issue, *B.* may, notwithstanding the release, reverse it by writ of error; for the common vouchee is only called in for form; as he really has no interest in, or title to the land, so really neither does he make any recompence to the person that loses the land; and therefore it were unreasonable to carry the notion of the imaginary recompence so far as to suppose him a real sufferer, and thereby give him the privilege of setting aside a conveyance by which he is no way affected. Cro. Eliz. 2. 3 Co. 4.

If he in the remainder be made privy to the record by *aide prier*, he shall have a writ of error during the life of the tenant for life: so, (a) if he be received by default of the tenant for life. 3 Co. 4. (a) 8 H. 4. 5. Bro. Error, 39.

So, if a feme be received by the default of her baron, and lose the land by judgment, the baron and feme shall have a writ of error thereupon. 49 E. 3. 21 b. Ro. Abr. 748.

If baron and feme levy a fine, they may, by error, reverse the fine, for nonage of the feme, during the life of the baron. 2 Co. 57. Beckwith's case. Cro. Eliz. 129. Leon. 114.

If the conusor of a statute aliens the land, and execution is sued against the alienee, he may have a writ of error upon the execution. 18 E. 3. 25. b. Dyer, 1. pl. 5. Ro. Abr. 748. this is made a *quare*, because, as there said, he is not privy thereto, for the execution goes of the land of the conusor; but Godb. 377. S. C. cited, and said, that otherwise there would be no remedy; for the conusor himself could not have error, because the lands were not extended in his hands.

If, pending a real action, the tenant aliens in fee, and after a recovery is had against him, he (b) himself may have a writ of error though he hath nothing in the land, because he is privy to the judgment after his alienation and tenant in law. Ro. Abr. 748. 1 Co. 111. Cro. Eliz. 294. Palm. 254. S. P. and when he is

restored, the alienee shall enter upon him. (b) But the alienee cannot have a writ of error for want of privity. 2 Ass. 2. Ro. Abr. 749.

But, if a fine be levied of 120 acres of land, and he, that has right to a writ of error, make a feoffment of the whole, he shall never reverse the fine. But, if the feoffment had been made, or a release had been given of 20 acres only, he might yet have a writ of error to reverse the fine as to 100 acres, because he has

not transferred his right to those, and therefore may be reinstated, if the fine be erroneous.

Jon. 352. Roll.
789. Moore,
365.

So, if tenant in tail levies a fine which happens to be erroneous, and after suffers a recovery of part of the land only, of which the fine was levied; if the issue in tail brings a writ of error to reverse the fine, the tenant may plead the recovery in bar for that part, because for so much the recovery is an alienation, and therefore the issue shall never have a writ of error for that part of the land which he cannot have or enjoy, should the fine be reversed.

Beecher's case,
8 Co. 61.

(a) 3 Leon. 176.
S. P. *per Cur.*

arguendo. Ro. Rep. 302. S. P. *arguendo.* (b) Otherwise, where the tenant departs in despite of the court, or judgment is given upon his confession. 8 Co. 62. a. F. N. B. 21. — So, if upon his default. 2 Ro. Rep. 127. Palm. 56.

Franke and
Stukely, Ro.
Abr. 749.

In a writ of annuity against an heir, upon an annuity granted by his ancestor in fee, upon *non est factum* pleaded, if a verdict be found for the plaintiff, and thereupon judgment be given, that the plaintiff shall recover his costs, damages, and arrears of the land descended from the same ancestor, and thereupon a writ of execution be awarded to levy it of the lands descended, but no return thereof appear upon the record, and after the heir dies intestate; his administrator cannot have a writ of error upon this judgment, inasmuch as he loses nothing thereby; for if it be levied, it is of the lands descended, the which, or the profits thereof, he cannot have, or be restored to, if he reverses the judgment.

White and
Thomas, *per*
Roll, Style, 38,
39.

* *Qu.* and see
post.

If *J. S.* binds himself and his heirs in a bond, and thereupon judgment is obtained against *J. S.*, and *J. S.* makes his will, and his heir at law executor, and dies, leaving lands, which descend to his heir, yet he shall not have a writ of error as heir, for he is not privy to the judgment*; and when an extent is made upon him, it is as terretenant: but after the lands are taken in execution, he may have a writ of error.

Gravenor and
Massey, Leon.
291.

If in a common recovery four husbands and their wives are vouched, the voucher shall be intended to have been in, in the right of their wives, and the heir of any one of the wives may have a writ of error; for this charge in the realty did not survive, and the heir of every of them being chargeable, the heir of any of them, and not of the survivor only, may have error: adjudged, where error was brought as heir to one of the husbands; but the plaintiff relinquished that, and brought a new writ, and entitled himself as heir to one of the wives.

The Queen
and Bishop of
Gloucester,
adjudged,
3 Leon. 176.
Cro. Eliz. 65.
S.C. adjudged;

If in a *quare impedit* judgment be given against the bishop and incumbent, though the bishop claimed nothing but as ordinary, and so lost nothing; yet being privy to the record, he may for conformity join in error; for the plea of the bishop is not so strong as a disclaimer.

and *Wray* said, that the bishop had a loss, for that the writ shall be to the archbishop for admission and institution, so that the bishop having a loss may therefore join. *Vide* 3 Mod. 134.

If execution upon a judgment is sued by *elegit*, and land only extended, and after the defendant dies, his administrator may have a writ of error, for he is privy to the record, and may *in futuro* have loss by it. *Scroggs and Lord Mor-*
dant, ad-
judged, Moore,
686. pl. 949.

Cro. Eliz. 294. S. C. adjudged, at the end of which a *nota* is added, that the execution of the land may be avoided, and then the administrator may be damnified.

If a man be outlawed for felony, and die, his executors may have a writ of error to reverse it, for they are (a) privy to the judgment, and possibly may have all the loss, as, if the testator had only goods; and the objection, that the testator was attainted, and so had no goods, nor could make an executor, was held not material in this suit, which is to reverse the outlawry, by which the disability arises. *Marsh's case,*
Cro. Eliz. 225.
Owen, 147.
S. C. debated,
Leon. 325. ad-
judged, and
the outlawry
reversed ac-
cordingly; and

by all the books it seems to be admitted, that the heir also might have had a writ of error in respect of the prejudice to him. 5 Co. 111. S. C. cited, *Cro. Eliz.* 558. S. C. cited. (a) *A.* being seised in fee, *B.* his eldest son is outlawed for felony, *A.* dies, and *B.* enters and devises to *C.*, and dies, and *C.* enfeoffs *D.*, and whether *D.* could have a writ of error to reverse this outlawry? *Godb.* 376. debated.

If a woman recovers her dower and damages, and the tenant brings a writ of error, pending which the woman dies, he may have a writ of error against her executor to avoid the judgment as to the damages; for that is a grievance to him as well as the loss of the land. *Cro. Eliz.* 558.
Noy, 126.

If in a real action the land and damages are recovered, and the tenant dies, and his heir, who in respect of the land ought to have a writ of error, releases all writs of error; yet the executor of the tenant may bring a writ of error to avoid the judgment as to the damages, for he that hath a loss must have a remedy to redress it. *Cro. Eliz.* 558.

If a judgment be given against *B.*, and the money of *C.* attached by force of a foreign attachment in *London*, *C.* shall not have a writ of error, because he comes in by garnishment by the custom, and is not party or privy. *Bro. Error,*
187. Ro. 747.

If an action is brought against *A.* as a feme sole, where she is a feme covert, and she pleads issue as a feme sole, and judgment is given against her, and she is taken in execution, she and her husband may bring a writ of error; for otherwise the husband may be prejudiced in the loss of the society and comfort of his wife, and of her care in his business and family; and he hath no (b) other means to help him. *Hayward and Williams,* *Ro. Abr.* 748.
Style, 254. 280.
S. C. adjudged,
though it was
objected, that
the husband
was a stranger,

for he had no other remedy to prevent the loss of the society of his wife, being taken in execution. *Ro. Abr.* 759. S. C. 2 *Ro. Rep.* 53. S. C. *per Cur.* but because, in the assignment of error, it did not appear that she was married when the original was sued out, the judgment was affirmed. (b) But it is otherwise in the case of a fine, for the husband may enter and avoid it. *Ro. Abr.* 748. *Vide tit. Fines and Recoveries.*

So, if an action be brought against a feme covert and others, they all with the husband may join in a writ of error. *Ro. Abr.* 747.

Style, 406.

If an infant plaintiff, in ejectment, or any personal action, appear

by attorney,

and obtain a verdict, the judgment shall not be reversed because of such appearance by attorney. Stat. 21 Ja. I. c. 13. § 2. — But, if an infant defendant appears by attorney, and judgment is given against him, error lies in the same court. *Danver's Abr.* 2 vol. tit. Error, fo. 12. pl. 13. and the cases there cited.

Carth. 7, 8.

Hacket and Herne.

3 Mod. 134.

S. C. Yelv.

208, 209. S. P.

[Walter v.

Stokoe, 1 Ld.

Raym. 71.

Burr. v. At-

wood, *id.* 328.

Rous v. Etherington, 2 Ld. Raym. 870. *Ginger v. Cowper*, *id.* 1403. 1 Str. 606. *Elkins v. Paine*, 2 Ld. Raym. 1532. *Ratcliffe v. Burton*, Ca. temp. Hardw. 135. *Vavasor v. Faux*, 1 Wils. 88. *Knox v. Costello*, 3 Burr. 1792. *Laroche v. Wassborough*, 2 T. R. 738. all S. P.]

Lev. 210.

Hob. 70. &

vide Style, 190.

S. P. *cont.*

(a) It is the common practice of the court of Chan-

cery to grant an original after the want of an original has been assigned for error. 7 T. R. 475.

(b) Ro. Abr.

749. 2 Leon. 4.

Cro. Car. 408.

481. (c) Ro.

Abr. 749.

Style, 39.

Cro. Car. 408.

Lev. 137. (d) Cro. Car. 300. 408. Jon. 360. Hob. 72. Cro. Ja. 384. Ro. Rep. 294. Cro. Car. 574. 561. Bulst. 125. Litt. Rep. 93. Lev. 137.

(e) Cro. Car.

481.

(f) Style, 174.

If there be three defendants, and they all appear by attorney, whereas one of them is an infant, and judgment be given against all; they must all join in a writ of error, for the judgment is entire, and cannot be naught as to the infant and good as to the rest.

So, if there be judgment against father and son, the son alone cannot bring a writ of error, for all the defendants ought to join in the writ, and if one of them refuse, he must be summoned and severed; for otherwise this inconvenience would ensue, that every defendant might bring a writ of error by himself, and by that means delay the plaintiff from his execution for a long time, and from having any benefit of his judgment, though it might be affirmed once or oftener.

But, if in trespass against three, there is judgment against two of them by default, and the third justifies, and it is found for him, the two only may bring a writ of error; for he for whom the judgment is, cannot say, that the judgment was to his prejudice: also, in this case, the verdict and judgment for the third defendant will not help the want of an original. (a)

If there be judgment against the principal, as also judgment against the bail, (b) the principal cannot have error on the judgment against the bail, nor (c) the bail on the judgment against the principal, nor (d) can they join in a writ of error any more than tenant for life and he in remainder can join in such a writ; for these are several judgments, and affect distinct persons.

But in (e) Cro. Car. it is said, that if the writ of error, by the bail, had recited the first judgment (as of necessity it must) and the judgment in the *scire facias*, and alleged the error in the second judgment, it had been well enough: but in (f) Style it is said, that of late such writ ought to abate for the whole. *

* The doctrine in the preceding clause I conceive is the established law.

Carth. 447.

Burr and At-

wood.

Where on a *scire facias* execution was awarded against the bail, who brought a writ of error, which was *tam in redditione judicii quam in adjudicatione executionis* against the bail, &c.; on motion to quash the writ the court agreed, that the bail was not entitled

entitled by law to a writ of error upon a judgment against the principal in the original action, and therefore quashed the writ of error *quoad* all that related to the judgment in the original action, and no more; and the writ was ruled to stand good *quoad* the judgment against the bail upon the *scire facias*.

(C) Of the time of bringing a Writ of Error.

IT was (a) formerly holden, that a writ of error could not be brought before the judgment given; and if it bore *teste* before, it was no *supersedeas*, for the words of the writ are, *si judicium redditum sit, &c.* (a) 21 H. 6. 7. Ro. Abr. 749.

But it seems now agreed, (b) that a writ of error that bears *teste* before the judgment is good; and this is the usual course for preventing and superseding execution; but (c) the judgment must be given before the return of it. (b) March, 140. Vent. 255. Moore, 461. 1 T. R. 280. (c) 3 Keb. 308. Vent. 96.

Latch. 133. — It may be returnable the same term judgment is given. Sid. 104. — The judgment, when entered, hath relation to the day in Bank, so that a writ of error returnable after in the same term, will remove the record. Mod. 212. — Where judgment is not given, the special matter may be returned, viz. that no judgment was given. Sid. 466. Vent. 96. & vide Sid. 311. — [If the plaintiff defers signing judgment till the writ of error is spent, then signs it, and brings debt thereon, the court will order a new writ of error at the expence of plaintiff's attorney. Arden v. Lamley, Barnes, 250. Jaques v. Nixon, 1 T. R. 280.]

But a writ of error, that bears *teste* before any plaint entered, is not good. March, 140.

So, where the defendant, upon an indictment of barrettry, brought (d) a writ of error, bearing *teste* before the assises, it was disallowed; because, if such practice should obtain, it would disappoint all proceedings there. Vent. 255. 3 Keb. 308. (d) Yet when a *certiorari* is awarded before any in-

dictment found, but one is found before the return, it should be removed; but for this *vide tit. Certiorari*.

By the 10 & 11 W. 3. c. 14. it is enacted, "That no fine or common recovery, nor any judgment in any real or personal action shall be reversed or avoided for any error or defect therein, unless the writ of error, or suit for the reversing such fine, recovery, or judgment, be commenced or brought, and prosecuted with effect, within twenty years after such fine levied, or such recovery suffered, or judgment signed or entered of record.

Note, this statute hath the usual savings as to infants, feme-coverts, persons *non-compotes*, in prison, or beyond sea.

(D) Of the Manner of bringing it : And herein,

1. Of the Form of the Writ, and where the Record shall be said to be removed.

Cro. Ja. 160. **T**HE law does not seem to require the same exactness in writs of error as it does in other writs; therefore, it has been holden, that in a writ of error to reverse a fine as cousin and heir of the conusor, it need not be shewn in the writ of error how he is cousin, for it is but a commission to examine the errors, and needs not such certainty.

Cro. Ja. 161. [1 Burr. 410.] Neither need the plaintiff in error shew a title in a writ of error, unless it be in a special case, varying from the common course; as, where a special heir in tail brings error, or he in remainder, because he is to entitle himself to the writ.

Ro. Rep. 22. So, if a man brings a writ of error to reverse an outlawry, it need not be shewn in what action it was.

Vide tit. Amendment and Jeofail. Carth. 368. But great certainty was formerly required in making the writ of error agree with the record; for as the writ was the sole authority by which the judges were empowered to examine, &c. they could proceed only on that record which the writ or commission authorized; nor could the defects herein, before the 5 G 1. c. 13. be amended, because by the former statutes of amendment the judges were only enabled to amend in affirmance of judgment.

Watson and Bernard, 1 Ro. Rep. 22. Therefore, where a writ of error was brought upon a judgment *in quadam loquela* by writ of certain land and pasture, without shewing in what action this plea was, it was held naught.

2 Ro. Rep. 210. If an ejectment is brought against seven, and one dies, and judgment is given against the six, and laid *ad damnum* of the seven, the writ shall abate; though it might have been otherwise if the writ had concluded *ad damnum* of the six only. 2 Ro. Rep. 210. If the writ of error had mentioned the seven only, according to the record, and concluded *ad damnum* of the six, it had been well. — If one of the parties is dead, yet he ought to be named in the writ of error. 2 Mod. 285. 1 Ld. Raym. 71. Carth. 368. 5 Mod. 16. 69. 1 Str. 606. 2 Ld. Raym. 1403.

IIob. 327. If in a *quare impedit* in *C. B. George Shirley* baronet recovers against *Underhill*, and he brings a writ of error, reciting a record between *George Shirley* knight and baronet and *Underhill*, and thereupon the record and proceedings are sent in *B. R.* and a *mittitur* entered upon the roll, (a) yet the record is not removed. Hutt. 41. Cro. Ja. 633. S. C. (a) Style, 153. Like point *per* Roll C. J. who said the variance was material, for these additions are made part of the name; otherways where one is named *Gent.* in the record, and *Yeoman* in the writ. — Where a variance in the addition shall abate the writ. Sid. 104. — Where it was moved to quash a writ of error *inter A. and B. nuper de Kelsey in com. Warwici gent.* and the record certified was, *inter A. and B. nuper de Kelsey in com. Lincoln gent.* it was doubted whether this variance in the addition would vitiate the writ, for that the addition was not of necessity; and at one time it may be, he was of one *Kelsey*, and at another time of another. Sid. 193. Keb. 117. — But for variances between the

the writ and record, *vide* Cro. Eliz. 92. 172. 198. Ro. Rep. 16. 2 Bulst. 167. 174. Style, 193. 407. where the court by consent of parties made a rule to proceed in the writ of error, notwithstanding a variance for which it ought to have abated; of which the reporter makes a *quære*, the record not being well removed.

A writ of error was brought to remove a record *in curia manerii de Cuttingby*; where the record was, *in cur. custod. libertat. Anglie auctoritate parlamenti de Cuttingby*; and ruled by Roll, that there was no direct opposition between them, for that both may stand together; and though *de facto* it is the court of the lord of the manor, yet virtually, and in dignity, it is the king's court. Style 344.

If a writ of error be directed *majori & aldermannis civitatis sue B. ac majori & constabulario stapule B. nec non vicecom. ejusdem ac ballivis majori & communitati ejusdem cur. tols. ac ballivis & communitati cur sue pulverisat. & corum cuilibet*, to certify the record of a judgment *loquela que fuit coram vobis in cur. nostra civilat. præd. sine brevi nostro, &c.* and the record is certified thus, *viz. Placita in cur. dom. regis tols. civilat. præd. &c. coram A. & B. tam vicecomitibus com. civilat. præd. quam ballivis, majore & communitate ejusdem civitatis*, this is a good writ of error to remove this record; for though it is not said therein *coram vobis seu aliquibus vestrum*; yet it shall be taken *distributive, viz.* the judgment upon a plaint before all the said officers, or any of them. Gay and Adams. 2 Saund. 291. || In Walker v. Stokoe, 1 Ld. Raym. 152. note, Lord Holt expresses his disapprobation of this case, and afterwards upon its being cited by counsel in Reg. v. Buines, 2 Ld. Raym. 1200. 1203. it

was said by Powell J. that in the case in *Saunders* the court went much upon the constant form of writs of error to that court, which had always gone that way; and he heard Chief Justice *Saunders* say so; to which Lord Holt said, it would be hard to maintain the judgment otherwise.||

If a writ of error be (*a*) directed to Sir *Edward Littleton* (he being then Chief Justice *de Banco*) to certify a judgment *in querela que fuit coram vobis & sociis vestris*, where it was before Sir *John Finch*, then Chief Justice, the predecessor of Sir *Edward Littleton*, this writ shall abate. Lewes and Webb, Ro. Abr. 752. (*a*) It must always be directed to them before whom the judgment is; *per* Godb. 44. Salk. 264, 265. — To him who hath the custody of the record wherein any judgment is given; as, of a judgment in the Common Pleas, to the chief justice only; so upon a judgment in the Exchequer, to the treasurer of the Exchequer and barons, to have the record before the chancellor and treasurer of *England*; though it happen the treasurer of *England* and of the Exchequer be the same person, 4 Inst. 105.

So, if a writ of error be directed to *Oliver St. John*, he being Chief Justice *de Banco* to certify a judgment *in querela que fuit coram vobis & sociis vestris*, where it was before *Edmund Reeves & sociis suis*, there not being then any Chief Justice; this is not good, but the writ shall abate. Ro. Abr. 752.

But, if a writ of error be directed to *Peter Pheasant*, to certify a judgment *in loquela que fuit coram vobis & sociis vestris*, where it appears by the record that it was held *coram Edmundo Reeves & Petro Pheasant*; this is a good writ; for though in the return *Edmund Reeves* is first named, yet this is well enough, in Clerk and Sprigg, Ro. Abr. 752.

as much as *Peter Pheasant* is also named; and it does not appear which of them was the eldest.

Sprye and
Mill, Ro. Abr.
752. Style,
191. 203. S.C.
and S. P. ad-
judged.

If a writ of error be directed to the mayor, aldermen, and recorder of *Launceston* in *Cornubiâ*, and the record be certified by the mayor, aldermen, and deputy-recorder, the court being held by letters patent; this is not well certified, inasmuch as this ought to be certified in the name of the judges of the court; and it does not appear that the recorder had power to make a deputy by the said letters patent.

Lord Crom-
well and An-
drews, Yelv.
3. b. Cro. Eliz.
891. Noy, 44.
S.C. adjudged.
Godb. 248.
Ro. Rep. 15.
S.C. cited.

If an assise is summoned before justices of assise, and they are afterwards removed, and the Chief Justice *de B.* and another justice are made justices of assise in the same county, and the assise is taken before them, & *propter difficultatem* adjourned in *B.* and judgment there given for the plaintiff, and a writ of error is directed to the same chief justice before whom the assise passed, reciting the assise summoned before the justices of assize by name, & *postmodum capt.* before the chief justice, &c. but not reciting how the assise came in *B. viz.* by adjournment, or otherwise; this writ of error is not good; for as it took notice of the change of the justices, *a fortiori* it ought to take notice of the adjournment, for by that both judges and court were changed.

(a) Dyer, 77.
(b) Lord
Cromwell v.
Andrews,
Cro. El. 891.
Yelv. 3. S. C.
and a diversity
taken between
the case of an
assise and a
quare impedit,
for the assise

But in the (a) 5 E. 6. where judgment in a *quare impedit* by the statute West. 2. was given by justices of *nisi prius*, and a writ of error thereof brought, without shewing where the judgment was given; it was held good; for the record beginning and remaining in the Common Pleas, it was held not material where the judgment was given; (b) and *Gawdy* said, when the record begins in one place, and is finished in another, there, of necessity, in a writ of error the proceedings in both places ought to be mentioned.

must originally commence before justices of assize, and yet by presumption judgment shall be there given, and not in *C. B.*, but the *quare impedit* must begin in *C. B.*, and by intentment judgment shall be there given, though by the statute to avoid a lapse, judgment may be given before justices of assise. 2 Bulst. 171. S. C. and S. P. cited.

Yelv. 212.
Cro. Ja. 254.
Sid. 349.
(c) If the
record vary

If a writ of error be directed to several justices, and returned by part of them only; yet, if it (c) truly recite the record, it is thereby removed, and a new writ of error lies *de recordo quod coram nobis residet*.

from the writ of error, yet the inferior court ought to remove it. Vent. 97.

Blackwood
v. S. S. Com-
pany, Ca.
temp. Hardw.
344. 2 Str. 1063. S. C.

[Although the return to a writ of error from the Common Pleas be not signed by the chief justice *propria manu*, yet this is no objection to proceeding on the writ of error.

Sullivan v.
Seagrave,
2 Str. 695.

If a writ of error be directed to *W. W.* chief justice, and the return be only by *W. W.*, without adding "the chief justice within named," yet if there are the words, "*as to me within is commanded*," the return is good; for these words are enough to shew him to be the same person to whom the writ is directed.]

If a writ of error be brought upon a judgment in an assise *capt. coram J. Fleming nuper capitul. justiciar. ad placita & J. Dodderidge uno justiciar. ad placita coram nobis tenend. assignat. justiciar. nostris ad assisas*; this writ is naught, for there was no such record before *Fleming justiciar. ad placita*, the words *coram nobis tenend. assignat.* being omitted, and those after *Dodderidge* cannot refer to the first.

Cro. Ja. 342.
adjudged.
Dodderidge,
dissent. who
said the ad-
dition was
surplusage.
Godb. 248.
Ro. Rep. 16. 2 Bulst. 164.

If a writ of error be brought *in recordo & processu assise*, &c. *inter A. & B. summonit.*, without shewing which was plaintiff and which defendant, it is well enough, because the precedents are both ways.

Cro. Ja. 341.

And now by the 5 G. 1. c. 13. it is enacted, "That all writs of error, wherein there shall be any variance from the original record, or other defect, may and shall be amended, and made agreeable to such record by the respective courts where such writ or writs of error shall be made returnable."

[Collins v. Moxworthy, Ca. temp. Hard. 194.]

[A writ of error was not amendable at common law, nor by any of the statutes of amendments and jeofails, till the above statute of 5 G. 1. for all amendments are granted for the support of judgments; but the principal design of writs of error is to reverse them. A writ of error was not amendable at common law, because it has in its nature two things, viz. a *certiorari* to remove the record, and a commission to examine it; and no court was ever allowed to amend its own commission.]

1 Ld. Raym. 71. Per Fortescue J. 1 Str. 607.

An ejectment was brought against the Company and Mr. *Edwards*. After a verdict for the plaintiff, Mr. *Edwards* died, and a writ of error was brought laying the judgment to be *ad grave damnum* of the Company, and of *Mary Edwards* the daughter and heir, and she and the Company jointly assign errors. It was moved to amend the writ and assignment by striking out her name. And upon consideration, the court were of opinion, that it was amendable by the above statute, not only as a variance from the original record, which is really no way to the damage of Mrs. *Edwards*, but also by virtue of the general words *other defects*.

Sword-blade Company v. Dempsey, 2 Str. 892. Fitzg. 201. S. C. 1 Barnard. 405. 421. S. C. So, where two were charged with a joint trespass, and judgment was given against

one only, the other being found not guilty, &c., a writ of error was afterwards brought in both their names; on an affidavit that this happened by the mistake of the officer, the court of B. R. upon the authority of the above case, ordered the writ to be amended by striking out the name of the person who was acquitted. *Verelst v. Rafael*, Cowp. 425. || But in this case the recognizance of bail in error must also be amended. 2 Bl. Rep. 1067. S. C.]

There was a variance between the writ of error and the record; and as it stood in the paper, the court observed it, but neither party would move to amend it, for fear of paying costs; upon which the court said, the above statute would warrant their amending it, which they did without costs.]

Gardner v. Merrett, 2 Str. 902. 2 Ld. Raym. 1587. S. C. Fitzg. 268. S. C. 1 Barnard.

462. It appears from some of the reports of this case, that no costs are payable upon amendments pursuant to the statute, though at the prayer of the party; but, if the prayer be also to amend the assignment of errors, the rule is with costs, because then the party comes for a favour of the court,

Barnard v.
Guy, 2 Smith,
259.

¶ Where in suing out the writ of error a mistake had been made in the name of the defendant in error, who thereupon issued execution; the court of King's Bench granted a rule to shew cause why the sheriff should not pay the money levied on the execution into court, and enlarged that rule in order to allow the plaintiff in error to amend his writ.¶

Wright v.
Canning,
2 Str. 807.
2 Ld. Raym.

[A writ of error was returnable before any judgment given, and on consideration, it was holden to be such a fault as is not amendable by this statute.]

1531. S. C. 1 Barnard. 62. 65. S. C. *Rejindoz v. Randolph*, 2 Str. 834. S. P. *Vice v. Burrow*, *Id.* 891. S. P. *Wilson v. Ingoldshy*, 2 Ld. Raym. 1179. However in almost all cases, the writ is sued out before judgment signed, because otherwise execution would issue instantly. *Per Buller J. Jaques v. Nixon*, 1 T. R. 280. ¶ And it is now settled, that it may be made returnable before the day on which the judgment is actually signed, provided it be of the same term with the judgment; *Somerville v. White*, 5 East, 145. *Hill v. Tebb*, 1 N. R. 298, and that, whether the judgment be final or interlocutory. *Emanuel v. Martin*, 2 M. & S. 334.¶

2. *What is necessary to be removed, and herein of removing the Record or a Transcript.*

22 E. 3. 6.
40 Ass. 29.
Ro. Abr. 753.
2 Str. 837.

On a writ of error of a judgment in the Common Pleas, or other inferior court, in every adverse suit the record itself shall be removed, that it may remain as a precedent and evidence of the law in the like cases.

Bendl. 51.
Ro. Abr. 752.
Dyer, 89.
Godb. 248.
2 Ro. Rep.
233. F.N.B.20.

But in the case of a fine the transcript only is removed, for fines are only a more solemn acknowledgement or contract of the parties, and therefore no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of *B. R.* may send for the fine itself, and reverse it, or may send a writ to the treasurer and chamberlain to take it off the file. Besides, should the record itself be removed and affirmed, it could not be engrossed for want of a chirographer in *B. R.*

4 Inst. 21.
Cro. Ja. 341.
Bulst. 166.
Ro. Abr. 753.
Godb. 249.
in which last
book it is said
to be at the
pleasure of the
parliament, to
have either the
record or
transcript.

Also, if a writ of error be brought in parliament of a judgment in *B. R.* the chief justice must go in person into the house with the record itself, and a transcript, which is to be examined and left there, and then the record to be brought back again in *B. R.* and if the judgment be affirmed, the court of *B. R.* may proceed on the record to grant execution; and therefore if the record itself should be removed, and judgment affirmed, and the parliament dissolved, there could not be any proceedings thereupon to have execution.

Hale's Lords'
Jurisd. c. 26.

[According to the course of parliament as settled in the time of Hen. IV. in error from the King's Bench, when the chief justice was commanded either by petition of error or writ of error to bring the record into parliament either *indilatè* or on a day certain, he brought up the roll and a transcript of the record, and left the transcript and roll with the clerk of the parliament to be examined, and then the same day, or some short time after, the rolls themselves were carried back into the treasury. And this

hath obtained to this day. In the parliament of 18 Ja. when the chief justice of the King's Bench was made speaker of the House of Lords by commission on the suspension of the lord keeper, yet it was resolved 14 *Maii* 1621, in that parliament, that upon a writ of error he should bring in the record as chief justice.

If a writ of error be brought in parliament upon a judgment in the King's Bench, if the writ abate by death, a record is made of it in the Lords' House, and by judgment the writ is there abated, and the judgment of abatement is entered upon the transcript left in the Lords' House, and the same is remanded to the King's Bench to proceed according to law, H. 22. Car. 1. *B. R. rot.* 696. Trowl and Methurst. *Id. c. 28.*

So, if the judgment be affirmed by the Lords, the judgment of affirmation is entered upon the transcript, and *remittitur* entered thereupon, and the record delivered back to the King's Bench to proceed with execution. T. 26 Car. 2. *rot.* 807. *Id. ibid.*

And so, if the judgment be reversed by the Lords, the judgment of reversal is entered upon the transcript with a *remittitur* in this form: *Et superinde recordum et processus per curiam parliamenti curiæ domini regis coram dicto domino rege ubicunque, &c. remittuntur, et in eadem curiâ coram dicto domino rege jam resident.* M. 24 Car. 2. *B. R. rot.* 237. Streter's case. *Id. ibid.*

And it seems, that although as to some purposes the record was removed from the King's Bench into parliament; yet really the record remains as to many purposes in the King's Bench; and after such a *remittitur* the court of King's Bench proceed upon the original record before them, and enter the reversal and *remittitur* upon that record. Therefore, if the parliament be dissolved before any judgment of affirmance or reversal, upon a suggestion thereof upon the roll in the King's Bench, the court of King's Bench shall proceed upon the record before them, though there be no *remittitur* of the transcript out of the parliament into the King's Bench. *Id. ibid.*

If a writ of error be brought in *B. R.* here, of a judgment in *B. R.* in *Ireland*, the record itself is not sent, but a transcript only, by reason of the danger of the seas; but when it is come safe and entered in the rolls here, then it ceases to be a record in *Ireland*, and is a perfect record here; yet if the judgment be affirmed, the King's Bench in *England* shall not award execution, but shall send a special mandate to the chief justice in *Ireland* to do it. [It is the very record which comes here out of *Ireland*, and not the transcript of it. And it is no objection, that it should be the transcript for fear of the

peril of the sea; for one might object in the same manner, that upon error in the Common Pleas, the transcript only is removed hither, for fear it should be burnt or lost before it comes into the King's Bench. But in fact, when the record in both cases arrives here, then it is the true record, and not before; and that which is in *Ireland*, or the Common Pleas, ceaseth to be the record. *Per Holt C. J.* in *Coot v. Linch*, 1 *Ld. Raym.* 427.]

If a writ of error be brought in *B. R.* to reverse a judgment given in *C. B.* the (a) original shall not be removed, if it be not by special matter, as, if error assigned in the original. 24 E. 3. 24. Ro. Abr. 753. (a) Though the command of the writ is to certify *recordum & processum*, yet the course is only to certify the declaration and pleas, omitting the writs. *Bridg.* 57. — All is certified which is with the chief justice; but

but the original and judicial writs remain with the *custos breviarum* and other officers, and are never certified, but where error is assigned for want of them. Cro. Eliz. 84. *vide* Leon. 22. Cro. Ja. 479. Ro. Abr. 790. pl. 6. — The writ is directed to the chief justice, who only certifies the body of the record, which remains with his clerk.

37 Ass. 5.

Ro. Abr. 753.

If a writ of error be brought in *B. R.* upon a judgment in an inferior court against the plaintiff, there, the court may reverse the judgment, though the original be not removed, no error being assigned in the original; for this is removed but to sue here upon the same original.

Dougl. 352.
n. 3. Rutter
v. Redstone,
2 Str. 837.
Tully v.
Sparkes, *id.*
869. 2 Ld.
Raym. 1571.
|| On all writs
of error re-
turnable in the
King's Bench,
as well as in
the Exche-
quer-chamber,
or House of
Lords, the
practice is to
send only a

[By the words of the statute of 27 El. c. 8., which first gave the writ of error from the court of King's Bench to the Exchequer-chamber, the chief justice is to cause the record to be brought before the judges in the Exchequer-chamber; yet the practice hath always been to send only a transcript, the original record remaining in *B. R.* In the pleadings in *Westby's* case, (3 Co. 67. a. 70. b.) the entry of the proceedings in error runs thus: "Afterwards, &c. the transcript of the record and proceedings, &c. by a certain writ of the lady the queen of correcting errors, &c. was brought to the justices, &c. in the chamber of the Exchequer aforesaid, according to the form, &c." Yet the subsequent part of the same entry says, "and thereupon the record aforesaid, &c. was sent back, &c." However, as to all legal effects, (a) the record itself is considered to be removed.]

transcript of the record, and not the record itself. 2 Tid's Pr. 1123. (a) Roche v. Wasbrough 2 T. R. 737. Sampayo v. De Payba, 5 Taunt. 85.||

Green and
Cole, 2 Sauad.
254. Lev. 309.
S. C. * So,
where a de-
fendant pleads
in abatement,
a demurrer,
&c. and judg-
ment of re-
spondeas
ofter; the
whole of these
proceedings
must be entered on record and certified.

In an action of waste brought in the *hustings* in London, there was a verdict for the plaintiff, which was after quashed for the insufficiency, and a new *venire* awarded, whereupon a verdict was given for the defendant, and judgment for him, and a writ of error being thereupon brought before special commissioners, it was resolved, that the first verdict should be certified in the record, because it was not set aside for that the jurors had found against evidence, or for any undue practice or misfeasance of the parties, but only for the insufficiency thereof in point of law, which the court had adjudged upon the verdict appearing before them upon record. *

30 Ass. 9.

Ro. Abr. 753.
(b) Where

If a writ of error be brought in *B. R.* upon a fine levied in the *hustings* of Oxford, the record (b) itself shall be removed.

upon a writ of error to reverse an outlawry upon an indictment of felony, the record itself, or a transcript only, shall be removed. Bulst. 181.

Vent. 96.

Sid. 466.

Raym. 189.

2 Keb. 684.

If there be several records between the same parties with which the description in the writ of error agrees, the inferior court may remove which of the records they please.

Ingoldsby v.
Martin, 1 Str.
316.

[If the writ is "*between A. late of Westminster in the county of Middlesex,*" and the record only "*late of Westminster,*" if *Middlesex* is in the margin, it is well enough.

A defendant

A defendant cannot have leave to transcribe the record (though plaintiff has not done it) in order to *non-pros* the writ, and have the benefit of the recognizance. But, (a) if the plaintiff in error is dilatory, the defendant must give a rule to transcribe, and then if he will not, the defendant may *non-pros* the writ of error.]

Anon. 1 Wils. 35. (a) Goodright v. Hugoson, Ca. temp. Hardw. 351.

(E) Of alleging Diminution and granting a Certiorari.

[F the judges of the Common Pleas, or other judges, upon a writ of error, will not certify all the record, the party that sues the writ of error may allege diminution of the record, and pray a writ to the justices that certified the record before, to certify the whole record.

F.N.B. 25. 2.

But diminution cannot be alleged upon a writ of error brought upon a judgment (b) in any inferior court.

Sid. 40. Sayer v. Curtis, Ca. temp. Hardw.

367. (b) As Elv, Sid. 147. — The sessions of peace. Sid. 364. — But may in error upon a judgment in *Wales* and counties palatine. Sid. 147. 364. — So, it may in error upon a judgment before justices of *Oyer and Terminer*. Sid. 40.

And therefore where in a borough-court a plaint was entered as the plaint of *A. and B.*, and the declaration was by *A. B.*, executor of *J. S.*, and on a writ of error in *B. R.* this variance was assigned for error: The court held, 1. That want of a plaint in an inferior court is the same as want of an original in the court of Common Pleas, and that this could not be a plaint in this action. 2. If such variance had been in a record of the Common Pleas, diminution might have been alleged, and a good writ certified; but in records out of inferior courts, no diminution can be alleged, and the court must take them as they find them.

Hale v. Clare, Salk. 266.

A man cannot allege diminution (a) contrary to the record which is certified.

Ro. Abr. 764.

lawry upon an indictment for murder, it being assigned for error, that the *exactus* was *ad comitatum*, without saying *meum*, the court, upon the prayer of the attorney general, shewing the king had seized his lands, &c. awarded a *certiorari* to the coroners to certify where the *exact* was, in order to amend the return. Latch. 210. — Upon a writ of error upon a bill of exceptions, diminution cannot be alleged, for the party must hold himself to the matter in the bill sealed; and if it is not there, it was his folly to omit it, 2 Inst. 427. — Where the record is not rightly certified upon a writ of error upon an outlawry upon an indictment for felony. Bulst. 181. but for this *vide* Godb. 267. 2 Ro. Rep. 353. Cro. Ja. 369.

(a) In error to reverse an out-

As, if in a writ of error it be certified that the judgment was *quod defend. sit in misericordia*, the defendant in the writ of error cannot allege diminution: ss. That the record is *quod capiatur*, because this is contrary to the record certified.

Ro. Abr. 764.

¶ So, where a writ of error was brought in parliament on a judgment of the court of Exchequer in *Ireland*, affirmed in the Exchequer-chamber there, the House of Lords held, that diminution could not be alleged in the body of the record, contrary to the transcript; and refused to issue a *certiorari* for verifying it. ||

Rowe v. Power in Error, Dom. Proc. Die Martis 8 Mar. 1803. 2 Tid's Pr. 1134. but see

1 Bulstr. 181. 1 Salk. 49.

Floyd v. Bethell, Ro. Abr. 764. 1 Ro. Rep. 200. S. C.

If upon a writ of error the record be certified, that a challenge was to the sheriff for cosenage, and after thereupon a *venire facias* was awarded to the coroner upon diminution; it cannot be certified, that the challenge was after the return of the *venire facias*, because this is contrary to the record before certified, for nothing can be certified but that which stands with the first record.

Leon. 22. Dayrell and Thinn. (a) *Vide Cro. Ja. 277. Bulst. 21.*, where upon the first *certiorari* it was returned, there was no warrant of attorney in that term wherein the action was commenced, and another *certiorari* was awarded.

In a writ of error brought in *B. R.*, upon a judgment in the Common Pleas, the want of a warrant of attorney being assigned for error, the plaintiff prayed one *certiorari* to the chief justice, and another to the *custos brevium*, both of whom returned *non inveni aliquod warrant.*, and the defendant dying, the plaintiff by journeys accounts brought a new writ of error against the son and heir of the defendant, who appearing alleged diminution, in that the warrant of attorney was not certified, and prayed another *certiorari* to the *custos brevium*; and it was urged, the return was not *quod non habetur aliquod warrant.*, but (a) *quod non inveni, &c.*, so that if upon the second a warrant should be returned, it would not be repugnant: but it seemed to *Wray* Chief Justice, that it would be hard to grant a new *certiorari* in this case; but, if any variance could be alleged, it would be otherwise, as adjudged in the case of one *Lassels*, where it was certified there was no warrant of attorney; and afterwards it was moved for another *certiorari* as it is here; and because the original was *inter Lassels executor. testamenti, &c.*, where he was not named executor in the first *certiorari*, upon that matter a new *certiorari* was granted.

Ro. Abr. 764. Style, 352. 2 Ro. Rep. 471.

After *in nullo est erratum*, the court, to inform their consciences, may award a *certiorari* to (b) amend the record.

(b) So, they may award a *certiorari* to reverse the judgment. Ro. Abr. 764. Cro. Eliz. 135. 281. 836. 2 Leon. 3. Cro. Ja. 6. 141. 445.

5 Co. 37. Ro. Abr. 764.

If after *in nullo est erratum* pleaded, another part of the record is brought in by *certiorari*, and made of record there, the court ought to reverse the judgment, if the matter so requires.

Ro. Abr. 764, 765. Jon. 139. S. C. [resolved that the *certiorari* was not well awarded; for after *in nullo est erratum* pleaded, neither the plaintiff nor defendant can allege diminution; for by the joinder they allow the record; and a note is there added, that

After *in nullo est erratum* pleaded, if one party allege upon record, a diminution of the record to reverse it, and pray a *certiorari* to certify it, and thereupon a writ of *certiorari* be sued out, and the record be certified; but before it is entered of record, the court be informed of this matter, this shall not be received, because it comes in by the prayer of the party after *in nullo est erratum* pleaded, which is not to be allowed: but upon information to the court, the court may grant it. [Michaelmas, 2 Car. between Weaver and Felton, *B. R.* adjudged, and such certificate disallowed, and a new writ of *certiorari* granted by the court, which is entered Hil. 1 Car. Rot. 647. and then the record of Bishop's case was shewn to the court, where the defendant did not plead *in nullo est erratum*, as the book is 5 Co. 37. a. but it passed against the defendant by *nil dicit*, and after diminution alleged, as it is in the book.]

Bishop's case in 5 Co. does not agree with the record; for there the defendant had not joined in *nullo est erratum*, but did not say any thing, *ideo remanet inde indefensus*. Noy, 83. S. C. held accordingly, but yet the court *ex officio* may award a *certiorari ad informandam conscientiam*,

scientiam, and that which is certified shall be annexed to the record, and is called a rider-roll, and says, see 22 E. 4. 46. a. 28 H. 6. 10 Dy. 32. b. 9 E. 4. 32. b. Franklyn v. Reeves, Ca. temp. Hardw. 118. And note in Chapin's case, the difference is, if diminution be alleged in a thing collateral, as warrant of attorney, or any mesne process that is not of the body of the record, it may be alleged after *in nullo est erratum*: but otherwise, if it be of the substance and parts of the record itself; as, if returned in the detinue only, where the first action was in the *debet* and *detinet*, for which see 1 H. 7. 21. which reconciles many differences.]

In trespass in *B. R.* judgment was given for the plaintiff by default, and a writ of error brought *in camera scaccarii*, and there assigned for error, that there was not any writ of inquiry of damages filed; and upon a writ of *certiorari* it was certified, that there was not any such writ. However, afterwards another *certiorari* was granted, and upon this the writ of inquiry was certified *, upon which the judgment was affirmed.

appears from a late case, that after an award of a writ of inquiry of damages, if final judgment be given for a certain sum with the plaintiff's assent, it is no cause of error, although the record contain no entry of any inquisition executed. Gould v. Hammersley, 4 Taunt. 148.]

So, where in a writ of right in *B. R.* after judgment, a writ of error was brought *in camera scaccarii*, and the want of continuances assigned for error; and upon a *certiorari*, the want of continuances certified; yet after, upon another *certiorari*, the continuances were certified, and upon this the judgment affirmed.

If error be assigned in the original, and upon a *certiorari* granted an erroneous original be returned; and upon this *in nullo est erratum* be pleaded, and after the court *ad informandam conscientiam* grant another *certiorari* for another original; and upon this a good original be certified; the court ought to intend that this is the original, upon which the judgment was given in favour of judgments, which ought to be intended to be good.

In a writ of error, upon a fine, an error was assigned in the proclamations, upon which a *certiorari* went to the *custos brevium*, and upon his certificate it appeared, that two of the proclamations were made in one day: but it appeared in the chirograph-office that the proclamations were duly made; and the chirographer making and being the principal officer as to them, and the *custos brevium* having only an abstract thereof; upon the prayer of the defendant a new *certiorari* was directed to the chirographer, who having certified the proclamations duly made, after examination of the clerks of the Common Pleas by the justices in *B. R.* they awarded that the proclamations with the *custos brevium* should be amended according to those in the custody of the chirographer.

If a writ of error is brought upon a judgment in *B. R.* in Ireland in a writ of false judgment, upon a judgment in the *Toulsel*, (which is the court of the mayor and aldermen of Dublin); and it is assigned for error, that there was no plaint entered in the *Toulsel*, and that these words *per quod actio accrevit* were omitted in the conclusion of the declaration; if the defendant alleges diminution, yet he shall not have a *certiorari* to the

Roror and Escort, Ro. Abr. 765.

* And probably filed after the first, and before the second *certiorari*. || It

Travis and Scott, Ro. Abr. 765.

Ro. Abr. 765. Godb. 407. adjorn. 2 Ro. Rep. 352. S. C. but no judgment. Cro. Car. 91. Style, 176.

Rag and Bowley, 3 Leon. 106.

Banister and Kennedy, Palm. 185.

the chief justice *de B. R.* in *Ireland*, to certify the residue of the record, &c. and that if any part of the record be not before him, that he should write to the mayor and aldermen to certify it, and that he should certify it to this court; for by this plea of *in nullo est erratum* in *B. R.* in *Ireland*, he hath admitted the record well certified by the mayor and aldermen; and this court hath no authority to require the court of *B. R.* in *Ireland* to write to the mayor, &c. and the judgment *de B. R.* in *Ireland* only is here in question; and such writ being issued, a *supersedeas* was granted to the whole, though it was prayed that the *supersedeas* should be as to the inferior court only. But at another day it being moved, that there might be a *certiorari* as to the words *per quod*, &c. it was granted.

Cro. Car. 91.
between
Howell John
and Thomas.

In a writ of error in the Exchequer-chamber upon a judgment in *B. R.* it was assigned for error, that in the bill, the plaintiff declared on a lease for three years; but in the plea-roll, upon which the issue was joined, and the record of *nisi prius*, it was upon a lease for five years, so that the bill and declaration vary; and diminution being alleged by the plaintiff, a bill was certified, in which it was only for three years; upon which the defendant had another *certiorari*, and thereupon a bill was certified, wherein he declared upon a lease for five years, which warranted the declaration upon the roll, and the *nisi prius*; and it was held by all the justices and barons, that the second certificate, upon diminution alleged by the defendant, should be received; for that warranting the roll and the record of *nisi prius*, shall be intended the true bill, and the other a fictitious one.

Carlton v.
Mortagh,
1 Salk. 268.
6 Mod. 113.
206. S. C.
2 Ld. Raym.
1005. S. C.
(a) Where the
defendant had
concluded
himself by
pleading in
*nullo est er-
ratum*, yet
the court
granted a *cer-
tiorari* to re-
move the
whole record,
a line being
omitted in the
transcript, on affidavit that the record below was right. Salk. 270. upon a writ of error of a judgment in ejectment in the grand sessions in *Wales*. [But this the court will do only in order to affirm a judgment, *Berkley v. Howard*, 2 Str. 907. not to reverse it. *Merryfield v. Berrey*, *Id.* 765. *Bowers v. Mann*, *id.* 819.]

A writ of error was brought upon a judgment in debt by confession in *C. B.* and the want of an original was assigned for error; the defendant, before a *certiorari* returned, came in *gratis*, and pleaded a release in bar, to which there was a demurrer; and it being agreed that the plea was ill for want of a *venue*, the question was, whether the court *ex officio* might award a *certiorari*. And it was held by three judges, that though the party (a) had concluded himself by relying on his release, yet the court was not bound thereby, but may award a *certiorari*; and if upon the return thereof it appeared that all the proceedings were right, they were obliged to give judgment on the whole record, according to conscience and right: but *Holt* Chief Justice held, that the court in this case could not award a *certiorari*, because the question was not, whether error or not, but whether barred or not by the release? Which being the point referred to their judgment, they were not at liberty to depart from it.

Smith v.
Stoneard,
2 Ld. Raym.

[A writ of error was brought of a judgment in the Common Pleas after a verdict. The plaintiff in error assigned for error

want of an original, but did not take out a *certiorari*, as the course is, to get the want of the original certified: the defendant in error pleaded *in nullo est erratum*. It was objected, that there ought to have been a *certiorari* taken out, and a certificate made of the error; for it might be that there was an ill original, and if that were returned, the plaintiff in error might take advantage of it, and that would not be helped by the verdict, though the want of the original were. *Per Holt C. J.* If the want of an original be assigned for error, and the plaintiff in error do not take out a *certiorari*, and get a return to it, and the want of an original certified; the course is for the defendant in error to go to the master of the office, and get a rule for the plaintiff in error to return his *certiorari* (a); and if he do not get it done, as is ordered by the rule, the assignment of error stands for nothing. But, if the defendant in error will come in *gratis*, and confess the error, there need be no *certiorari* returned. And as to the matter, that there might be a bad original, &c. that is another sort of error; and when the want of an original is assigned for error, the court will never intend, that there is a bad original. And the judgment was affirmed.

1156. 1 Salk.
267. S. C.

(a) Error for want of an original is not completely assigned, until the certificate is returned. *Sterling v. Tanner, Com. Rep. 115.*

If upon error, diminution be alleged for want of original, warrant of attorney, &c. and a *certiorari* be sued out, upon which a record is returned contrary to what is before returned, it cannot be received.

Tyson v. Hilyard, 2 Ld. Raym. 1122. 1 Salk. 269. S. C.

Where the want of an original is assigned for error, and it appears that all the proceedings are of the same term wherein the original is returnable, such an original warrants those proceedings, let it be of any return in that term. But an original of the term wherein final judgment is given, will not warrant the proceedings, if by the record it appears that there have been proceedings in the cause in a term or terms before. The case of original writs differs from that of warrants of attorney; for it is sufficient if a warrant of attorney be filed at any time pending the suit, let it be in which term it will; the stat. of H. 8. only requires a warrant of attorney to be filed in the cause; and the stat. of 4 Ann. requires it to be filed according to the course of the court; and that is to have it filed at any time pending the cause; and it is no matter when, so that it be in the same suit. But as to an original writ, it is otherwise; for if there be proceedings in the action in a term preceding the return thereof, the original will not support them.

Dismo v. Shirley, Yelv. 108. Booth v. Beard, 1 Keb. 327. Dyke v. Sweeting, 1 Wils. 181.

The plaintiff in error assigned for error the want of an original, and had a *certiorari* upon which it was certified that there was no original; afterwards the defendant applied to the court of Chancery, and upon affidavit that instructions were given to the cursitor for an original, but that they were lost, that court allowed the original to be supplied. Upon this the defendant in error prayed another *certiorari*, and an original was certified of the same term in which the default of an original was certified before. It was insisted, that this was irregular, for before the second *certiorari* was returned, the defendant ought

Levin v. —, Com. Rep. 118. 1 Ld. Raym. 695. S. C.

to have given a copy of the original to the plaintiff's attorney; and the master informed the court that the course was so, when the second original certified was of another term; but it being in the same term, the motion was not allowed.]

(F) Of the *Scire Facias*.

F. N. B. 20.

(a) Must assign his errors, and sue out a *scire facias ad audiendum errores* the same

AFTER the record is (a) removed, and the plaintiff in error (b) has assigned his errors, which (c) may be either errors in fact or in law, he shall have a *scire facias ad audiendum errores* against the defendant, who thereupon may plead *in nullo est erratum*, a release, &c.

term, or the term next after the record is removed; otherwise the whole matter is discontinued, and he will be obliged to sue a new writ upon the record directed to the justices before whom the record is removed, to proceed upon the record *quod coram vobis residet*. F. N. B. 20. G. But such discontinuance is saved by the defendant's appearing, which he may do *gratis*. Sid. 173. Keb. 642. (b) Must assign his errors before he can have a *scire facias*, &c. F. N. B. 20 E. Vide Ro. Abr. 762. (c) If the matters which are assigned for error appear to the court to be no error, nor colour of error, it will not grant any *scire facias*. 18 H. 6. 18. Ro. Abr. 763. — The usual practice is, that the defendant in the writ of error by consent doth voluntarily take notice of the assignment of errors; and this consent is testified by his pleading *in nullo est erratum*, and then there is no occasion for a *scire facias ad audiendum errores*. Carth. 41. — If he does not, there must be a *scire facias*.

Vent. 34.
Palm. 186.

The Exchequer-chamber not having the record before them, but only a transcript, do not award a *scire facias ad audiendum errores*, but notice is given to the parties concerned.

Hale's Lords'
Jurisdic. c. 26.

[The ordinary return of the *scire facias* in a writ of error in parliament was *ad proximum parliamentum*; for the sessions were short and uncertain; and if it had been returnable at a day certain, (as it must) in the same session, the session might end before the return of the writ. But in cases where no *scire facias* was to issue, as, where the king was party, the errors were oftentimes examined the same parliament wherein the petition of error was exhibited. But in Charles the First's parliaments the ancient course was altered; for they made writs of error returnable *in præsens parliamentum*, and gave notice by orders from day to day to the defendant. And this course holds now in use, the old way of *scire facias* returnable the next parliament being laid aside, yet without any law at all to warrant it; for the record cannot be reversed or affirmed without making the defendant a party by writ, unless he appear *gratis* without a *scire facias*, and plead to the errors. This is now the common course, and the defendant commonly appears upon orders of the House without any *scire facias*, and pleads to the errors *gratis*; which therefore being done *gratis* supplies the defect of a regular process, which yet the defendant may insist upon, if he will.]

This is done upon a motion by a peer, that, on assigning errors, the defendant may appear and make his defence.

2 Tidd's Pr. 1143.

Vent. 34. said by the Secondary to be so ruled in the

If after a writ of error brought the defendant dies, yet the plaintiff in error may sue out a *scire facias*, &c. against (d) the executor.

case of Sir H. Thyn. and Corie. — But in Ro. Abr. 763. taken from the Year-book of 9 H. 4. 3. it is said, that if a man be outlawed upon a process at the suit of A. who dies, and he bring error to reverse the outlawry, he shall not sue a *scire facias* against the executor, because he cannot proceed upon this original, which is abated by the death of the testator. Bro. Error, 44. S. C. (d) May be against an administrator generally, or by his particular name. Ro. Rep. 23. 2 Bulst. 231.

[If the original plaintiff dies, pending error, his executor may have a *scire facias quare executio non* out of C. B. before the record is transcribed; but afterwards out of B. R. And the plaintiff in error may have a *scire facias ad audiend.* out of B. R. against the executor of defendant in error.] Wright v. Treweeke, Barnes, 432.

If a man condemned in an assise be outlawed for the fine of the king, and he bring a writ of error to reverse the outlawry only, there shall not be any *scire facias* against the recoverer, because the outlawry is at the suit of the king (a) only. 7 H. 4. 40. Ro. Abr. 763. (a) But, if the writ of error had been brought of Ro. Abr. 763.

the judgment and outlawry also, it had been otherwise. 7. H. 4. 4.

The attainder of felony of a person who had any lands shall never be reversed by writ of error (b) without a *scire facias* against all the tertenants and lords mediate and immediate. But it is (c) settled, that such *scire facias* is not necessary in the case of high treason, It is (d) said too, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the attorney-general confesses it. (b) Dyer, 34. pl. 20. Keb. 121. Sid. 316. Hardw. 164. (c) 2 Hawk. P. C. c. 50. § 13. (d) 2 Salk. 495. Ld.

Raym. 154. 12 Mod. 545. 668.

Upon a writ of error against the heir of him that recovers, a *scire facias* lies (e) against the heir and tertenants. 8 H. 4. 17. 2 Ro. Abr. 763. (e) Anciently

the writ against the tertenants was special, naming them; but of late the course hath been to word the writ generally. Bridgm. 72. — The *scire facias* against the tertenants is not *ad audiend. errores*, but *ad audiend. processum & record.* Lev. 72. *per cur.* Keb. 352. — An attain lies against him who recovered, and against the tertenant. 2 Bulst. 244. Ro. Rep. 37. 302. Bridgm. 72. And the judgment may be reversed against the parties to the judgment and their heirs, though they have nothing in the land.

(f) If a writ of error is brought to reverse a common recovery, the court (g) before the reversal thereof, ought to award a *scire facias* against the tertenants; and this is not merely discretionary, but *ex necessitate juris*; for they may have matter to plead in bar, as a release, &c. Hil. 2 & 3 Ja. 2. between Kingston and Herbert, 3 Mod. 119. *per cur.* but *adjournatur.* — [Sir B. Shower in his report of this case, 2 Show. 490. says, that the court were of opinion, that the awarding of a *scire facias* to the tertenants was not *ex necessitate*, but discretionary. And the same is said in argument in Comberbach's Report.] (f) Leon. 290. Like point in a writ of disceit to annul a fine of ancient demesne lands, and that the tertenant is not bound thereby till, &c. (g) It is the best way to

award a *scire facias* against the tertenant, before the court proceeds to the examination of the errors, for he may have something to plead in bar, and so save the court the trouble of examining the errors; and if the judgment should be reversed against the party and privy, yet the plaintiff could not have restitution till a *scire facias*, &c. Dyer, 321. — That such *scire facias* may be granted before or after, at discretion. Hardw. 163.

But this matter was fully debated in the case of (h) Wynn and Lloyd, where in a writ of error to reverse a judgment given in a common (h) Lev. 72. 130. 146. Sid. 213.

Keb. 54.
351. 388. 459.
717. 748.
Raym. 16. 55.
70. 96. S. C.
upon a judgment
had in the grand sessions
in *Wales*.

(a) Dyer, 321.
Cro. Ja. 392.
Owen, 157.
Bridg. 69, 70.
21 E. 3. 56.
Cro. Carl. 295.
313. Moore,
524. Cro.
Eliz. 739.
Co. Ent. 233.

Earl of Pembroke's case,
Carth. 111.
Skinn. 273.
S. C. The like
law in error to
reverse a fine.
Co. Entr. 233.
b.

Hall v. Woodcock, 1 Burr.
359. Sheepshanks v.
Lucas, *id.* 410.

common recovery against the vouchee after *in nullo est errat*. pleaded, the court awarded a *scire facias* (upon a surmise of the defendant, that there were tertenants) to the tertenants; the sheriff returned, that *A.* is tertenant, and a *scire feci*, and *A.* comes in and says that there are other tertenants, and prayed a *scire facias* to them, and had it; the sheriff returned that *B.* is tertenant, and *scire feci*, and *B.* coming in, says there are other tertenants, and prayed a *scire facias* to them. It was insisted, that the tertenant was not a party concerned in the reversal of the judgment, but only as to his possession, and therefore could not otherwise plead than as concerning his possession; that by this means the delay might be infinite, for he that comes in upon this *scire facias* might as well plead that there is another tertenant, and so the plaintiff might be staved off from ever having the benefit of his writ of error: besides, this surmise is contrary to the return of the sheriff. On the other side it was urged, 1. That the *scire facias* ought to go out against the tertenants, and had in all cases, where it ever was controverted, been awarded, as appears by the (a) books cited in the margin. 2. That it ought to go out against them all, because any one of them may have a release to plead, which may discharge or advantage the other. 3. That if it cannot be pleaded by the tertenant, yet it may be suggested to the court as *amicus curiæ*, and awarded *ex officio*; for it may be, that he who is not summoned, can plead in bar of the writ of error what will go to the whole, and ease the court of examining errors; and in that respect it may be awarded, and the proceedings stay. But the court held, that the awarding of a *scire facias* to the tertenants was not *ex necessitate juris*; and therefore when it is once out, and the tertenants are warned, there is no reason to grant it a third time; that here the delay was apparent; but if he could make it out, that he that is not warned had a release of errors to plead, it being in their breasts and discretion, it should be granted; otherwise not.

But, where a writ of error was brought to reverse a common recovery, and a *scire facias* sued out against him that was the nominal demandant in the writ of entry, and a *scire facias* was moved for to the tertenants, but opposed, because the tertenant was an infant, and therefore the parol may demur during her nonage, which would greatly delay the plaintiff; and further, that if the infant should die, the lands may remain to another; notwithstanding this, the court awarded a *scire facias*; and it was held by Holt C. J. that though the granting of a *scire facias* in such cases against the tertenants is discretionary, and not *stricti juris*, yet it hath been the constant course of this court to grant it; therefore he was of opinion not to depart from that which had been the usual course of the court.

[And upon the authority of those two last cases Lord Mansfield said, that by the established mode of proceeding there must be a *scire facias* against the terre-tenants, otherwise it is an irregularity,

regularity, but no more. But a *scire facias* to the heir is clearly not necessary.

In an information *qui tam*, &c. upon 5 El. for using a trade *contra formam statuti*, there was judgment for the plaintiff, on which a writ of error was brought. *Per cur.* In the case of indictments, there needs no *scire facias* for the party to assign his errors, but a rule is sufficient, because the queen is always in court by her attorney-general. But a rule in this case being moved for, the court said, they had ordered precedents to be searched for, but could find none; and therefore the defendant in error must proceed as he could by law.

If a plaintiff below brings error to reverse his own judgment, and does not proceed, the court will make a rule to assign errors in a limited time, or his writ to be non-prossed, for a *scire facias* would here be improper.

Where in error from *Ireland*, the King's Bench affirmed the judgment on a collateral point, it was holden, that the plaintiff could not, on the defendant in error's coming of age, take out a *scire facias ad audiend. errores in B. R. in England*; for upon the affirmance of the judgment, the record must be remitted to *Ireland*.

On *scire feci* returned, if the defendant do not appear and join in error, the plaintiff may put it in the paper without taking out a rule to join in error.]

The Queen
v. Ford, Tr.
8 Ann. B. R.
Vin. Abr. Er-
ror, (H.a.) p. 9.

Johnson v.
Jebb, 3 Burr.
1772.

Fortescue
Alland v.
Mason, 2 Str.
1258.

Thatcher v.
Stephenson,
1 Str. 144.

(G) Of the Proceedings after the Record removed: And herein of the Abatement of the Writ of Error.

IF the plaintiff in error assigns an error in fact, if the defendant will put in issue the truth of the fact, he ought to rejoin by denial of the fact, and so join issue thereupon, and shall not say (a) *In nullo est erratum*, for by this he acknowledges the fact alleged to be true.

Ja. 29. Cro. Car. 53. Lev. 311. — It is a confession of an error in fact well assigned, Raym. 231. Lev. 294. but not of a matter assigned contrary to the record. Cro. Ja. 12. 521. Raym. 231. But see Edmonds v. Probert, Carth. 338. Davie v. Franklin, H. 26 G. 3. K. B. 2 Tidd's Pr. 1144.

Ro. Abr. 763.
Bro. Error, 93.
[1 Burr. 410.]
(a) This is in
nature of a de-
murrer, Cro.

But, when an error in fact is assigned, if the defendant will acknowledge the fact to be so as alleged, and yet that by law this is not error, he ought to rejoin *in nullo est erratum*, for by this he acknowledges the fact, and yet that by law it is not error.

Ro. Abr. 763.

Also, if a man who is outlawed brings a writ of error to reverse the outlawry, and assigns his errors, the king's attorney shall not plead *in nullo est erratum*, which amounts to a demurrer, as is done between common persons; but upon the assignment of the error, the court shall give a day to the king's counsel to maintain the outlawry; and it is entered *curia advisari vult* till the outlawry is reversed or affirmed.

Ro. Abr. 763.

Ro. Abr. 763. If error be alleged in the body of the record, *in nullo est erratum* is a good rejoinder, for this shall put the matter in the judgment of the court, the record being agreed to be so.
 [Upon error in the record, as, want of *capias*, or the like, there, he may say, *in nullo est erratum*; and there, though the defendant confess the error, the court ought not to reverse the judgment, till they be assured of the error. Br. Error, pl. 165. cites 7 E. 4. 16.]

Ro. Abr. 764. So, if error be alleged in a matter of record, which is not of the body of the record, but in a collateral thing, as *quod non habetur aliquod recordum* of resummons, *in nullo est erratum* is a good rejoinder; for if the plaintiff in the writ of error does not pray diminution, and thereupon procure a certificate from the inferior court, that there is not any resummons before the rejoinder entered, this assignment is of no effect, but void, inasmuch as this is to be tried by the record itself, and no diminution can be alleged after rejoinder entered; for if the defendant will confess the error, yet the court ought not to reverse the judgment, till they are ascertained of the error by the record itself.

Keb. 658. If a writ of error abates or discontinues by the act and default of (a) the party, a second writ of error shall be no *superseas*: otherwise, if it abates or discontinues by (b) the act of God or the law.

writ of error again. Salk. 263. pl. 4. Ld. Raym. 91. 5 Mod. 228. Comb. 393. 12 Mod. 105. Comb. 19. S. P. (b) A writ of error abated by the death of the lord chief justice *Foster*, and a second writ was sued out and allowed; and it was held a *superseas*. Keb. 658. 686. — A writ of error does not abate by the death of the defendant in error; but a *scire facias ad audiendum errores* may be taken out against his executor. Vent. 34. Salk. 264. *Secus*, if the plaintiff in error dies. Yelv. 208. but for this *vide* Moore, 701. Sid. 419. Carth. 236. and Godb. 68. A diversity where a writ of error shall abate in a real action, though not in a personal action. — Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, because they are all compellable to join. Palm. 151. [For if they do not all join, the writ will be quashed. 1 Ld. Raym. But though the writ, in such case be quashed, yet the record is removed by it. 2 Ld. Raym. 1403. 1 Str. 606. Where two join in a writ of error, and one will not assign errors, the court will give the other time to summon and sever. 2 Str. 783. But, if one of two persons against whom judgment hath been given, dies after judgment, error may be brought by the survivor without the executor of the deceased. 1 Str. 234.]

|| It was formerly holden that a writ of error in the House of Lords abated by the dissolution of parliament, (c) or by a prorogation of it (d); but afterwards the Lords declared, that a writ of error should not determine by the prorogation (e) of parliament; and at length it was ordered, that upon a dissolution, all appeals and writs of error should continue, and be proceeded on *in statu quo*, as they stood at the dissolution (f) of the last parliament.

(c) Heyden v. Godsalve, Cro. Ja. 342. 2 Bulst. 163. S. C. Dethick v. Bradbourne, Sir T. Raym. 5. (d) Wortley v. Holt, 1 Vent. 31. 1 Sid. 413. S. C. (e) Gofton v. Sedgwick, 2 Lev. 93. 1 Mod. 106. Prichard's case, 1 Lev. 165. 1 Sid. 245. S. C. Wortley v. Holt, *ubi supra*. (f) Sir T. Raym. 383. Com. Dig. tit. Parliament, (P. 2.). Yet, *Comyns* adds, that by a dissolution a writ of error is suspended; and therefore a defendant in execution shall not be bailed upon the recognizance given upon the writ of error in parliament; for, if there should be a dissolution before judgment affirmed, the party would be at large. *R. by all the judges*, 1 H. 7. 20. a. And the writ itself is determined; for there shall be another writ of error at the next parliament. Heyden v. Godsalve, *ubi supra*. It is also laid down by Mr. *Crompton*, that if the parliament is dissolved, the writ of error is abated. 2 Cr. Pr. 333. 1st edit.

Bankruptcy is no abatement of a writ of error: therefore, where the defendant in error becomes bankrupt, his assignees cannot sue out a *scire facias* in their own name to compel an assignment of errors, but should proceed in the bankrupt's name till judgment. Kretchman v. Beyer, 1 T. R. 463.

But the writ abates by the marriage of a female plaintiff in error. Buller v. Lusitano de Pina, 2 Str. 879.

1 Barnardist. K. B. 403. Jenkins v. Bates, 2 Str. 1015.

Where to a *scire facias quare executionem non* the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment and before the issuing of the *scire facias*, the defendant moved to quash her own writ, which was granted without costs.|| Pocklington v. Peck, 1 Str. 638.

(H) *How far the Writ of Error is a Supersedeas.*

AFTER a writ of error shewn, the plaintiff ought not to take out execution, but the defendant shall have four days' time to get it (a) allowed, and four days' time more to put in bail, if the case require it; and if he (b) passes that time, the writ of error shall be no farther a *supersedeas*. 2 Keb. 129.
(a) By the clerk by indorsing a receipt thereon. Vent. 255.
Mod. 112. S.P. and that he

must not keep the writ in his pocket. (b) That the very sealing of the writ of error is a *supersedeas* to the execution. Mod. 28. *per Kelynge*. [A writ of error is said to be a *supersedeas* from the allowance; provided bail be put in and perfected in due time. Meriton v. Stevens, Willes, 271. Barnes, 205. S. C. Hannot v. Farettes, *Id.* 376. Jaques v. Nixon, 1 T. R. 279. Hawkins v. Innes, 5 Taunt. 204. But as it is the practice to sue out the writ of error before judgment is signed, the courts have said, it shall not operate as an allowance till the judgment is actually signed, and the party shall be allowed four days after the signing of the judgment to put in bail; for before the judgment no bail can possibly justify. As to the service of the allowance, that is only material to bring the party into contempt, if he proceeds to sue out execution afterwards. Jaques v. Nixon, 1 T. R. 279. Doe v. Bracebridge, *ibid*]. || If the defendant, before the allowance, have notice of the writ of error being sued out and delivered to the clerk of the errors, it is a *supersedeas* from the time of that notice. Perkins v. Woolaston, 1 Salk. 321. 6 Mod. 130. S. C. And a writ of error is so absolutely a *supersedeas*, that after it is allowed, the plaintiff cannot take out a *capias ad satisfaciendum* against the principal, and get it returned *non est inventus*, in order to proceed against the bail; Sweetapple v. Goodfellow, 2 Str. 867. Fitzg. 175. S. C. 1 Barnardist. K. B. 334. S. C. 2 Ld. Raym. 1567. S. C. Derisley v. Deland, Barnes, 83. Bayley v. Tucker, 2 N. R. 458. Nor, if the *capias ad satisfaciendum* be sued out before, can the plaintiff call for a return of it after, the allowance of the writ of error, Smith v. Nicholson, 2 Str. 1186. 1 Wils. 16. S. C. Miller v. Newbald, 1 East, 662. even though it has previously lain four days in the office; Perry v. Campbell, 3 T. R. 390. but in such case the *capias ad satisfaciendum* may be returned, so as to fix the bail after the writ of error is determined. Simmonds v. Middleton, 1 Wils. 269. but see Derisley v. Deland, *ubi supra*, *contr.*||

Where judgment in a *formedon* was pronounced 16 Novemb. and a writ of error brought by the tenant bearing *teste* 27 Novemb. and then allowed, and *in majorem cautelam a supersedeas* made out against executions, and the demandant obtained a writ of seisin, bearing *teste* 9 Octob. before, by warrant of the judgment, which was afterwards entered but as of Octav. Mich. being the last continuance; this being made appear to the court, and they being satisfied that the judgment was pronounced

16 Novemb., before which time the defendant could not have a writ of seisin, nor the plaintiff a writ of error, they held this such a trick as would defeat any writ of error: and therefore a new *supersedeas* was awarded against that writ of execution, *quia erroneè*.

Mod. 28.

Hughes and Underwood. [See *acc. Larroche v. Wassebrough*, 2 T. R. 737.]

(a) That if the record vary from the writ of error, yet the inferior court ought to remove it. Vent. 97.

If a writ of error is taken out to remove a record between such and such persons, and some of the parties are omitted; so that in strictness the writ does not agree with the record, yet it is notwithstanding a *supersedeas*, and no execution can be taken out, for the court below (a) cannot judge of the fitness of it, though it may be quashed in the court of which it issues.

Ro. Abr. 491. Lock and Tildard, per Croke and Jones, cont. the opinion of Brampton.

* But the court, on motion, will stay proceedings against the bail.

If *A.* recovers in debt or damages against *B.* and sues out a *capias ad satisfaciendum* against *B.* which is returned *non est inventus*, upon which a *scire facias* is awarded against the bail and returned, and after a second *scire facias* awarded, but not returned; *B.* brings a writ of error on the principal judgment; this is no *supersedeas* as to the proceedings against the bail, but the second *scire facias* may well be returned, and the plaintiff may proceed thereon, notwithstanding the writ of error, which, affecting only the principal judgment, is distinct from the proceedings against the bail. *

2 Ro. Abr. 491.

So, if a man recovers against *J. S.* and on a *scire facias* hath judgment against the bail, and the bail bring a writ of error of the judgment on the *scire facias*; this shall be no *supersedeas* as to the principal judgment, and therefore the plaintiff may take out execution against the principal.

Benwell v. Black, 3 T. R. 643. Taswell v. Stone, 4 Burr. 2454. But see Fisher v. Emerton, 1 Str. 526. (b) Humphreys

v. Daniel, Barnes, 202. Robinson v. Tuckwell, Willes, 183. Clarkson v. Physick, *Id.* 184. Barnes, 203. S. C.

Throgmorton, v. Church, 1 P. Wms. 685.

In the House of Lords, it hath been determined, that taking out execution against the bail below, pending a writ of error in parliament, is a contempt, and breach of privilege. ||

2 Ro. Abr. 491. Marsh and Whitestone, adjudged *per cur.*

If a man brings a writ of error on a judgment, but does not remove the record within six days, this shall be no *supersedeas*, but execution may well be taken out, for it appears that the writ of error is merely for delay.

2 Ro. Abr. 491. Sare and Shelton, *per cur.* (c) || "Which reason," says Lord C. J. Willes, "not

If upon a *fieri facias* on a judgment against *B.*, the sheriff takes the goods of *B.* into his hands; but before any sale of them, *B.* delivers to the sheriff a *supersedeas* on a writ of error, *B.* shall have the goods again, for by this seizure no property is altered. (c)

" being

"being a true one, I give no credit to this case." Willes, 281. An execution being an entire thing, cannot be superseded after it is once begun; therefore, if a writ of execution be executed before a writ of error allowed or notice, it may be returned afterwards: and the utmost length of time the law allows for executing a writ is the day whereon it is returnable; and it is not executable any longer that day, than the court sits. So long as it is executable, but not executed, the allowance of a writ of error is a *supersedeas*, but not afterwards. Perkins v. Woolaston, 1 Salk. 321. See Baker v. Bulstrode, 1 Vent. 255. Meriton v. Stevens, Willes, 271. Barnes, 205. S. C. Where a writ of execution was sued out before, but executed after, the allowance of a writ of error, served on the sheriff and the party, the court of King's Bench would not set it aside, because the plaintiff in error had not put in bail. But the party taking out execution after the allowance of a writ of error, and before bail put in, does it at his peril; for if the writ of error is regularly followed up, the execution will be set aside. Lane v. Bacchus, 2 T. R. 44. ||

If a writ of error is brought returnable into the Exchequer-chamber, which is allowed by the clerk of the errors, and a *supersedeas* granted thereupon; but the record is not marked by the clerk of the errors, as the usage is, nor notice thereof given to the attorney of the other side; but these matters are omitted, because the attorney was not known, nor the number-roll of the record; yet this is a good *supersedeas* in law, so that if execution be awarded and executed, it is erroneous, and a *supersedeas* shall be awarded *quia erroneè emanavit*: but it is no contempt in the attorney in taking out execution, he having no notice of the writ of error, and the roll not being marked.

It seems clearly agreed, that an action of debt may be brought upon a judgment in *B. R.*, notwithstanding a writ of error brought in the Exchequer-chamber; for though such writ of error be a *supersedeas* to the execution, yet the duty remains upon record; and it is but reasonable the party should have this remedy for his damages for forbearance. [But (a) execution cannot be sued out upon the second judgment until the writ of error be determined;] || though it is otherwise in the Common Pleas (b); but even there, the allowance of the writ on a judgment of *nil dicit*, is so entirely a *supersedeas* to a subsequent writ of execution, that if it be sued out and returned pending the writ of error, all proceedings thereon against the bail may be set aside upon motion.

Granvil, S. P. (a) Benwell v. Black, 3 T. R. 643. Taswell v. Stone, 4 Burr. 2454. But see Fisher v. Emerton, 1 Str. 526. *contr.* (b) Humphreys v. Daniel, Barnes, 202. Robinson v. Tuckwell, Willes, 183. Clarkson v. Physick, *Id.* 184. Barnes, 203. S. C.

Though the courts will, upon motion, stay proceedings in an action on the judgment, where a writ of error is depending; yet such motion cannot be made until the defendant has put in bail to the action. Nor is it then a mere motion of course; and therefore the application will not be attended to, where the writ of error is obviously for the purpose of delay (c), or is sued out against good faith (d), or is returnable of a term previous to the signing of final judgment. (e)

714. Box v. Bennett, 1 H. Bl. 432. Mitchell v. Wheeler, 2 H. Bl. 30. Miller v. Cousins, 2 B. & P. 308. Spooner v. Garland, 2 M. & S. 474. Hawkins v. Snuggs *Id.* 476. (d) Cates v. West, 2 T. R. 183. (e) Cook v. Horrock, Barnes, 197.

Ro. Abr. 492.
Mich. 1649.
Methwold and
Bawd. [See
Burr. Rep.
340.]

Supra acc.

10 H. 6. 6.
2 Ro. Abr.
490. Dyer, 32.
pl. 5. Adams
and Tomlin-
son, Sid. 236.
Lev. 153. Keb.
127. Raym.
100. S. P. ad-
judged, Draper
and Bright-
well. Mod.
121. 3 Keb.
129. 239. 316.
Vent. 372. S. P.
4 Mod. 247.
Dighton and

Smith v. Shep-
herd, 5 T. R. 9.
(c) Entwistle
v. Shepherd,
2 T. R. 78.
Kemland v.
Macauley,
4 T. R. 436.
Masterman v.
Grant, 5 T. R.

Harrison v.
Grote, 6 T. R.
400. Somer-
ville v. White,
5 East, 145.
Rawlins v.
Perry, 1 N. R.
307.

But the Court of King's Bench will not permit execution to be taken out, pending a writ of error in parliament, on the ground that the writ is brought for delay, merely because the defendant suffered judgment to be affirmed in the Exchequer-chamber without any objection. And they will not infer that a writ is brought for delay from its having been sued out before final judgment signed. Nor can execution be taken out in the Common Pleas, because the defendant's attorney has declared that the debt would be settled, and that time was all the defendant wanted.||

(I) To what Court a Writ of Error lies : And herein,

1. Of Writs of Error into Parliament.

(a) Show. Parl.
Cases, 24, 110.
Vent. 334.

Raym. 330.
2 Jon. 99.
2 Lev. 232.

(b) When a re-
cord comes
into parlia-
ment upon a
writ of error,

the king may assign certain earls and barons, and with them the justices, to determine the matter. 22 E. 3. 3. Ro. Abr. 789. 2 Bulst. 164. For the form of the writ, *vide* Show. pl. 12. and for the manner of proceeding thereon, *vide* Moore, 834. Cro. Ja. 341. Godb. 250. Ro. Rep. 14, 15. Noy, 76. Raym. 5. 383.

37 H. 6. 13.
11 E. 4. 9. Ro.
Abr. 745. For
the manner of

obtaining and proceeding upon such writ of error, *vide* 4 Inst. 21. Godb. 247. Bulst. 162. 166. Moore, 834. p. 1122. — That a writ of error may be returnable *ad proximam sessionem parliamenti*. Dyer, 375. Rast. Ent. 805. — But no *supersedeas* ought to be granted upon a writ of error returnable *ad proximam parlamentum*. Vent. 31. Sid. 413. — Writ of error in parliament is no *supersedeas*, if it be not transcribed in fourteen days, and the parliament be dissolved. Bunb. 64. — If error is brought in parliament, though the house is prorogued, and the record has not been transcribed, the court will not on motion grant leave to take out execution. Bunb. 131. — If error in parliament is not transcribed in fourteen days, the defendant in error, on motion, shall be at liberty to take out execution if it is not transcribed and certified in eight days. Bunb. 69.

(c) || Mellor v.
Spatheman,
1 Saund. 346.
Redman v.
Edolph, 1 Sid.
424. S. P.
Philips v.
Bury, Carth.
180. S. P. In

Wilson v. Lawes, Comb. 295. Lord Holt says, "It hath obtained that no writ of error lieth in the Exchequer-chamber, where the action was commenced here by original, but I never understood the reason of it." The words of the statute, § 2. are, "That where any judgment shall be given in the said court of the King's Bench in any suit first commenced there."

The

The reason would seem to be, that the suit in this case is not first commenced in the King's Bench, because it is founded on the original writ, which issues out of Chancery. And for a like reason, a writ of error lies not in the Exchequer-chamber upon a judgment affirmed on error in the King's Bench, but must be brought in the House of Lords. Heydon's case, 2 Bulstr. 162. Harvey v. Williams, 1 Ro. Rep. 264. Hartop v. Holt, 1 Salk. 263.||

And therefore it seems, that if a writ of error is brought upon a judgment in the Exchequer-chamber, where the judgment is affirmed, and after error is brought upon the same judgment in the parliament, this writ of error is no *supersedeas*; but, if the writ of error is brought upon the judgment in the Exchequer-chamber, it is a *supersedeas*. Vide 1 Ro. Abr. 492. 2 Lev. 232.

[By § 12. of the statute of 6 Ann. c. 26., which established a court of Exchequer in Scotland, a writ of error is given from that court to parliament.] See the statute 48 G. 3. c. 151. concerning appeals to the

House of Lords from the Court of Session in Scotland.

|| Since the union with *Ireland* a writ of error lies from the superior courts in that country to the House of Lords.

There must be a warrant for the writ of error from the crown; and where it is against the king, the *fiat* of the attorney-general must be obtained, upon a petition, setting forth the errors intended to be assigned, accompanied with a certificate from counsel, that they are real errors. This practice was anciently used, as a mark of decency and respect; and though it appears to have been laid aside in the time of the usurpation, yet it has since been revived. It was not till the year 1640 that writs of error first began to be made out *ex officio*; and except in the case of the crown, the practice hath been ever since continued without law or warrant, as is noticed by Lord Hale in the following extract. 2 Tidd's Pr. 1103.
Sav. 131.
Salk. 264.

The writ of error in the ordinary courts of justice is *breve de cursu*, and grantable in Chancery of course; and so is the writ of error in parliament as to some purposes, and therefore made by the cursitor; but, considering that the court of parliament is an extraordinary court, whose principal end is to advise the king *circa ardua regni*; that such writs may be brought there for delay, and without any just cause; that the proceedings in parliament must necessarily be dilatory and expensive in respect of the intervention of publick business, and their frequent adjournments, prorogations, and dissolution; and that suits for error in parliament are for the most part upon judgments given in the highest court of ordinary justice, the court of King's Bench, where the proceeding is *coram ipso rege*, and where the causes are discussed by judges of great learning and experience; all these reasons considered, the writ of error in parliament ought not to pass the seal without a petition or bill to the king, and that bill signed by him. And the writ itself was anciently, and still ought to be *per regem*, or *per warrantum domini regis*; and this appears expressly by the books of 22 E. 3. 1 H. 7. 19. Flour-dew's case; and Dy. 375. and by the constant indorsement of these writs, *viz. per regem*. And this course anciently obtained till Hale's Lords' Jurisdiction, c. 23. 25.

till the long parliament; where, by reason of the king's absence; he who then exercised the office of attorney-general did grant his warrant to the cursitor for the making of writs of error returnable in parliament, and the writ was indorsed *per warrantum attornati domini regis generalis*. And upon that account it hath been also practised since the Restoration, which is an error, and ought to be reformed.

2 Tidd's Pr.
1106. Lill.
Entr. 248. 254.
Id. 292.
1 Vent. 31.
266. 1 Mod.
106.

The writ of error is now obtained of the cursitor, as in other cases; and if the parliament be *sitting* is made returnable before the king in his present parliament *sine dilacione*; if *prorogued*, at the *next session*; or after a *dissolution*, at the *next parliament*, specifying the day when it is to be holden.||

2. Of Writs of Error into the Exchequer-chamber.

As no writ of error lay of a judgment in the King's Bench, but in parliament, and as the subjects were often disappointed of their writ of error by the not sitting of parliament, or by their being employed in publick business when they did sit; therefore,

By the 27 Eliz. c. 8., reciting, "that erroneous judgments given in the court called the King's Bench are only to be reformed in the High Court of Parliament; which court of Parliament is not in these days so often holden as in ancient time it hath been, neither yet (in respect of greater affairs of this realm) such erroneous judgments can be well considered of and determined during the time of the parliament, whereby the subjects of this realm are greatly hindered and delayed of justice in such cases, it is enacted, That where any judgment shall at any time hereafter be given in the said court of the King's Bench in any suit or action of debt, detinue, covenant, account, action upon the case, *ejectione firmæ*, or trespass, first to be commenced there, (other than such only where the queen's majesty shall be party,) the party plaintiff or defendant, against whom any such judgment shall be given, may, at his election, sue forth out of the court of Chancery a special writ of error to be devised in the said court of Chancery, directed to the chief justice of the said court of the King's Bench for the time being, commanding him to cause the said record, and all things concerning the said judgment, to be brought before the justices of the Common Bench, and the barons of the Exchequer, into the Exchequer-chamber, there to be examined by the said justices of the Common Bench and barons aforesaid; which justices of the Common Bench, and such barons of the Exchequer as are of the degree of the coif, or six of them at the least, by virtue of this present act, shall thereupon have full power and authority to examine all such errors as shall be assigned or found in or upon any such judgment; and thereupon to reverse or affirm the said judgment, as the law shall require, other than for errors to be assigned or found for or concerning the jurisdiction

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"tion of the said court of King's Bench, or for any want of
 "form in any writ, return, plaint, bill, declaration, or other
 "pleading, process, verdict, or proceeding whatsoever; and
 "that after the said judgment shall be affirmed or reversed, the
 "said record and all things concerning the same shall be re-
 "moved and brought back into the said court called the King's
 "Bench, that such further proceedings may be thereupon, as
 "well for execution as otherwise, as shall appertain."

And it is further enacted, "That such reversal or affirmation § 3.
 "of any such former judgment shall not be so final, but that
 "the party who findeth him grieved therewith shall and may
 "sue in the High Court of Parliament for the further and due
 "examination of the said judgment, in such sort as is now
 "used upon erroneous judgments in the said court of King's
 "Bench."

This statute is confined to the particular actions enumerated therein, and does not extend to actions of replevin (*a*), rescous (*b*), *scandalum magnatum* (*c*), ravishment of ward (*d*), or *scire facias* (*e*) against bail, &c.; so that in these actions error will not lie in the Exchequer-chamber, but must be brought in parliament. In *scire facias* on a judgment against the party or his executors, it seems, that error lies in the Exchequer-chamber, *tam in red-ditione judicii, quam in adjudicatione executionis* (*f*); but not upon an award of execution only. (*g*)

S. C. Earl of Stamford v. Nedham, 1 Sid. 143. 2 Ld. Raym. 954. (*d*) Barnefield v. Hutchins, 2 Ro. Rep. 134. (*e*) Prowse v. Turner, Yelv. 157. Vaughan v. Williams, Cro. Ja. 171. Nevill v. South, Cro. Car. 286. Lancaster v. Keyleigh, Id. 300. Sir W. Jon. 325. S. C. Har-top v. Holt, 1 Ld. Raym. 98. But see Cockeyn v. Hawkins, Cro. Eliz. contra. (*f*) Nevill v. South, Cro. Car. 286. Anon. Id. 464. (*g*) Bertie v. Clutterbuck, 2 Str. 1102. Andr. 287. S. C. by the name of Crow v. Maddock, Marquis of Powis's case, 3 Atk. 297.

But it is said to have been adjudged, that error lies in this court in an action on the statute of tithes (*h*); but whether it lies in debt on the statute of usury was formerly doubted (*i*), though it is now settled that it does (*k*). It lies in debt *qui tam* on the statute for absenting from church (*l*), because, though the king is to have part of the penalty, he is not properly a party.

v. Knapton, Sir

Errors in *fact*, being examinable in the King's Bench, cannot legally be assigned in the Exchequer-chamber; yet, (*m*) if a re-lease of errors be pleaded in that court, it would seem they may try it, and award a *venire* under the seal of the court of Ex-chequer.

Com. Rep. 597. (*m*) Gomez Serra v. Munez, 2 Str. 821. Mosel. 93.

Although the statute directs the record and proceedings to be sent back into the King's Bench only *after the judgment shall be affirmed or reversed*, yet, if the plaintiff in error be nonsuited, or the writ of error determines by abatement or discontinuance, the record may be remitted; for the court of Exchequer-chamber

2 Tidd's Pr.
 1100. (*a*) 2 Ro.
 Rep. 434.
 (*b*) Ody v.
 Yate, Moore,
 694. (*c*) Vis-
 count Say and
 Seale v.
 Stephens, Cro.
 Car. 142. Sir
 W. Jon. 192.
 S. C. Ley, 82.
 2 Tidd's Pr.
 1100. (*a*) 2 Ro.
 Rep. 434.
 (*b*) Ody v.
 Yate, Moore,
 694. (*c*) Vis-
 count Say and
 Seale v.
 Stephens, Cro.
 Car. 142. Sir
 W. Jon. 192.
 S. C. Ley, 82.
 (*h*) Whitton
 v. Preston,
 1 Sid. 240.
 (*i*) Id. *ibid*.
 1 Ventr. 49.
 (*k*) Lloyd v.
 Skutt, Dougl.
 350. (*l*) Scott
 T. Raym. 275.

Hopkins v.
 Weiggles-
 worth, 2 Lev.
 38. 1 Ventr.
 207. S. C.
 3 Keb. 28. S.C.
 Roe v. More,
 106. 113. S. C.

Pecock v.
 Punter,
 1 Anders. 143.
 Anon.
 2 Anders. 123.

(a) Lumley v. Nevil, Sty. 238.
 (b) Howard v. Pitt, 1 Salk. 261.
 (c) Giggeer's case, 1 Salk. 264.

chamber (a) have no power to grant execution; but it must be had in the King's Bench. But the judgment is not again in the King's Bench till a *remittitur* is entered; for without a *remittitur* it cannot appear to that court, but that the writ of error is still pending in the Exchequer-chamber (b); and therefore, in such case, it is usual for the party succeeding in the original action to move the court, on an affidavit of the fact, for leave to enter a *remittitur*; and take out execution. (c)

Philips v. Bury, 1 Salk. 403.
 1 Ld. Raym. 9.
 S. C. Skinn. 514.
 Denn v. Moore, 1 B. & P. 30.
 (d) Winchcomb v. Shephard, Cro. Eliz. 746.
 Faldowe v. Ridge, Cro. Ja. 207.

Where a judgment is given against the plaintiff in the King's Bench, on a *special verdict*, by which the damages are assessed, the Exchequer-chamber or House of Lords may, in case of reversal, give a new and complete judgment for the plaintiff to recover those damages. But, (d) where the damages are not assessed, as when judgment is given on *denuer*, the Exchequer-chamber or House of Lords cannot give a new and complete judgment, but only an interlocutory judgment *quod recuperet*; and the transcript being remitted, the court of King's Bench will award a writ of inquiry, and give final judgment.

75. S. C. Noy, 129. S. C. Witherley v. Sarsfield, 1 Show. 125.

By 31 El. c. 1. § 2. reciting the above act of 27th of Eliz. and reciting also that "it doth many times fall out, that the full number of the said justices of the Common Bench and barons of the Exchequer, so authorized by the said statute, sometimes for want of health, sometimes through other weighty services and earnest occasions, cannot be present at the days and times of the returns and continuances of the same writs of error, and by reason of their absence and not coming, the said writs of error are discontinued, justice delayed, and the parties put to begin new suit, to their great charges and prejudice:" it is enacted, "That from henceforth, if the full number of the justices and barons authorized by the said act come not at the day or time of return or continuance of any such writ of error, that it shall be lawful for any three of the said justices and barons, at every of the said days and times, to receive writs of error, to award process thereupon, to make and prefix days from time to time of and for the continuance of all such writs of error as shall be there returned, certified or depending; and that the same shall be to these respects as good and available as if all the justices and barons authorized by the same act were present; and that the justices and barons authorized by the said statute may, after that, proceed in all those cases in such sort to all intents, as they may do in other cases mentioned in the said statutes, any not-coming of any the said justices or barons notwithstanding.

§ 3. "Provided nevertheless, that no judgment shall be given in any such suit or error, unless it be by such full number of the said justices and barons as are in that behalf authorized and appointed by the said act.

§ 4. "Provided also, that the party plaintiff or defendant, against whom any such judgment hath been heretofore or here-

"after

“ after shall be given in the said court of King’s Bench, may,
 “ at his election, sue in the high court of Parliament for the
 “ reversal of any such judgment as heretofore hath been used or
 “ accustomed.” ||

3. *Of reversing Judgments in the Court of Exchequer.*

Before the statute of 31 E. 3. st. 1. c. 12. (a) errors in the Exchequer were sometimes examined in (b) parliament, and sometimes before commissioners, by force of the king’s writ under the great seal. 4 Inst. 72. Moore, 566. (a) Upon motion for the allowance of a court is grown error, and now
 judgment in the Exchequer in the 24th of Elizabeth, *Manwood* said, This to be of little regard; for in two hundred years there were but six writs of error, and now there are as many in every term. Sav. 31. (b) Ro. Rep. 14, 15.

By that statute, “ It is accorded and established that in all cases touching the king (c) or other persons, where a man complaineth of error made in process in the Exchequer, the Chancellour (d) and Treasurer (e) cause (f) to come before them in any chamber of council nigh the Exchequer the record of the process out of the Exchequer, and take to them * justices and other sage persons, such as shall seem to them fit to be taken; and cause also to be called before them the Barons of the Exchequer to hear their informations and the reasons of their judgment, and thereupon duly examine the business; and if any error be found, correct it, and amend the rolls, and after send them into the Exchequer in order to do thereof execution as appertaineth.” (c) The king may have error here. Vide Co. 42. a. 3 Co. 1. (d) By 31 Eliz. c. 1. the not coming of the lord chancellor or lord treasurer, or either of them, at any day of adjournment, shall be no discontinuance, so as

one of them, or both chief justices come, and are present. — But this statute not providing remedy where they came not at the return of the writ of error, *vide* 2 Leon. 59. it was enacted by 16 Car. 2. c. 2. that if the chief justices, or either of them, or the chancellor or treasurer shall not come at the return of the writ of error, it shall be no abatement or discontinuance; but no judgment shall be given, unless both chancellor and treasurer shall be present. (e) Intended of the treasurer of *England*, and at the time of making this statute, the offices of treasurer of *England* and of the Exchequer were in several hands. (f) Though the barons only are judges, yet the treasurer together with them hath the custody of the records, and therefore the writ of error is to be directed to him and the barons, and it is, though the lord treasurer and treasurer of the Exchequer are the same person. 4 Inst. 105. Sav. 35, 36. — *If the chancellor and treasurer do not call in the other justices, it seems to be error. 8 H. 7. 13.

In the *Bankers’ case* adjudged in the Exchequer, which came before the lord keeper, &c. pursuant to the above statute, the lord chancellor and three of the judges were of opinion, that the judgment of the Exchequer should be reversed; and then the question was, whether the judgment of the court should pursue the opinion of the majority of the judges, or that of the lord keeper and the three judges? And three of the judges were of opinion, that the majority of the judges should govern this judgment; but the others being of a contrary opinion, the judgment was reversed, which was pronounced by my Lord Keeper *Somers*. Carth. 388. Vide the Bankers’ case.

Rex v. Cotton,
2 Ves. 298.
Parker, 142.

[A writ of error from a judgment in the court of Exchequer issued returnable in the Exchequer-chamber, pending which the plaintiff in error died; whereby the writ abated. Lord Chancellor *Hardwicke*, and the two Chief Justices *Lee* and *Willes*, were of opinion, that the new writ could not be properly to the Exchequer-chamber, because the record did not reside with them, and the words of the writ are *record. quod coram vobis residet*; for only a transcript of the record is sent into the Exchequer-chamber, and the record itself remains in the court of Exchequer. But the court made a rule for a *remittitur* to be entered on the record, together with a suggestion of the death.]

4. Of Writs of Error into the King's Bench.

(a) || Except in The court of King's Bench superintends the proceedings of all other inferior courts, (a) and being the king's own court in which he formerly sat in person, by the plenitude of its power corrects the errors of those courts. Hence it is, that (b) a writ of error lies in this court of a judgment given in the (c) King's Bench in (d) *Ireland*.

London, and some other places. 2 Burr. 777. ||
(b) 34 Ass. 7.
37 Ass. 5.
Ro. Abr. 745.
F. N. B. 22. but for this vide 4 Inst. 356. Keilw. 202. 5 Co. 18. a. Calvin's case, Leon. 55. Yelv. 118. Style, 386. Vaugh. 290. 402. and per Ro. Rep. 17. it is said, per Coke, that *Ireland* was annexed to the crown of *England* by conquest, and therefore, &c.; but Q. 2 Bulst. 163. — It lies not in the parliament of *Ireland*. Ro. Rep. 17. per Coke. (c) Upon a judgment in *Banco* there, it must be brought in *Banco Regis* here, &c. F. N. B. 22. Yelv. 118. [By stat. 23 Geo. 3. c. 28. § 2. no writ of error or appeal from the courts in *Ireland* shall be received or adjudged in any court in this kingdom.] || But since the Union a writ of error lies from the superior courts in that country to the House of Lords. || (d) Upon a judgment in *Calais*, when under the subjection of the king of *England*, a writ of error lay in *B. R.* 4 Inst. 282. Raym. 174. S. P. cited. Vaugh. 290. 402. S. P. cited; but yet vide Keilw. 202. S. P. cont. — But it lies not upon any judgment in *Scotland*, because a distinct kingdom, and governed by distinct laws. Show. Par. Cases, 33. Vide supra as to the Court of Exchequer in *Scotland*.

Ro. Abr. 744-5. So, a writ of error will lie of a judgment given in Chancery on Ro. Rep. 287. the common law side, called the *petty-bag*, as upon a *scire facias* 29 Ass. 47. upon a recognizance, although both courts were before the king 4 Inst. 80. himself, and to (e) some purposes are the same.
Dyer, 315.

& vide Moore, 570. pl. 778. (e) As, if issue be joined in Chancery, it must be tried in the King's Bench, and the record delivered over per proprias manus of the chancellor. 2 Saund. 23. 2 Keb. 621. Lev. 283. Sid. 436. Mod. 29. Jefferson and Dawson. [No traces of any writ of error being actually brought from the common law side of the court of Chancery into *B. R.* are to be met with later than the fourteenth year of Queen Elizabeth, A. D. 1572. Dy. 315. And Lord Keeper *North* in 1682 declared, that no such writ of error lay, that the books were founded only on the single opinion of Lord *Dyer* in the above case, and that he would grant injunctions against them. 1 Vern. 131. 1 Eq. Cas. Abr. 129. This opinion of the Lord Keeper, Sir *W. Blackstone* says, seems not to have been well considered. However, there are respectable authorities in confirmation of it. Lamb. Archion. 69. The opinion of Mr. Justice *Choke*, 37. H. 6. 13. b. and 11 E. 4. 9. a. Bro. tit. Error, pl. 95. At the same time it must be acknowledged, that the learned commentator cites authorities equally respectable in opposition to it. 18 E. 3. 25. 27 Ass. 24. 29 Ass. 47.] || In the case of *Foxwith v. Tremaine*, 1 Ventr. 102. one of the points there resolved by the court of King's Bench was, that a writ of error did lie out of the *petty-bag* into that court on an error in fact. ||

If a peer be attainted before the lord high steward, a writ of error lies in the King's Bench of such attainder, and the party has no other remedy. * Sid. 208. Lev. 149. per Twissden. * Error lies in parliament, upon an attainder for treason; for though the stat. 33 H. 8. 20. says, that judgment of attainder by common law, shall be of as good force, as if done by authority of parliament, this shall be intended of a lawful attainder. Hale's Hist. Pow. and Jurisd. of Parliament, 19. 4 Inst. 21.

A writ of error lies of a judgment in the Common Pleas into the King's Bench, which only can correct the errors of that court, and from thence into parliament. 4 Inst. 22.

A writ of error lies into the King's Bench of a judgment in a county palatine; for though these are superior courts and have *jura regalia*, yet their jurisdiction is derived from the crown. 4 Inst. 214. 223. Ro. Abr. 745.

If an erroneous judgment be given in *Durham* in the Chancery, upon proceedings according to the common law, or before the justices of the bishop, a writ of error lies before the bishop himself, and if he gives an erroneous judgment, error lies in *B. R.* 4 Inst. 218.

If the justice in eyre gives an erroneous judgment at a justice-seat in a forest, a writ of error lies thereupon in *B. R.* 4 Inst. 297.

By the 34 & 35 H. 8. c. 26. § 113., errors in judgment in pleas real and (a) mixt, before the justices in their Great Sessions in *Wales*, shall be redressed by error in *B. R.* in *England*; but errors in pleas personal shall be reformed before the (b) President and Council. (a) In ejectment, Griffith's case, Moore, 248. pl. 391. adjudged. Cro. Eliz. 104. adjudged. (b) This court is dissolved by the statute of 1 W. & M. stat. 1. c. 27., and by the same act, errors in pleas personal are to be redressed as errors in pleas real and mixed were by 34 & 35 H. 8. c. 26.

5. *Of Writs of Error into the Common Pleas and Inferior Courts.*

If an erroneous judgment be given in (c) *London*, or other place, which is a court of record, the party grieved shall have a writ of error, and this writ may be returned into the Common Pleas, or into the King's Bench, at the pleasure of him who sueth the same. F. N. B. 44. (c) Though error lies not in *B. R.* upon a judgment given in *London*, yet it lies upon a judgment given at Newgate, which is upon commission in their sessions. 2 Leon. 107. so held, and vide 2 Ro. Rep. 97. 2 Lev. 223.† —† If error be of a judgment in the sheriff's court in *London*, it shall be before the mayor and sheriffs in the hustings. 4 Inst. 248. F. N. B. 22. (H.) Vide Priv. Lond. 164. 168.

No writ of error lies in *Banco* or *Banco Regis*, upon a judgment given within the Five Ports; but by custom such judgment is examinable by bill in nature of a writ of error *coram domino custode seu guardiano quinque portuum apud curiam suam de Shepway*. 4 Inst. 224. See the courts of Cinque Ports.

If a judgment be given in the court of Stannaries of the duchy of *Cornwall*, (d) no writ of error lies upon this in *Banco* or *Banco Regis*, because it hath not been used; but of this there may be Ro. Abr. 745. l. 20. (d) That is, for any matters touch-

ing the Stannaries; otherwise, upon a judgment there given upon collateral matters. ³ Bulst. 183. *per* Coke chief justice, said to have so been resolved upon a conference by all the judges, as is seen recorded in Chancery in the petty-bag office. Q. Owen. 8. Sid. 233.

Ro. Abr. 743. A writ of error lies in the Common Pleas upon a judgment but *vide* Leon. given before the judges of assise.

35. 3 Leon. 159. Dyer, 250. Moore, 78. And. 12. N. Bendl. 153. Cro. Eliz. 26. Carter, 222.

18 E. 3. 14. Upon a judgment given in the Hustings in London, a writ of error lies at St. Martin's before certain justices.

2 Saund. 253. S. P. and that upon a judgment of the said justices, a writ of error lies in parliament, *vide* 2 Leon. 107. It lies not from the courts of the city of London, to B. R. though it does lie thither, from all other corporation courts. 2 Burr. Rep. 777. — An appeal lies to the House of Peers from a decree in the mayor's court. See the case of Littlebury and Buckley, *post*, tit. Evidence (G). [In the case of Harrison v. Evans, 6 Br. P. C. 181. on a judgment in the sheriff's court in London, a writ of error was returnable in the court of Hustings there, and on the judgment of that court, a special commission of errors was directed to five of the twelve judges, or any two of them, upon whose judgment a writ of error was brought returnable in parliament.]

6. Where a Writ of Error lies in the same Court in which the Record is.

F. N. B. 21. If upon a judgment in B. R. there be error in (a) the process, Poph. 181. or through the default of the clerks, it shall be reversed in the Ro. Abr. 746. same court by writ of error sued there before the same justices. (a) And therefore the 27 Eliz. c. 8. which gives a writ of error into the Exchequer-chamber, extends not to errors in fact, for these might have been examined in B. R. 2 Lev. 38. Vent. 207. Cro. Ja. 5 S. P. adjudged.

3 Inst. 214. So, if one is indicted of treason or felony in B. R. or, being indicted elsewhere, the indictment is removed in B. R. and by process of that court he is erroneously outlawed, and so returned; a writ of error may be brought in B. R. for the reversal thereof.

Sid. 208. Also, if an erroneous judgment in point of law be given in Cornhill's case, adjudged. B. R., upon an indictment in London, a writ of error may be Lev. 149. S. C. brought in the same court; for though in civil cases error does adjudged, and not lie in the same court, unless for a matter of fact; yet in said, though criminal cases it lies as well for an error in law as fact. it may be brought in parliament, that does not prove but it may be brought here also. — But according to 1 Sid. 208. it seems that this was only for error in fact. And Q. If it could be for error in law? And see *infra*.

(b) Fitz. N. B. 21. (c) Moore, 186. pl. 332. In (b) *Fitz. N. B.* it is said, that a judgment cannot the same term it is given be reversed in B. R., without a writ of error, though such judgment may in the Common Pleas. But it Yelv. 157. does not seem that there is any foundation for this (c) distinction, Poph. 181. for during the term, in which any judicial act is done, the record remains in the breast of the judges of the court; and therefore But when the term is past, the roll is the record, and the roll is alterable during the term, as they shall direct.*

admits

admits of no alteration. Co. Litt. 260. a. *vide tit.* Amendment. — * An erroneous judgment, may be stayed, by moving in arrest of judgment, within four days.

But, if an erroneous judgment be given, and the error lies in the judgment itself, and not in the (a) process, a writ of error does not lie in *B. R.* of such judgment.

Ro. Abr. 749.
7 H. 6. 30.
(a) As, if the court awards

an exigent where they ought to award a *pluries capias*. Ro. Abr. 746. — They may reverse their own judgment for false *Latin*, because this is not the default of the court, but of the clerks. 7 H. 6. 30. Ro. Abr. 746. — Where by reason of fraud, &c. a judgment may be vacated after the term in which entered, *vide* 2 Ro. Abr. 724. — If judgment be given in an action in *B. R.* and there also execution be awarded, a writ of error *quod coram vobis residet* does not lie in *B. R.* in *adjudicatione executionis*. Ro. Abr. 746, 747. Ro. Rep. 65. S. C.

If two bring a writ of error in *B. R.*, upon a judgment in an assise, and pending the writ one of the plaintiffs dies, and after, the court, not knowing of the death of one of them, reverses the judgment; and after he, against whom the judgment was reversed, brings a writ of error in the same court of *B. R.*, and assigns the death of one of the plaintiffs in the first writ of error, which was the act of God, not the error of the court, it seems the writ well lies.

Ro. Abr. 747.
Cro. Eliz. 105.
Like point adjudged.
4 Leon. 60.
S. P.

If a record is removed by writ of error out of the Common Pleas into the King's Bench, and the writ of error for insufficiency is quashed in the King's Bench, the plaintiff in error may have a new writ *coram vobis residen*. but such new writ is not a *supersedeas* of itself (b) as the first writ was, and therefore he must move the court for a *supersedeas*, and put in bail thereon.

Carth. 368,
369. (b) || The writ of error in this case is or is not a *supersedeas* according to circumstances;

and these circumstances the court will inquire into on motion for leave to take out execution. In case, therefore, of error brought *coram nobis*, the practice is that the defendant in error shall move the court for leave to take out execution. *Birch v. Triste*, 8 East, 412. *Ribout v. Wheeler*, Sayer, 166. || [In all cases where the record is actually removed, and the writ of error is quashed, error *coram vobis* lies: *secus*, where the record is never removed, as is the case where the writ is quashed for variance between the writ and the record. *Ginger v. Cooper*, 1 Str. 607. 2 Ld. Raym. 1403.]

So, if such second writ be quashed for insufficiency, yet the court will grant a new or second writ of error *coram vobis residen*. as also a *supersedeas* on putting in bail; for such second writ being void is as if there had been none before.

Carth. 369,
370.

[Error *coram vobis* does not lie in the King's Bench after error brought in the Exchequer-chamber, and the judgment affirmed; for before the statute of Eliz. the King's Bench could not examine its own errors in fact after an affirmance in parliament; and the Exchequer-chamber is now in the same degree with regard to the King's Bench in those cases within the statute, as the parliament was before.

Lambell v. Pretty John,
2 Str. 690.

Error *coram vobis* lies not in the Exchequer-chamber.]

4 Cr. Pr. 337.

(K) Of assigning Errors: And herein,

1. Of the Manner of assigning Errors.

Sid. 294.
Cowper and
Price. 2 Keb.
32. 71. 75.
S. C.

UPON a writ of error for want of (a) assigning errors, judgment is not affirmed, (b) but execution goes upon the first judgment, so that the party can have no costs; but his remedy must be upon the recognizance, by which he is bound to prosecute with effect.

(a) Error cannot be assigned in a record which is not in the court where the writ of error is brought. 11 H. 4. 47. b. Ro. Abr. 760. 769. — Assignment of error is in the place of a declaration. 9 E. 4. 32. — Error may be assigned in every part of the record. Ro. Abr. 760. — May be moved to the court, though not particularly assigned. 5 Co. 37. b. Error in fact or in law may be assigned on a judgment by default. Ro. Abr. 756. Style, 122. (b) If a record be removed out of the Common Pleas into the King's Bench by writ of error, and the plaintiff will not assign his error, then a *scire facias* shall issue forth *quare executionem habere non debet*; and, upon summons and two *nihils* returned, the plaintiff shall have execution. 2 Leon. 107. [But a *scire facias*, it seems, cannot issue till the transcript of the record below is removed; and therefore the defendant in error, if the plaintiff is dilatory, must give a rule to transcribe; and if the plaintiff will not do it, he may then *non pros* the writ of error. Ca. temp. Hardw. 351.]

Carth. 40, 41.
per Holt C. J.
where the
errors were
assigned in a
private man-
ner without
giving notice
to the defend-
ant in error.

The parties, upon the removal of the record by the writ of error, have no day in court given to either of them; wherefore if the plaintiff in error delay to sue forth his *scire facias ad audiendum errores*, the defendant hath no other way to compel him, but by suing out a *scire facias quare executionem non*, &c. and if, upon such *scire facias*, the plaintiff in error doth not plead, that his errors are assigned, but suffers judgment to pass upon two *nihils*, no errors afterwards assigned shall prevent execution.

And by a rule of the court of King's Bench, if the plaintiff in error doth not assign his errors, and give a copy of them to the defendant's attorney in error, by or before the time given by the rule on the *scire facias* is out, the defendant's attorney in error may enter judgment on the *scire facias*, and take out execution thereon, but can have no costs, unless he gives a rule for the plaintiff to assign error on record; which, if he doth not do, he may be non-prossed, and then the defendant in error shall have his costs.

Also, by another rule of the same court, when the plaintiff in error hath assigned the general errors, he must give a copy of them to the defendant's attorney, who may plead *in nullo est erratum* to it immediately, and enter both on the roll, paying the plaintiff's attorney 2s. 4d. for the same.

Yelv. 6, 7.

If the defendant in error sues out a *scire facias quare executionem non debet*; this is merely collateral to the record removed, and yet by matter *ex post facto* may become a record; as, if the plaintiff upon the return of the *scire facias* appears, and pleads a release, or other matter, as he well may, then this is a record annexed to the first record removed; but, if upon the return of the *scire facias*, the plaintiff appears, and assigns errors, or hath

a day

a day given him to assign them, and upon this record assigns his errors insufficiently; this *scire facias* is but a piece of paper filed to the record, no proceedings being thereupon.

In a writ of error it is no good assignment of error, *quod in omnibus erratum est*; for the court is not bound to inquire of the errors, if the party does not shew them. 6 E. 4. 6. P. o. Abr. 761. Bro. Attaint, 86.

In a writ of error to reverse an (a) outlawry, errors cannot be assigned by attorney, but the party must appear in person. 2 Leon. 82. Cro. Eliz. 611. S. P. Wade &

Ur. v. Smith, where the husband and wife being outlawed, and the wife refusing to appear, the outlawry could not be reversed, & *vide* Carth. 7. S. P. where a difference was taken, that where the error appears on the face of the record it may be assigned *per attornatum*, but no opinion given thereon. (a) A person attainted of treason or felony, before he can have a writ of error to reverse the attainder, must assign his errors, and thereupon have leave from the court to prosecute his writ of error. 2 Hawk. P. C. c. 50. § 11. — And no such writ of error is to be allowed without an express warrant from the king, or the consent of the attorney-general. Sid. 69. Bulst. 71. 3 Mod. 42. Ro. Rep. 175.

[A defendant convicted for a misdemeanour, and in execution for the fine may, with leave of the court, assign errors by attorney.] Rex. v. Sta-pleton, 1 Str. 443.

If two bring several writs of error, and several *scire facias*'s to reverse a judgment in an assise against them, they may assign errors jointly. 11 H. 4. 92. b. Bro. Error, 50. Ro. Abr. 761. S. C.

If a writ of error upon a judgment in an assise be brought by four, and only one appear, and the others make default, he cannot assign errors alone, till the others are summoned and severed. Yelv. 3, 4. Cromwell and Andrews. Cro. Eliz. 891. S. C. adjudged. [In such case,

he must move the court for time to assign his errors, till the others can be summoned and severed. *Frescobaldi v. Kinaston*, Str. 783.]

So, if upon a judgment in a *quare impedit*, a writ of error be brought by the bishop and incumbent, the incumbent only without summons and severance, cannot assign errors. Cro. Ja. 94. Lancaster and Law, adjudged.

If two are outlawed in an appeal of murder, and they bring a writ of error to reverse it, and one appears, but the other does not, he shall not assign errors till the other does; because he hath joined with him in the writ of error. Sid. 316. The King and Tottenham, adjudged; but *vide* 2 Ro. Rep. 490.

Two brought a writ of error, and made two attornies; upon the *scire facias*, the one attorney assigned error, to which the defendant took issue, and then the other would plead in abatement of the writ: it was held *per Cur.* if one of the plaintiffs had made default, he should be severed; but, if they go on, they must proceed jointly; and if one attorney will assign error, &c. without authority from both, we cannot help him, let him take his remedy against the attorney. 6 Mod. 40. Shepherd and Baily v. Orchard. Lev. 146.

[A writ of error cannot be non-proceed without a rule to assign errors. But, where neither plaintiff in error, nor his attorney could be found, so as to be served with the rule, the court of K. B. ordered, that fixing the rule up in the King's Bench office should be good notice.] Leith v. McFarlan, 3 Burr. 1772. Thompson v. Baker, Ca. temp. Hardw.

2. Of assigning Errors in Fact and in Law.

Ro. Abr. 761. The plaintiff in error cannot assign error in (a) fact and error
Sid. 147. in law together; for these are distinct things, and (b) require
Leon. 105. different trials.

(a) As that he was under age when he levied a fine. Raym. 231. Vent. 252. — That the plaintiff was a feme covert. Ro. Abr. 761. (b) *Viz.* Matters of fact to be tried by a jury, those of law, *i. e.* those appearing on the face of the record, by the judge before whom the record is removed. Yelv. 58.

Burleigh v. Harris, 2 Str. 975. [And as error in fact and error in law cannot be assigned on one writ; so, after affirmance on error in law assigned, error *coram vobis*, and error in fact assigned, shall not be allowed.]

Style, 69. If the plaintiff in error assigns error in fact and error in law, Lev. 6. Salk. 268. pl. 15. which are not assignable together, and the defendant in error pleads *in nullo est erratum*; this is a confession of the error in fact, 270. pl. 18. and the judgment must be reversed; for he should have (c) demurred for the duplicity. 3 Salk. 399. pl. 3. 6 Mod. 113. 206.

2 Ld. Raym. 1005. (c) Where the errors assigned were, 1. That the declaration was *minus sufficiens in lege*. 2. That judgment was given for the plaintiff, when it should have been for the defendant. 3. That the plaintiff in the action died before the verdict given; and though it was agreed, that this assignment of matter of fact and matter of law was double, and would have been ill on a general demurrer; yet the court held, that the advantage thereof was lost by pleading in *nullo est erratum*. Carth. 338, 339. Edmonds and Probert.

Sid. 93. Also, if an error in fact be well assigned, *in nullo est erratum*
Raym. 59. is a confession of it, for the defendant ought to have joined issue upon it, so as to have it tried by the country.

Cro. Ja. 12. But, if an error in fact be ill assigned, *in nullo est erratum* is 29. 529.
Raym. 231. no confession of it; as (d) if it be assigned, that such an one at the time of the return of the *venire* was not sheriff, and the record be removed into *B. R.* by *certiorari*, there, *in nullo est erratum* is no confession of that error, because the record is not in court, that being no part of the record, for the plea is *in nullo est erratum in recordo*.

Yelv. 58. So, if the plaintiff in error assigns an error in fact, *viz.* that King v. Gosper and Shire. the defendant, who was an infant, did not appear by guardian, but by attorney, and concludes with *hoc paratus est verificare*, instead of concluding to the country, as he ought to do, though error in fact is assigned, the plaintiff must conclude with an *averment*, in order to give an opportunity of trying the fact by the country, if the defendant in error chooses it. Sheepshanks v. Lucas, 1 Burr. 412. Carth. 367.

Cro Car. 12. Also, if an error in fact that is not assignable be assigned, and 29. 52. Yelv. 58. Raym. 231. Vent. 252. 3 Keb. 259. Lev. 76. (e) If a man appear and plead as a prisoner *in nullo est erratum* be pleaded, it is no confession; as, if it be assigned, that at such a day there was no court of Common Pleas sitting; because that is against the record; and in such case *in nullo est erratum* is only a demurrer. So, if a man say he did not appear, and the record say he did, *in nullo est erratum* is no confession, but a demurrer, because it is (e) against the record.

prisoner

prisoner in custodia maresch. he cannot after assign for error, that he was not in custodia maresch. Cro. Ja. 568. Hob. 264. Ro. Abr. 762.

After errors assigned, and a release pleaded by the defendant, the plaintiff discontinued; and because there was manifest error in part of the record remaining in *B.* he obtained a writ out of Chancery to the chief justice to remove the residue of the record, which being removed in *B. R.*, he would assign errors upon a new part removed: it was ruled *per Cur.*, that inasmuch as the first writ was discontinued, and this a new writ, the plaintiff is not tied to the former errors, but may shew others at his pleasure; for it is now as if none were assigned before, and he may assign other errors out of the record; and the removing of the record in this manner was held allowable. But this being entered upon another roll, it was held a mis-entry, and the plaintiff was put to a new writ of error.

Yates and
Windham,
Cro. Eliz. 155.
281. 2 Leon.
2. S. C.

3. *Of assigning that for Error which appears contrary to the Record.*

It seems a general rule, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice, being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore, though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.

Ro. Abr. 757.

Hence it is, that in a writ of error to reverse a fine, the plaintiff cannot assign, that the conusor died before the teste of the *dedimus*, because that (a) contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance after they were armed with the commission, and the *dedimus* issued.

Dyer, 89.

Ro. Abr. 757.
Cro. Eliz. 469.

(a) But the plaintiff in error may say, that after the conusance

taken, and before the certificate thereof returned, the conusor died, because this is consistent with the record. Ro. Abr. 757. *Vide* head of *Fines and Recoveries*.

A conusance of a fine was taken before *R. M.*, one of the justices of the Common Pleas, and after, in the prosecution of the fine, the *dedimus* was directed to Sir *R. M.*, he being after the conusance made a knight, who returned the *dedimus* with his name and title; and this was assigned for error, that the person who took the conusance was not the same who was empowered to take it; but it was not allowed, because it contradicts the record, which is, that the *dedimus* was directed to Sir *R. M.*, and that Sir *R. M.* by virtue thereof took the conusance.

Arundel and
Arundel,
Yelv. 33. Cro.
Eliz. 677. S. C.
Ro. Abr. 757.
Cro. Ja. 11, 12.
3 Mod. 141.
S. C. cited.

If a writ of error be brought upon a judgment in an inferior court, and the record certified of a court held before the mayor, bailiffs, and burgesses of *A.* by custom, it cannot be assigned for error, that there is no such custom, for this is contrary to the record, and even what the writ of error itself supposes, *viz.* that they have a court.

Whistler and
Lee, adjudged,
2 Bulstr. 243.
Ro. Rep. 53.
S. C. Cro. Ja.
359. S. C. and
per totam
curiam, this

assignment being against the record, it is not receivable; wherefore the judgment was affirmed.

Cro. Jā. 597.
Johns and
Bowen. Palm.
428.

If, upon diminution alleged, the plaintiff in error procures an original to be certified, and the defendant surmises there is a good original; and upon a new *certiorari* granted that is certified; the plaintiff in error cannot assign that the proceedings were upon the first writ, for that is contrary to the record; for when there is a good writ to warrant the proceedings, a man shall never be admitted to say the proceedings were upon the bad writ.

Cro. Car. 53.
Morris and
Fletcher, ad-
judged upon a

writ of error in the Exchequer-chamber. [Nor can it be alleged that the defendant died before the day of *nisi prius*, if the record mentions that he appeared on that day. *Plummer v. Webb*, 2 Ld. Raym. 1415.]

Molins and
Wheatly,
Lev. 76. Sid.
94. Keb. 355.
S. C. adjudged.

In a writ of error upon a judgment in the Palace Court held *coram Jacobo Duce Ormond*, it cannot be assigned for error, that the duke was not there, because that is contrary to the record, though in fact the court was held before his deputy, according to the patent.

Kipply and
Tuck, 2 Lev.
184. 2 Jon.
81. S. C. ad-
judged *per*
Cur. præter
Wid. 3 Keb.

In a writ of error upon a judgment in an inferior court, it may be assigned for error, that the mayor, who was the judge, had not received the sacrament, and taken the oaths, according to the 25 Car. c. 2., because his office is made void, and so the proceedings *coram non judice*.

606. 665. 721. S. C. adjudged *nisi*; but *vide* 2 Lev. 242. 2 Jon. 137. S. P. adjudged *cont.*

Baker v.
Thompson,
Ca. temp.
Hardw. 166.

[Where in the description of the justices of assise, *A. & B. just., &c. ad capiend. juxta formam, &c.* the word *assises* was omitted; yet, as it appeared from other parts of the record, that they were justices of assise, the court held, that this could not be assigned for error, inasmuch as it would be contradictory to the record.

1 Ro. Abr. 758.
pl. 8.

If *A. B.* is sworn upon the principal panel, and another of the same name is sworn upon the *tales*, it shall not be assigned for error that the *A. B.* first sworn, and *A. B.* the tales-man were one and the same person, so as to make it a trial by eleven jurors only; for this is contrary to the record, which says, that they who were sworn on the *tales* were *alii de circumstantibus*; he could not be *idem* consistently with the record, which says, that he was *alius*; and therefore such an averment, contrary to the record, shall not be admitted.

Helbut v.
Held, 2 Str.
684. 2 Ld.
Raym. 1414.

So, it shall not be assigned for error, that *A. B.*, who was sworn as a juror, returned upon the principal panel, was never returned by the sheriff: for after the joinder in issue, the record goes on to the award of a *venire facias* returnable at such a day, *ad quem diem*, it says, *jurata inter partes præd. ponitur in respectu* till the next term, *nisi prius* the justices come, &c.; at which time they come, *et juratores unde infra fit mentio exacti unus eorum*, (that is, one of those returned by the sheriff,) *viz. A. B. venit et in juratam illam juratus existit*; so that the record ex-

pressly says, that the *A. B.* who was sworn, was one of them who was returned by the sheriff, and therefore the error assigned is contrary to the record.

So, as being contrary to the record, it shall not be assigned for error, that the defendant filed his warrant to defend by *A. B.* his attorney, and that it appears on the judgment that he appeared and defended by *C. D.* his attorney. Bradburn v. Taylor, 1 Wils. 85.

A defendant in ejectment cannot assign for error, that being an infant, he appeared by attorney.] Goodright v. Wright, 1 Str. 25.

4. *Of assigning that for Error which is for the Party's Advantage.*

It seems agreed, as a general rule, that a man cannot reverse a judgment for error, unless he can shew that the error was to his (a) disadvantage. 5 Co. 39. 8 Co. 39. (a) And therefore a man cannot assign error in process, or delay, which is for his own advantage. F. N. B. 21. 8 Co. 59. — But a man may assign the want of a warrant of attorney of his own attorney, though it be his own default. 11 H. 4. 44. Ro. Abr. 760.

Hence it is, that no man can have a writ of error to reverse a fine that took any estate by it; for it would be trifling with the courts of justice, and unreasonable to defeat the estate which he accepted by the fine. 5 Co. 39. b.

For the same reason, the conusor cannot assign any error in the grant and render; because by that the estate which passed from him by his conusance is restored to him, and therefore he shall not be admitted to defeat the estate which by his own agreement he accepted. 5 Co. 39. b. Moore, 74.

But, if the error be the default of the court, though it be for the advantage of the party, yet the party that hath the benefit by it may assign it for error, for the course of the court ought to be observed. 8 Co. 59. Ro. Rep. 759.

As, if in action of debt it is found, that the defendant owes the plaintiff 5*l.*, and the jury assess damages to 2*d.*, and costs 2*d.*, and after judgment is given, that the plaintiff should recover *debitum & damna prædict.* to 2*d.*, and no judgment is given for the costs, though this is for the advantage of the defendant, yet he may assign it for error, because this is the error of the court to alter the manner of judgments. Ro. Abr. 759. Holmes and Twiste, adjudged, and the judgment reversed accordingly.

So, if the plaintiff in a suit retracts, by which judgment is given against him, but he is not amerced as he ought; though this is for his own advantage, yet for that the amercement ought to be parcel of the judgment, and so the judgment is not perfect without it, he may assign it for error. 8 Co. 59. Beecher's case. Cro. Ja. 211. S. C. adjudged.

So, in every case, where a judgment is given against a man, in which he ought to be amerced, if he be not amerced, he may assign it for error, though it be for his own advantage. 8 Co. 59. Ro. Abr. 759, 760. But where this

will be aided by the statute of jeofails, *vide tit. Amendment and Jeofail.*

So, if a man be amerced by the judgment, where he ought to be fined; though this be for his advantage, yet he may assign it for Ro. Abr. 760. 5 Co. 59. Cro. Eliz. 84.

S.P. adjudged, for error; for the form of the judgment, which is the act of the but for this court, is altered by it.
vide Cro. Eliz.
 65. 107. Poph. 203. 2 Saund. 47. and tit. *Amendment and Jeofail.*

Kent v. Kent, [So, if one defendant only be charged with the whole of the
 Ca. temp. damages and costs, this may be alleged for error by the other
 Hardw. 50. defendant not charged; for this is an error in the final judgment,
 2 Str. 971. it is the fault of the court.]
 2 Barnard. 357.
 386. 441.

Ro. Abr. 769. But if in a writ of annuity, the issue be found for the plain-
 Bent and tiff, and no damages found for him, and judgment be given
 March, *per* according to the verdict, the defendant cannot assign it for
Cur. Ro. error, that no damages were taxed against him, because this
 Rep. 88. S. C. is for his advantage; and here the defect is not in the judg-
 adjudged. ment, as it is where it is a *capiatur* for a *misericordia*, but in the
 2. Bulst. 279, verdict.
 280. S. C. ad-
 judged.

11 Co. 56. a. S. C. adjudged; by which books it appears, that the plaintiff before judgment released his damages, and had judgment for the annuity only, which made it more clear; and so it is in Ro. Abr. 784. S. C.

Ro. Abr. 37. Upon an issue between a peer of the realm and another, if
 between the the *venire facias* be *quod summoneat 12 liberos & legales homines*,
 Earl of Wor- and do not say, *tam milites, quam alios*, as the register is,
 cester and (a) though the peer of the realm may assign it for error, yet the
 Trade. yet the other cannot, because it does not concern him.
 this being the error of the
 court may be assigned for error. *Vide* 2 Saund. 258.

Williams v. In a writ of error brought by the tenant, it cannot be as-
 Gwyn, signed for error, that the court awarded a *grand cape*, where
 2 Saund. 45. they ought to have given judgment for the defendant to recover,
 3 Keb. 450. because the award of the *grand cape* was only in delay of the de-
 551. 605. mandant, and not to the prejudice of the tenant, and therefore
 S. C. not by him to be alleged for error, because not *ad grave damnum*
tenentis.

5. *Where the Matter assigned for Error is aided by the Appearance of the Party, and not being taken Advantage of in proper Time.*

Carth 124. A man shall never assign that for error which he might have
 laid down by pleaded in abatement, for it shall be accounted his folly to
Holt as a neglect the time of taking that exception.
 general rule.
 Salk. 2 S. P.

Carth. 124. As, if a feme covert bring an action in her own name, *per at-*
tornatum, and the defendant plead in bar to the action, he shall
 never afterwards assign the coverture for error.

Ro. Abr. 781. So, if a feme sole brings trespass and recovers, and a writ
 Smith and of inquiry of damages is awarded; and before the return thereof,
 Odyham. the plaintiff takes husband; and after the writ is returned, and
 judgment given thereupon, without any exceptions taken by the
 defendant;

defendant; he shall not have advantage of this in a writ of error, because the writ was only abateable by plea.

Also, if there be an (a) omission of any writ or process, or one writ awarded in lieu of another; yet if the judgment is not given thereupon, but after the party appears and pleads to issue, and judgment is given upon the verdict; this is not erroneous, because he had not taken advantage of this before pleading to issue.

83. Style, 237. Vent. 220. 249. Cro. Ja. 424. Bulst. 143. Latch. 118. Humble v. Bland, 6 T. R. 255.

3 H. 6. 9.
Ro. Abr. 779,
780.
(a) Where an
error in pro-
cess is helped
by appearance,
vide Cro. Eliz.
Cro. Car. 351.

If a man in B. brings a bill upon his privilege, but hath no writ of attachment of privilege; yet, if the defendant after appears and pleads, this shall be helped by the appearance.

adjudged. 3 Bulst. 61. S. C.

If a man be indicted, and no addition be given to him as there ought, yet if the defendant appear and plead to issue, and this be found against him, it is helped, for the addition is ordained by the statute, that the party who may happen to be outlawed ought to have notice of it; and here he hath notice, and *constat de personâ* by the appearance.

Ro. Abr. 780.
Johnson's
case. Cro.
Ja. 609. 2 Ro.
Rep. 225. S. C.
adjudged.

A *capias* was directed to the sheriff of B., and it was returned by one who was not sheriff, and this was held a manifest error: but because the defendant had appeared after and pleaded, it was held not material.

Cro. Eliz. 582.
Thorowgood
and Sewys,
adjudged.

If upon a trial between a peer and a common person, the sheriff does not return a knight, as he ought, yet, if the array is not challenged for this, the peer cannot take advantage of it afterwards; for this is a privilege only which the law gives him, and which he may waive if he please.

Ro. Abr. 781.
Lord Powis
and Kirtman.
[This chal-
lenge is taken
away by 24
G. 2. c. 18. § 4.]

So, if the sheriff who returns the panel in an assise was brother to him for whom the assise passed; yet, if the party does not challenge the array, it is no error.

3 H. 4. 6. Ro.
Abr. 782.

¶ If a peer plead in chief to a bill filed against him in the court of King's Bench, he cannot afterwards assign for error, that he ought to have been sued by original writ, and not by bill.¶

Earl of Lons-
dale v. Little-
dale, 2 H. Bl.
299.

If a verdict be quashable for the misbehaviour of the jury, as for the receiving evidence of one part, after departure from the bar, which was not given in evidence at the bar; if this be not shewn in arrest of judgment, no advantage can be taken thereof in a writ of error, for this shall not be examined after judgment.

Ro. Abr. 783,
784. Cro.
Eliz. 616.

The writ was in debt for 40*l.*, and the *capias* and all the process to the return of the *pluries capias* accordingly, and then the entry was, that *querens obtulit se in placito* 40*s.*, and upon the default of the defendant an exigent was awarded; and the defendant after appeared and pleaded, and confessed the action; and

Cro. Ja. 311.
Lovelace and
Juniper.

and this was held no error, being helped by the appearance; for as an appearance saves defaults in mesne process, so it saves the fault of the (a) continuance by an *obtulit se*.

(a) Style, 209. Swift and Nott. Keb. 641. Sid. 173. & vide Cro. Eliz. 367.

Palm. 270.

(b) Here the general rule to be observed is, that where the writ is *de facto* a nullity and destroyed, so that judgment thereupon would be erroneous, there the writ is *de facto* abated; as, if an action be brought against a feme covert as sole, this makes another man's property liable, without giving him an opportunity of defending himself, which would be contrary to common justice; and therefore the writ is *de facto* abated, for which vide Cro. Eliz. 121. 185. 193. 330. Couls. 106. 2 Leon. 162. 3 Leon. 93. Ro. Rep. 176. Palm. 311. Hob. 37. 162. 279. 281. Godd. 11. Style, 477. Yelv. 56. 3 Co. 85. a. Vaugh. 95. — So, if the return of a *pluries* is laid to be after the beginning of a term, and the memorandum of the bill is entered generally of that term; this makes the writ a perfect nullity, for, by the plaintiff's own shewing, he had no cause of action at the time when the action was brought. Carth. 172. — And in these cases, which are more than matters in form, the party may move in arrest of judgment, or have advantage of them by writ of error. Jon. 304. Cro. Ja. 654. Cro. Eliz. 722.

Vaughan and Lloyd, Sid. 406. Vent. 7. S. C. adjudged, the *scire facias* being only in the nature of mesne process, to bring in the party to answer. 2 Keb. 461.

If upon an *audita querela* a *scire facias* be brought bearing date before the *audita querela*, and the defendant appear, and for this cause demur; this fault is cured by the appearance, for the *audita querela* is more of the nature of a commission than a writ; and if the party be in court, the matter ought to be inquired into, without inquiring into the nature of the process by which he was brought in.

Sid. 406.

Vent. 7. S. P. But a *scire facias* upon a judgment differs, and a fault therein will not be cured by appearance.

For this is the foundation, and *quasi* an original; and if an original should bear date on a Sunday, or other like defect be therein, it would not be helped by appearance.

Sir George Savil and Thornton, Cro. Ja. 651. Palm. 306. 311. S. C. # adjudged. 2 Ro. Rep. 239. S. C. adjudged.

If a *quare impedit* be brought against the bishop and incumbent only, without naming the patron, though this might have been pleaded in abatement; yet, if the defendant plead in bar, &c. it cannot after, upon a writ of error, be assigned for error; for though the want of the patron's being made a defendant might make the writ abateable, yet it was not thereby actually abated; and nothing shall be assigned for error concerning the writ, but what actually abates it.

Salk. 4.

So, though it be a good plea for a defendant to say, that a stranger is tenant in common with the plaintiff; yet, if he does not plead it in abatement, he shall not have advantage of it in arrest of judgment.

Ro. Abr. 781. 791. Markham and Sir Francis Fortescue. Ro. Rep. 450. S. C. adjudged.

If an action be brought against Sir Francis Fortescue, knight and baronet, and he appear, and plead to issue, and a verdict and judgment be given for the plaintiff, the defendant in a writ of error shall not assign for error, that he was a knight of the Bath, and ought to be so named, for he has lost this advantage by appearing to the other name, and thereby concluded himself.

If an alien brings a real action as heir to *J. S.* against another, and recovers, the defendant cannot assign for error, that he was an alien born, inasmuch as he did not take this exception at first, as he should have done. Ro. Abr. 782.

Although a person acquitted on an erroneous indictment or appeal may be tried again, and cannot plead, that he was acquitted, because his life was never in danger on such erroneous indictment or appeal; yet, if the error were in the process only, the acquittal may be pleaded to a second indictment or appeal, because such error is saved by the appearance. For this *vide* 2 Hawk. P. C. c. 27. § 107, 108, 109, 110. c. 35. § 8.

If a judgment be given in an inferior court and no (*a*) plaint entered, this is error, and not aided by the appearance of the party; and therefore, where by the record it appeared, that the defendant (*b*) *summonitus fuit*, where the first entry ought to be *A. B. queritur* versus *C. D., &c.*, judgment was reversed for this reason. Leon. 189. 302. Knight and Savage. (*a*) Yelv. 158. Ro. Rep. 338. and Salk. 266. that the want of a plaint is

the same as the want of an original in the Common Pleas, which may be certified on alleging diminution; but in records out of inferior courts no diminution can be alleged, but the court must take them as they find them. (*b*) Cro. Ja. 108. — And that the court of King's Bench is to take notice of the particular laws and customs of the place where judgment was given. Salk. 269. pl. 17.

6. Where Matters which might have been assigned for Error are aided by a Release, and the Consent of Parties.

If the plaintiff recovers more damages than he has declared for; as, if he declares for 40*l.* and the jury give him 49*l.*, though (*c*) this be error, yet, if before judgment he releases the overplus, he may take judgment for the 40*l.* 10 Co. 115. Pilfrid's case. Where the plaintiff may release damages for part,

and take judgment for the rest, *vide* F. N. B. 107. Moore, 281. Leon. 92. 2 Bulst. 280. Brownl. 235. Style, 364. Hardw. 58. (*c*) If a man brings a plaint in an inferior court, and in the declaration sets forth particular demands, which over-run the sum mentioned in such plaint, though never so little, and the jury give a verdict according to the sums mentioned in the declaration, this is erroneous; for the plaint is in nature of a writ, and is the original and foundation of the whole proceedings; and if the declaration, verdict, or judgment are for more than is contained in the writ or plaint, though beyond it never so little, by the same reason they may go to larger sums in *infinitum*, and then the plaint or writ would be no direction for the future proceedings of the court; but in such case the plaintiff may remit the overplus. Yelv. 5. Noy, 44. 1 Saund. 286.

Also, where the jury find greater damages than the party declared of, the court may, to prevent error, give judgment for so much as the party declared for, *nullo habito respectu* to the rest, as well as the party may release the overplus, and take judgment for the rest. Yelv. 45. [And where for this cause a writ of error was brought, the court permitted the

plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. Pickwood v. Wright, 1 H. Bl. 643.]

In an *ejectione firmæ*, if part of the things declared for be Ro. Abr. 786. Clive and Vere. Cro. Car. 458. well demanded, and others not, and the plaintiff have a verdict for the whole, and entire damages given, he may release all the damages in that which is not well demanded, and pray judgment

ment for the residue; and this helps the error, if judgment be given accordingly.

Ro. Abr. 784. As, in an *ejectione custodiæ terræ & hæredis*, if a verdict be
786. Clifford's given for the plaintiff, the issue being upon the tenure, and en-
case. Dyer, tire damages given and costs, the plaintiff may relinquish the
369. Cro. Ja. damages and costs, and have judgment of the ejectment of the
104. 5 Co. land only, for that such writ does not lie for the body.
108. and 10 Co.
130. S.C. cited.

Ro. Abr. 784. So, in an *ejectione firmæ de uno tenemento* and several acres of
786. Rhetorick land, upon not guilty pleaded, if a verdict be given for the
and Chappel. plaintiff, and entire damages found where the action does not
2 Bulst. 28. lie for the tenement for the uncertainty; the plaintiff may re-
S. C. Cro. Ja. linquish his damages and have judgment for the lands only,
146. Cro. Eliz. without error.
119. 3 Leon.
128. Style, 30.
S. P. adjudged.

Ro. Abr. 764. In a writ of debt for 100*l.* against an executor, if the plaintiff
Ashford's case. counts upon an obligation for 99*l.* and upon a *mutuatus* by the
1 Saund. 286. testator for 20*s.*, and upon the issue, the jury find for the
Like point de- plaintiff in the whole, and assess damages entire, where it ap-
bated. peared no action lay against the executor upon the *mutuatus* of
the testator; yet, if the plaintiff releases the 20*s.* and all the da-
mages, and hath judgment for the residue, this judgment is not
erroneous.

2 Ro. Abr. 784. In a *quare impedit*, if the jury give damages and costs, where
Grange and no costs ought to be given, for that the statute did not give
Denny. Ro. them, and after judgment is entered *quod nullo habito respectu*
Abr. 363. of the costs, the court awards that he shall recover the damages,
3 Bulst. 174. this special entry, without any release of the costs, shall help
S. C. adjudged. the error.

Hob. 178. Ro. If a bill of debt be brought against an attorney upon three
Abr. 785. S. C. several obligations, and, upon demand of *oyer*, it appear by the
Saund. 286. condition of one of the obligations, that the day of payment
S. C. cited. thereof is not yet come; after a verdict for the plaintiff, upon
conditions performed pleaded, and costs and damages given,
though the plaintiff cannot have judgment for this obligation,
of which the day of payment is not yet come, yet, upon his
release of costs and damages, he shall have judgment for the
other obligations.

Cro. Ja. 104. If in debt upon the statute of usury it is laid in the writ, that
Woody's case. he *corruptive* lent 40*l.* &c. and that he lent 20*l.* &c. but it is not
said *corruptive*, and the defendant pleads *nihil debet*, and it is
found against him, the plaintiff shall have judgment as to the
40*l.*; and in this case it was said, that if the defendant had de-
murred, the plaintiff should have had judgment for this part.

Raym. 395. If in trespass the plaintiff declares for taking the mare of the
Cutforth and plaintiff and several goods, but does not say of the plaintiff, and
Taylor. thereupon the defendant demurs, the plaintiff may have judg-
ment for the mare, and release the action for the rest.

Ro. Abr. 785. In an action of debt for 10*l.*, if the plaintiff declares upon a
Barber and lease for years, rendering rent at certain feasts, and concludes
Pomrey, ad- & quia

& *quia* 10*l.* of the said rent, for such a time ending at such a feast, &c. he brought this action, where it appears by the declaration, that there was 4*s.* wanting of the 10*l.*, so that the rent in arrear amounted but to 9*l.* 16*s.* and thereupon the defendant pleads *nihil debet*, and upon this there is a verdict for the plaintiff, and damages and costs given; though the demand be entire, *scilicet* of 10*l.*, and it appear by the plaintiff's own shewing that he had no cause of action for the whole; yet the plaintiff may release the 4*s.* and damages, and take judgment for the rest.

case of Barber and Pomrey being cited in the argument of Duppa v. Mayo, Lord Hale said, that there was no judgment given. But this is a mistake; for in the case of Crips v. Ingledew, 7 Mod. 87., the roll in Barber v. Pomrey was brought into court, by which it appeared that judgment was entered for the plaintiff. See too 2 Ld. Raym. 816. 5 Mod. 215. S. C. & S. P.||

If in trespass for an assault, battery, and taking his corn, the defendant justifies as to the battery in defence of his corn, upon which there is a demurrer, and pleads not guilty as to the corn, upon which issue is joined, and found for the plaintiff, and damages taxed thereupon; the plaintiff may relinquish the demurrer, and pray judgment on the verdict, and this will not be error.

In trespass for a battery against two, if one pleads not guilty, and the other pleads a special plea, and upon this a demurrer by the plaintiff, and it is adjudged for the plaintiff, (a) he may relinquish his action against the other, and have his writ to inquire of the damages against him.

In an action of trespass, if there be three issues joined, *scilicet*, one, not guilty to part; the second, upon a prescription for common; the third, whether the beasts *raptim momorderunt* in going to take the common; and the jury find the first issue for the plaintiff, and the second issue for the defendant, but did not inquire of the third issue; the plaintiff relinquishing the third issue may pray judgment for the first issue, and this shall prevent any error.

If a *venire facias* be awarded to the coroners, where it ought to be to the sheriff, or the *visne* come out of a wrong place, if it be *per* (b) *assensum partium*, and so entered of record, it will stand good. appears by attorney, this is no error. 21 E. 4. 77 b. Ro. Abr. 787. — So, if the defendant appears by attorney upon the exigent by consent, this is not error. 7 H. 6. 21 Ro. Abr. 787. For the rule therein is *consensus tollit errorem*, for which *vide* several cases in 5 Co. 40. 2 Ro. Rep. 21. Godb. 428. Noy, 107.

Upon the rule of *consensus tollit errorem*, it hath been (c) adjudged, that an action in its own nature local may, by the (d) consent of parties, be tried in a different county: so, (e) if it be doubtful in which of two counties the action did arise, it may be tried by a jury from both counties; and this being done by assent can be no error. consent must be entered on record, otherwise it is error; for which *vide* Hob. 5. 787. Bulst. 216. Cro. Eliz. 664. Hob. 266. 5 Co. 40. Dyer, 284. Sid. 339. (e) 7 H. 6. 21. Ro. Abr. 787. S. C.

judged; *cont.* Justice Jermin. Style, 175. S. C. 1 Saund. 286. Like point upon demurrer debated, but no judgment given, & *vide* All. 29.

|| Upon this

1 Saund. 286.

Ro. Abr. 785. Washman and Rowe.

Ro. Abr. 785. Starr and Cuckow.

(a) For this *vide* 2 Ro. Abr. 100.

Ro. Abr. 785. Brown and Stephens.

Co. Litt. 125. a. (b) If by consent the defendant on a

cepi corpus

(c) 44 E. 3. 6. 44 Ass. 4. Ro. Abr. 787. Ro. Rep. 166.

Palm. 100. Raym. 372. 2 Jon. 199.

(d) But the

Camden v.
Edie, 1 H. Bl.
21.

[A party who has agreed under a consolidation-rule not to bring a writ of error, is precluded from bringing one, though there be manifest error on the record.]

Executors of
Wright, Bart.
v. Nutt, 1 T.
R. 388.

Executors against whom a *scire facias* is sued out to recover damages assessed on an interlocutory judgment against their testator in his lifetime, cannot bring error, if the testator's attorney agreed for him, that no writ of error should be brought *in that action*.]

(L) What Defence the Defendant in Error may make :
And herein of pleading a Release.

(a) 9 H. 6. 48.
Ro. Abr. 788.
[And a release
of errors in

THE defendant in error may plead (a) a release of all errors, or a release of all (b) suits; and these pleas, if found for him, will for ever bar the plaintiff in error. (c)

the same instrument with the warrant of attorney, and dated the term in which judgment was entered, is good. *Landon v. Pickering*, 2 Str. 1215.] — The defendant in pleading a release must lay a *venue*. — But, though it be ill pleaded, yet, if there are not errors, the judgment will be affirmed. *Salk.* 268. 270. 3 *Salk.* 399. 6 *Mod.* 113. 206. 2 *Ld. Raym.* 1005. (b) *Latch.* 110. *Cole's case*, resolved *per cur.* (c) || Where there are several plaintiffs in error, the release of one of them shall not bar the others. *Razing v. Ruddock*, Cro. El. 648. *Blunt v. Snedston*, Cro. Ja. 116, 117. *Hacket v. Herne*, 3 *Mod.* 134. ||

Co. Litt. 228. b.
8 Co. 152.
Ro. Abr. 788.
2 Ro. Abr.
405.

So, where by a writ of error the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar: but, where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions real or personal is no bar.

9 H. 6. 46.
Ro. Abr. 747.
788. *Dyer*, 90.
a. 3 *Lev.* 36.
Hutchinson's
case.

Also, if a man loses in a real action, and he releases all his right to the land, this shall bar him of his writ of error; for no person that is not entitled to the land, &c. can bring a writ of error to reverse a judgment; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears.

Cro. Eliz. 469.

Hence it is, that if a man releases all his right to the land of which a fine was levied, he has thereby barred himself of his writ of error; for his release having for ever excluded him from the land, he can have no writ of error, because no body is entitled who cannot have the land of which the fine was erroneously levied.

Ro. Abr. 788.
Cro. Eliz. 469.
Moore, 413.
Owen, 22.
S. C. *Wright*
and the Mayor
of *Wickham*.
(d) A lease for
years of the

So it is, if a fine be levied of 120 acres of land, and he that has right to a writ of error make a (d) feoffment of the whole, he shall never reverse the fine: but, if the feoffment had been made, or a release had been given of twenty acres only, he might yet have a writ of error to reverse the fine as to 100 acres, because he has not transferred his right as to those, and therefore may be reinstated if the fine be erroneous.

land

land is a suspension of the writ of error for the time. Lev. 72. *per cur.* Keb. 350. Bridgm. 57. — But a feoffment is an extinguishment thereof. Lev. 72. *per cur.* & vide Godb. 26. 4 Leon. 135. 221. Palm. 247. Co. 112. Bridg. 57.

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage after inspection is recorded by the court, but, before the fine reversed, he levies another fine to another; this second fine shall hinder him from reversing the first; because the second, having entirely debarred him of any right to the land, must also deprive him of all remedies which would restore him to the land.

was staid on purpose by the conusee.

But, if tenant in tail levies an erroneous fine with proclamations, and then levies a second fine, which is also erroneous, and dies; if the issue in tail brings a writ of error to reverse the first fine, the defendant may plead in bar the second fine; for though there be error in the second, yet, till that appears judicially to the court, it must be looked upon as a fine duly levied, and, consequently, a bar to the plaintiff; because while the second stands in force, he cannot have the land. But, if in this case the plaintiff brings another writ of error to reverse the second, and the defendant pleads in bar the first fine, the plaintiff may reply upon the first writ of error that the second fine was erroneous, and upon the second writ that the first fine was erroneous, and so be relieved against both; for here the examination of both fines comes judicially before the court, and if there appears any error, the court will set them aside, and not suffer them to stand in the way of the plaintiff's right.

But in a writ of error to reverse a fine, the defendant cannot plead the same fine now endeavoured to be reversed, and five years in bar of the writ of error, any more than in a writ of error to reverse an outlawry can that outlawry be pleaded in bar of the writ of error, *quia non valet exceptio istius rei cujus petitur dissolutio*.

Cockman and Farrer, T. Jon. 181. Raym. 461. Vent. 353. 2 Sid. 92. Fortescue Aland v. Mason, 2 Str. 861. and 2 Ld. Raym. 1433. S. P.

So, if a fine be levied of land in ancient demesne, the lord may reverse it after five years expired; but, if a second fine had been levied, the lord should be barred of his writ of disceit after five years from the second fine; for a fine of ancient demesne is not originally within the courts of *Westminster*, and the statute in relation to the bar does not extend their jurisdiction; but, when a fine is levied of ancient demesne, it comes within the conusance of the king's courts till the fine be reversed, and, by consequence, they have a jurisdiction of it, and so the fine becomes a bar.

If a man (a) outlawed upon a *redisseisin* releases all actions to the recoverer, yet he may have a writ of error of the outlawry, because that this does not belong to the party, but to the king in interest, and he may assign error in the judgment of the *redisseisin* to reverse the outlawry.

upon the original, and brings error; a release of actions personal is no bar, because he is to be restored to nothing against the plaintiff; though when by the outlawry he forfeited all his goods to the king, he shall be restored to them and to the law, so as to be of ability to sue. Co. Litt. 288. b. 8 Co. 152. a.

Ro. Abr. 788. If the tenant, pending a *præcipe* against him, aliens in fee, Bridg. 77. and (a) after judgment is given against him, and he brings a writ of error; this feoffment is not any bar to the writ, because (a) So, if the tenant, pending a *præcipe* against him, aliens in fee, and repurchases for life, and after judgment is given against him, he shall have a writ of error, and his feoffment is no bar. Ro. Abr. 748. 788.— So, after his death his heir shall have a writ of error, because of the privity. Ro. Abr. 788.

Lev. 72. In a writ of error to reverse a common recovery, it is no Winn and good plea, that the plaintiff pending the writ of error hath entered Lloyd. into part; for before the possession was taken from him, he might have error to reverse the judgment, though not to have restitution.

9 H. 6. 48. In a *scire facias* against a terretenant, he may plead a release Bro. 9. S. C. of error, though he be not privity to the judgment.

Lev. 72. But the terretenants cannot plead (b) in abatement of the [1 Burr. 362.] writ of error, but only in bar as a release, &c. in maintenance (b) Where a of their title.

scire facias is awarded generally against the terretenants, without naming them, and several are returned warned, and appear; one may plead non-tenure to discharge himself, though not to abate the writ as to the rest; as might be done, if all were named in the writ, for which vide Holland and Jackson. Bridg. 72. Ro. Rep. 301, &c. Cro. Eliz. 739. Palm. 123. 227.

9 H. 6. 48. In a writ of error against the heir of the recoverer within age, Ro. Abr. 766. and a *scire facias* against the terretenants; if the parol demurs for the heir, and the judgment is reversed against the terretenant; yet at full age the heir may plead the release of the demandant of the right, or of the errors, and bar him.

[By stat. 10 & 11 W. 3. c. 14. a writ of error for the reversing of any fine, recovery, or judgment, must be commenced, or brought and prosecuted within twenty years after such fine levied, recovery suffered, or judgment signed or entered of record.

Street v. Hop- Although it should appear on the record that the judgment is kinson, Ca. above twenty years standing, yet cannot the defendant have the temp. Hardw. benefit of this statute without pleading it, because there is a saving of rights of the persons mentioned in the act, as in- 345. 2 Str. fancy; &c. which may be replied to take off the effect of the plea; and therefore the court cannot take notice of it merely as it ap- 1055. S. C. pears upon the record itself. And this plea, as well as the plea of a release of errors, must conclude with praying that the plaintiff may be barred of his writ of error, not that the judgment be affirmed, for they admit the judgment to be erroneous. wood, 2 Str. 683. Kirle v. Clifton, 1 Show. 50.

Ibid. Cun-
ningham v.
Horston,
1 Str. 127.
Dent v. Ling-

(M) Of the Judgment to be given on the Writ of Error: And herein,

1. Where, on the Writ of Error, Part only, or the whole Judgment, shall be reversed.

A JUDGMENT being an entire thing (a) cannot regularly be reversed for part, and affirmed for part; as (b) in a *formedon de uno crofto*, messuage, &c, if the demandant recovers, and in a writ of error it is adjudged, that a *formedon* does not lie of a *croft*, the judgment for the residue shall be reversed also, because the writ is not good, inasmuch as there cannot be a good judgment upon a bad writ.

2 Jon. 374. Carth. 235. (b) Ellis and Wallis, Ro. Rep. 2. 2 Bulst. 214. Allen, 74. Ro. Abr. 774. S. C.

(a) For this vide Moore, 366. Noy, 117. 2 Leon. 178. Cro. Eliz. 425. 2 Sid. 57. 94. 2 Ro. Rep. 136. Sid. 357. Allen, 74. Ro.

So, in an action of trespass against three, if one (c) dies pending the writ, and yet judgment is given against all three, in a writ of error upon this judgment, the whole judgment shall be reversed, because it is entire, though the writ by the death abates but against one.

Ro. Abr. 775. & vide Allen, 43. Yelv. 209. (c) But vide 17 Car. 2. c. 8. by which it is enacted, that

in all actions real, personal, or mixed, the death of either party between the verdict and judgment shall not be alleged for error, so as such judgment be entered within two terms after the verdict, & vide Sid. 385. — *And the stat. 8 & 9 W. 3. c. 11. § 7. the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit, and suggesting the death, it cannot be alleged for error.*

In an action of debt upon a bill, and upon a contract upon an *emisset*, if the defendant pleads *non est factum* as to the bill, and *nil debet* as to the contract, and both are found by verdict against the defendant, and judgment against the defendant *quod capiatur*† for denying his deed; and it is not also *quod sit in misericordia* as to the contract, as it ought to be, and entire damages given, and a writ of error is brought; for this the whole judgment shall be reversed, *scilicet*, as well the judgment upon the bill as for the contract.

Eltonhead and Deerman, Ro. Abr. 775-6. Allen, 74. S. C. cited. Vent. 27. 2 Keb. 506. 545. like point; but for this vide 16 & 17 Car. 2. c. 8. where this is

aided, tit. *Amendment and Jeofail*. — †*Capiatur pro fine*, taken away, and other provisions in lieu thereof. 5 W. & M. c. 12.

In a writ of error upon a judgment in trespass against several, if the judgment be erroneous, because one of the defendants was within age, and appeared by attorney, the judgment shall be reversed *in toto* against all.

Bird and Orms, Ro. Abr. 776. Cro. Ja. 289. S. C. and S. P. adjudged. S. P. adjudged.

If an action be brought against *A.* as a feme sole, where she is covert, and against *B.* and *C.*, and they all plead to issue, and *A.* as a feme sole, and judgment is given against them all accordingly; in this case the baron of *A.* with *A. B.* and *C.* may

Ro. Abr. 776. Hayward and Williams, adjudged.

join in error, and assign for error the coverture of *A.*, and thereupon the judgment shall be reversed for all, because it is entire.

Carth. 234.
235. Parker
and Harris,
adjudged in
B. R. and the
judgment
given on de-
murrer in
C. B. reversed
accordingly.

If there is debt for rent on two several demises, and on the first the demise and reservation are laid right; but as to the second, the demise is with a reservation of rent *secundum ratam* 18*l.* per annum, which is a void reservation, because no certain time or day being appointed of payment, it would subject the lessee to an action of debt every hour (*a*); though the error be only in the second demise; yet, the judgment, being entire, must be reversed *in toto*.

4 Mod. 76.

Salk. 262. 2 Vent. 249. 270. S. C. (*a*) So, where *A.* brought an action on the case against *B.* for words spoken of him, and for causing him to be indicted, &c. and the jury found for the plaintiff as to both, and entire damages given; yet, it being afterwards held that the words were not actionable, the judgment was reversed *in toto*; but for this *vide* Cro. Ja. 424. Hob. 6. Ro. Rep. 24. Cro. Ja. 343. Allen, 75. Ro. Abr. 775. Vent. 27. 40.

Ro. Abr. 776.
Tie and At-
kins.

But in a writ of dower, if the plaintiff recovers by default, and upon this a writ is awarded to the sheriff or bailiff, where the recovery is to deliver to the plaintiff *tertiam partem per metas*, and to inquire of the value by the year; and how much time is past after the first demand of dower, and what damages she hath sustained; and upon this the sheriff or bailiff returns, that he had delivered the third part of the lands, and the value found by the jury to 30*l.* per annum, and that two years are past after the first demand and damages 50*l.* and thereupon judgment is given accordingly to hold in severalty the said third part, and to recover the said damages: in this case, though the judgment is not good as to the damages, inasmuch as it is not averred, that the husband of the plaintiff died seised (as the use is), nor is it so found by the jury, nor was it so commanded by the writ to be inquired, by which the judgment as to this is erroneous; yet it shall be reversed only as to this, and shall stand as to the recovery of the third part of the land.

Williams v.
White. Cro.
Eliz. 806.
Sty. 290. S. C.
cited by Rolle
C. J.

So, in an action of account, if judgment is given *quod computet*, and after, auditors are assigned, and upon the account, judgment is given against the defendant, and damages and costs, and after a writ of error is brought upon both judgments, and thereupon the last judgment only is found to be erroneous; in this case, the last judgment only shall be reversed, and not the first judgment, but this shall stand in force; for these are two distinct judgments, and perfect; for the first judgment is *ideo consideratum est quod computet, & defendens in misericordia*.

5 Co. 32.
Pettifer's case,
& *vide* Ro.
Abr. 776.

If a judgment is given against executors in an action of debt, and after a *scire facias* judgment is given against them, to have execution of their proper goods, and a writ of error is brought upon both judgments; in this case, if the first judgment be good, and the last erroneous, the last judgment only shall be reversed, and the first judgment shall stand.

43 E. 3. 1 Ro.
Abr. 777. Sid.
253. S. P. and

But, if a man recovers in debt upon a judgment, if the first judgment be reversed, the second judgment shall also.

the court took time to advise, whether, by the reversal of the first judgment, the other was not *ipso facto* void. Palm. 187. *per Dodderidge*. The reversal of the first judgment does not reverse the second, but defeats it, so that the plaintiff shall have no fruit thereof. Palm. 303. S. P. *per Chamberlain J.*

After a recovery in a *redisseisin*, if the first judgment be reversed, the judgment on the *redisseisin* shall be reversed also. 8 Co. 143. Ro. Abr. 777.

By the reversal of the original judgment, the outlawry depending thereupon shall also be reversed. Ro. Abr. 777. But by the reversal of the

outlawry, the original judgment shall not be reversed. Ro. Abr. 777. 2 Brownl. 39. S. P.

If a man recovers in an annuity, and has a *scire facias* thereupon afterwards, and the judgment upon the *scire facias* is after affirmed in a writ of error; yet, if the first judgment of the annuity be reversed, the other shall be also. 11 H. 4. 48. Ro. Abr. 777.

If a man recovers upon an original, and hath another judgment in a *scire facias*; if the first judgment be reversed, the other shall be also reversed. 8 Co. 143. Ro. Abr. 777.

If a man recovers in a *quare impedit*, and hath a writ to the bishop, and after recovers against the bishop in a *quare non admisit*, and after the judgment in the *quare impedit* is reversed, the judgment in the *quare non admisit* shall be also reversed by this, though this was for the contempt to the king. 26 E. 3. 75. Ro. Abr. 777.

If the demandant recovers against the tenant, and the tenant against the vouchee; if the heir of the vouchee reverses the judgment of the value, because the vouchee was dead at the judgment rendered; this shall reverse the judgment against the tenant also. Ro. Abr. 777.

If the principal is outlawed of felony, and the accessory attainted and executed, and after the principal reverses the outlawry, and is indicted, and found not guilty of the felony; by this reversal and acquittal, the attainder against the accessory is annihilated; for his heir may have a *mort d'ancestor*, it seems, because he hath no remedy by writ of error, or otherwise, to reverse it; for this depends upon the principal. 9 Co. 119. Ro. Abr. 777.

If the conusee of a statute recovers in detinue by erroneous judgment against the garnishee, and sues execution; if the garnishee in a writ of error reverses the judgment given in the detinue, yet the execution is not reversed by this, because it is a collateral thing executed. 8 Co. 142, 143. 5 Co. 90. b. Ro. Abr. 777.

If an infant and one of full age join in a fine, and the infant after brings error for the reversal thereof, it shall be reversed *quoad* the infant only. Leon. 317. Co. 76. b. Hob. 278. Cro. Eliz. 115.

124. 2 Leon. 108. Moore, 565. 2 Jon. 182.

If husband and wife join in a fine when they are of full age, it shall bind them both; but, if the feme be within age, they may join in a writ of error to reverse it (a) during the minority of the wife. F. N. B. 21. Leon. 115.

(a) By the opinion of some books, the fine shall be reversed *in toto*, both against the husband and wife; as Cro. Eliz. 129. Leon. 115. Owen, 21. — But by others, the writ of error shall reverse the fine as to the wife, but no execution shall

shall be awarded during the life of the husband. Bro. tit. Fines, 29. tit. Error, 28. Leon. 116.
— And accordingly in 3 Lev. 36. Hutchinson's case, a *vacat* was entered *quoad* the wife only.

Ro Abr. 775. If a fine be levied of land, of which part is guildable, and part
F. N. B. 98. ancient demesne, and as to that which is ancient demesne, the
Cro. Eliz. 469. fine be reversed by writ of disceit, yet the fine shall stand for the
Jon. 374. residue; for a mark shall be made on the fine, in the nature of
2 Jon. 182. a cancelling of that which is ancient demesne only.

Per Holt C. J. [Where a judgment is partly by the common law, and partly
1 Salk. 24. by statute, it may be reversed in part; for that which was a
Ca. temp. judgment at common law will remain a judgment, and be com-
Hardw. 50. plete without the other.

Moore, 565. A judgment in an information *qui tam*, &c. may be reversed
as to the informer, and stand for the king.

Frederick v. And wherever the judgments are distinct, part may be af-
Lookup, firmed, and the other part reversed. Hence, if a judgment for
4 Burr. 2021. a common informer give damages for detention, and costs *de in-*
Bellew v. *cremento*, the judgment for the penalty may be affirmed, and for
Aylmer, the damages and costs reversed. But, (a) where costs are merely
1 Str. 189. accessory to the principal judgment, there, if they are errone-
S. P. Kent ously given, the judgment cannot be reversed as to them only,
v. Kent, but must be reversed *in toto*.]
2 Str. 673.
Ca. temp.
Hardw. 50.

S. P. Green v. Waller, 2 Ld. Raym. 893. S. P. (a) Lampen v. Hatch, 2 Str. 934. Rous
v. Etherington, 2 Ld. Raym. 870. 1 Salk. 312.

2. What Judgment shall be given on the Reversal of the first.

Cro. Car. 442. If judgment be given against the defendant, and he bring a
Ro. Abr. 774. writ of error, upon which the judgment is reversed, the judg-
2 Saund. 256. ment shall only (b) be *quod judicium revesetur*; (c) for the writ of
Carth. 253, error is brought only to be eased and discharged from that judg-
254. Salk. ment.
262, 263.

Cuming v. Sibby, 4 Burr. 2489. [Pugh v. Goodtitle on the demise of Bailey, House of Lords, 15th
May 1787.] (b) If the error be error in fact, and not in the record, as for infancy, the judgment
shall be *quod pro errore predicto judicium predictum revocetur*, without saying, & *aliis in re-*
cordo. Ro. Abr. 805.— If judgment be affirmed in *B. R.* upon a writ of error, the judgment
shall be *quod judicium redditum remanebit stabile in perpetuum*. 21 E. 4. 44. Ro. Abr. 805.—
[If defendant demur for duplicity, and have judgment; the entry shall be *quod judicium af-*
firmetur. Jeffry v. Wood, 1 Str. 439. If a release of errors, or the statute of limitations be
pleaded, and found for the defendant; the judgment must be, *quod querens nil capiat per*
breve, not *quod judicium affirmetur*. Kirle v. Clifton, 1 Show. 50. Cunningham v. Houston,
1 Str. 127. Dent v. Lingwood, 2 Str. 683. Street v. Hopkinson, *Id.* 1055. Ca. temp.
Hardw. 345. In the House of Lords, if judgment below be given for the plaintiff, and
deemed right, it is simply affirmed. Countess Dowager of Cavan v. Doe on the demise of
Pulteney, 7 May 1795. So, if judgment be given in the Exchequer or King's Bench for the
plaintiff, reversed in the King's Bench, or Exchequer-chamber, and that reversal approved by
the Lords, their judgment is, that such second judgment be affirmed. Sutton v. Johnstone,
22 May 1787. Home v. Earl of Camden, 22 June 1795. So, if two former judgments
concur, and are deemed right, they need only be affirmed. Foley v. Burnell, House of Lords,
27 April 1789.] [(c) It would seem that in this case, as well as where the judgment below is
against the plaintiff, the court of error should, upon reversal, give the same judgment as the
court below ought to have given; for their duty is to *reform* as well as to *affirm* or *reverse* the
judgment. Where therefore judgment had been given in the Common Pleas for the plaintiff,
upon a special verdict in *assumpsit*, which was reversed upon a writ of error in the King's
Bench; the defendant was holden to be entitled in the latter court, not only to judgment of
acquittal,

acquittal, but also for the costs of his defence in the Common Pleas, which is the same judgment which that court ought to have given; the defendant in such case being entitled to his costs by the statute 23 H. 8. c. 15. *Gildart v. Gladstone*, 12 East, 608.||

But, if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed, but the court shall also give such judgment as the court below should have given; for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein erroneous judgment was given.

Carth. 243. 254. S. P. *Ld. Raym.* 5. 4 Mod 106. *Skin.* 447.

Ro. Abr. 774.
805. S. P.
Cro. Car. 442.
Yelv. 47.
2 *Saund.* 256,
317. *Show.*
Parl. Cases, 57.
Salk. 262.
Salk. 403.

As, in an action upon the case for words, if judgment be given against the plaintiff, that the words are not actionable, upon which the plaintiff brings a writ of error, and thereupon the first judgment is reversed, because the words are actionable; the court, after reversal of the first judgment, ought to give judgment, that the plaintiff shall recover; for this court ought to give the same judgment which the first court might have done.

So, in an *ejectione firmæ*, upon not guilty pleaded, issue is joined, and a special verdict found, and upon this verdict judgment given against the plaintiff, and after the plaintiff brings a writ of error, in which the judgment is reversed, the plaintiff shall have judgment, and recover his term, his declaration being good, and the law being for him upon the special verdict; for the court that reverses the first judgment ought to give the same judgment which ought to have been given in the first suit.

If in an action of waste in the hustings in *London* judgment is given for the defendant, and after upon a writ of error brought before commissioners in *St. Martin's*, according to the custom of the city, that judgment is reversed; the commissioners shall give the same judgment as before ought to have been given; for the custom of proceeding in *London* shall be intended according to the common law, if no precedent appear to the contrary.

In *replevin in banco*, the defendant pleaded a lease made 1 *Octob. &c.* and avowed for rent reserved thereupon; and the plaintiff, in bar thereof, pleaded *non demisit 1 Octob. &c. modo & forma*; upon which issue being joined, it was found for the plaintiff, and judgment for him, and the defendant brought error in *B. R.* and it was agreed to be an immaterial issue, and the judgment erroneous, and yet that the court could not award a repleader, as the Common Pleas might have done (and as the ancient usage was, but disused for one hundred years); and there being gross faults in the avowry, it was said, that if they reversed the judgment, perhaps they must give judgment upon the declaration for the faults in the avowry.

could not be reversed for the faults in the avowry; and the judgment was affirmed.

Ro. Abr. 774.
Hopkins and
Chele. Cro.
Car. 509. S. P.
and judgment
given accord-
ingly.

Ro. Abr. 774.
Omuleunrie
and *Ayres.*
Cro. Car. 512.
adjudged upon
a writ of error
out of *Ireland*.

Lev. 310.
Cole and
Green.
2 *Saund.* 256.
S. C. adjudged,
and after-
wards affirmed
in parliament.

2 *Lev.* 11, 12.
Holbeach and
Bennet.
2 *Saund.* 317-
319. S. C. and
S. P. as to the
repleader
agreed, but
Hale contra.
Twisden held
the issue was
aided by the
statute of jeo-
fais, and said,
the judgment

If the court of Exchequer-chamber reverse a judgment in the King's Bench for the defendant on demurrer, they cannot award a writ

Feldowe v.
Ridge. Cro.
Ja. 206. *Yelv.*

74. S. C.
Noy, 129. S. C.
Wetherley
v. Sarsfield,
1 Show. 127.

a writ of inquiry, but must remit the record to the King's Bench, with an order to that court to award such writ and execution upon the return of it.

Kent v. Kent, Ca. temp. Hardwicke, 51.

(a) Carth. 319.
Skin. 514.

But in the case of (a) *Phillips and Bury*, where the House of Lords reversed the judgment that was given in *B. R.* on a special verdict, there the House of Lords gave a new judgment, which was executed accordingly, on refusal of the *B. R.* to give a contrary judgment to what they had given before, although it was objected that they could not, having a transcript only, and not the record itself, before them.

4 Inst. 270.
F. N. B. 19.
Skin. 515.
S. C. cited.

If in a writ of right close in ancient demesne, the demandant makes his protestation to sue in nature of a *mort d'ancestor*, and the tenant pleads in abatement, and judgment is given for him; and after, upon false judgment brought, the writ is affirmed good, the Court of Common Pleas shall proceed as the inferior court should have done.

Campbell v.
French, 6 T.R.
200.

|| If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for the defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count; the court of error cannot examine the legality of the judgment on the second count, no error being assigned on that part of the record.||

Hardwood v.
Goodright,
Cowp. 89.
Grant v. Astle,
Dougl. 731.
Bent v. Baker,
3 T. R. 27.—

[It is now settled, though it was in one case (b) denied, that a court of error may award a *venire facias de novo*. And this it may do, after a bill of exceptions allowed upon a demurrer to evidence, and after a general verdict, when some of the counts are defective.]

In *Kinaston v. Mayor, &c. of Shrewsbury*, 2 Str. 1051. 4 Br. P. C. 271. *Haswell qui tam v. Chalie*, 2 Str. 1124. *Andr.* 392. *Parker v. Wells*, 1 T. R. 783. *Lickbarrow v. Mason*, 5 T. R. 367. the House of Lords directed a *venire de novo* to be awarded by *B. R.* (b) *Street v. Hopkinson*, 2 Str. 1055. *Ca. temp. Hardw.* 345.— In *Trevor v. Wall*, 1 T. R. 151. the court of *B. R.* refused to award such a writ, on the ground that the proceedings upon which error was brought originated in an inferior court. But in *Davis v. Pierce*, 2 T. R. 125., where a bill of exceptions had been tendered in the court of Great Sessions in *Wales*, and the proceedings were removed by writ of error into *B. R.*, that court being of opinion that the bill was properly tendered, awarded a *venire de novo* into the next *English* county.

3. To what the Parties shall be restored on the Reversal of the first Judgment.

8 Co. 142. b.
(c) In an assise, if the tenant loses by verdict, he shall be restored to the lands, if it be reversed in

If a man recovers by erroneous judgment, and by virtue thereof presents to a church, or enters into the perquisite of his villein, and after the judgment is reversed; these collateral things executed shall not be devested thereby; but collateral things executory are, after reversal, as (c) if no judgment had ever been.

a writ of error. 8 H. 6. 2. *Ro. Abr.* 778.— So, he shall be restored to the mesne issues. 8 H. 6. 2. So, if the tenant loses in a writ of entry *sur disseisin*, and after it is reversed for error, he shall be restored to the mesne issues. *Ro. Abr.* 778.

If a man recovers damages, and hath execution by *feri facias*, and upon the *feri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed; the party shall be restored only to the money for which the term was sold, and not to the term itself; because the sheriff had sold it by the command of the writ of *feri facias*.

8 Co. 19. 143.
Ro. Abr. 778.
Cro. Eliz. 278.
Moore, 573.
& vide Leon.
96. 3 Leon. 89.
Godb. 27.
Gouls. 103.
Cro. Ja. 246.

But, if the goods of an outlawed man are sold by the sheriff upon a *capias ullagatum*, and after the outlawry is reversed by writ of error, he shall be restored (c) to the goods themselves; because the sheriff was not compellable to sell those goods, but only to keep them to the use of the king.

Hoe's case,
5 Co. 90. Ro.
Abr. 778. S. C.
cited. Cro.
Eliz. 278. S. P.
adjudged,
where a termor

being outlawed upon the statute of recusancy, the lord treasurer and barons sold the term. (a) If the king grants over the land of a person outlawed for treason or felony, and afterwards the outlawry is reversed, the party may enter on the patentee, and needs neither to sue a petition to the king, nor a *scire facias* against the patentee. c. 50. § 19. cites 1 And. 188.

of the Exchequer
2 Hawk. P. C.

If a man recovers damages in a writ of covenant, as the particular case was, against *B.* and hath an *elegit* of his chattels, and of the moiety of his lands; and the sheriff upon this writ delivers a lease for years of land which *B.* had, to the value of 50*l.* to him that recovered, *per rationabile pretium & extentum* (as the words were) to have as his own term, in full satisfaction of 50*l.* part of the sum recovered, and after *B.* reverses the said judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet (b) here is no sale to a stranger, but a delivery of the term to the party that recovered, by way of extent, without any sale; and therefore the owner shall be restored.

Ro. Abr. 778.
Cro. Ja. 246.
Yelv. 179.
Brownl. 107,
108. S. P. ad-
judged.

(b) That it
would be
otherwise if
sold to a
stranger. Yelv.
108. Brownl.
107, 108.

And for the same reason, if personal goods were delivered to the party *per rationabile pretium & extentum*, upon the reversal of the judgment, he shall be restored to the goods themselves.

Ro. Abr. 778.

If in debt upon an escape the plaintiff recovers, and hath execution, and after, the first judgment is reversed; yet the judgment for the escape remains in force.

8 Co. 142. b.
3 Mod. 325.
S. C. cited.

But, if an action of escape be brought against the sheriff, and the judgment upon which it is founded be reversed before such time as the defendant is forced to plead, he may plead *null tiel record*.

8 Co. 142. a.

But there is a diversity between a recovery by prior title, and a reversal of a judgment by writ of error; as, if a woman hath judgment and execution in dower in ancient demesne, and it is after reversed in a writ of false judgment; and because she had held the lands for two years between the first judgment and reversal, the value of the land was inquired, and taxed at twenty marks; in a *scire facias* against her, it was adjudged she could not plead a recovery in a writ of right close in nature of a *cui in vita*.

8 Co. 143. a.

If an advowson comes to the king by forfeiture upon an outlawry, and the church becoming void, the king presents, and then

Beverley v.
Cornwall,
Moore, 269.

then the outlawry is reversed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson.

Moore, 269.
agreed *per*
curiam.

But, if a church is void at the time of the outlawry, and the presentation is thereby forfeited, as a chattel principally and distinct of itself; there, upon the reversal of the outlawry, the party shall be restored to the presentation.

Cro. Eliz. 170.
Oguel's case,
adjudged.
(a) *Vide*
13 Co. 20. 22.

If a termor, being outlawed for felony, grants over his term, and after, the outlawry is reversed, the grantee may have trespass for the profits taken between the reversal of the outlawry and the assignment (a); for by the reversal it is as if no outlawry had been, and there is no record of it.

Cro. Ja. 645.
Appesley and
Sir John Key,
agreed *per*
curiam. Palm.
187. 301. S. C.
Querela.

If after judgment in a *scire facias* against bail, the judgment against the principal is reversed (b); this is no reversal of the judgment against the bail, because it is a collateral judgment by itself.

(b) But the bail may be relieved by *audita querela*: for which see title *Audita Querela*.

See further Tit. BAIL (B) 7. and Tit. SCIRE FACIAS.

ESCAPE IN CIVIL CASES.

ESCAPE in general is understood, where any person, who is under lawful arrest, and restrained of his liberty, either violently or privily evades such arrest and restraint, or is suffered to go at large before delivered by due course of law.

For the better understanding whereof I shall consider,

(A) Where the Party shall be said to be legally committed, so that the suffering him to go at large shall be judged an Escape: And herein,

1. *Where the Authority by which he is committed shall be said to be sufficient for that Purpose.*
2. *Where the Form of the Commitment, or being in Custody, shall be said to be regular.*

(B) What Degree of Liberty, or going at large, shall be deemed an Escape: And herein,

1. *With what Strictness Prisoners are to be kept.*
2. *What on this Account shall excuse the Sheriff, Gaoler, &c. when acting in Obedience to some Authority; as removing a Prisoner on a Habeas Corpus, &c.*

(A) *Where the Party said to be legally committed, &c.*

3. *What by Construction of Law shall be deemed an Escape, though the Party be still in Confinement.*

(C) *Of the Difference between voluntary and negligent Escapes.*

(D) *Of the Difference between an Escape on Mesne Process and Execution.*

(E) *What Persons are answerable for, and to be charged with an Escape: And herein,*

1. *Of the preceding or succeeding Sheriff, Warden, &c.*
2. *Where Sheriffs, Wardens, &c. their Superiors or Deputies, are liable at the Election of him who is injured by the Escape.*
3. *Where the Party injured may have his Remedy against the Person escaping; and herein of Escape Warrants.*

(F) *Of the proper Remedy and Nature of the Action to be brought for an Escape.*

(G) *Of the Manner of laying the Action.*

(H) *Of the Party's Defence who suffered the Escape: And herein of pleading fresh Suit.*

(A) *Where the Party shall be said to be legally committed, so that the suffering him to go at large shall be adjudged an Escape: And herein,*

1. *Where the Authority by which he is committed shall be said to be sufficient for that Purpose.*

IT seems agreed as a general rule (a), that wherever a sheriff or other officer hath a person in custody, by virtue of an authority from a court which hath jurisdiction over the matter, that the suffering such person to go at large is an escape; for he cannot judge of the validity of the process, or other proceedings of such court, and therefore cannot take advantage of any errors in them. Hence the law allows him, in an action of false imprisonment, to plead such authority, which will excuse him, though it be erroneous. But, if the court hath no jurisdiction of the matter, then all is void, and, consequently, the officer not punishable for suffering a person taken up upon such void authority to escape.

(a) This distinction is laid down in Moore, 274. Dyer, 175. Poph. 203. Leon. 30. 8 Co. 141. b. 10 Co. 76. a. 5 Co. 64. Cro. Ja. 3. 280. 289. 2 Bulst. 64. 256. 2 Saund. 100. 101. 3 Mod. 325. Carth. 148. 234.

Upon this distinction it hath been adjudged, that if *A.* obtains judgment against *B.*, and a year afterwards, without any *scire facias*, takes out a *capias ad satisfaciendum*, upon which *B.* is taken,

Cro. Eliz. 188. Bushe's case.

(a) Shirley v. Wright, 2 Ld. Raym. 775. 1 Salk. 273. 2 Salk. 700. S. P. adjudged; imprisonment; but there said that it would be otherwise, had it been on a *capias ad respondend.* bearing *teste* in *Trinity* term, and returnable in *Hilary*, because such process must be returnable from term to term, otherwise it is out of court.

Brown v. Compton, 8 T. R. 424. In this case the case of Orby v. Hales, 1 Ld. Raym. 3. which was recognized in 4 Mod. 353. was over-ruled as against the Marshalsea case, 10 Co. 76. and the whole current of authorities. That case decided, that if the justices of the quarter sessions make an order under 2 W. & M. c. 15. for the discharge of poor prisoners, which order is not warranted by the statute (as if the prisoner were in execution for more than 100l.) and the sheriff discharge the prisoner accordingly, he shall not be liable for an escape.

|| The statute of 37 G. 3. c. 112. authorized the justices of the peace, "at the first or second general quarter session, or general session, to be holden after the passing of the act, or some adjournment thereof," to discharge insolvent debtors under certain circumstances. The justices in the county of S. "at a general quarter session holden by adjournment" after the passing of the act, but which appeared to have been an adjournment of a session holden before the act passed, ordered the gaoler of the sheriff's gaol to discharge an insolvent, who was in the custody of the sheriff in execution. It was holden, that this adjourned session, not being an original session holden after the passing of the act, nor an adjournment of such a session, had not any jurisdiction under the act: and, as the court of general session or general quarter session had not, independently on the act, any authority over a person charged in execution in a civil suit, the proceeding was *coram non judice*, and, consequently, the sheriff, being responsible for the act of his servant, was liable to the party at whose suit the insolvent was in custody for an escape, agreeably to the rule above laid down, that when the court hath not jurisdiction of the cause, the whole proceeding is *coram non judice*, and an action lies against the officer, who executes the process of the court. ||

Coniers, Sheriff of Durham's case, Cro. Eliz. 576. Ognell v. Paston, *Id.* 165. Moore, 274. & 2 Leon. 84. S. C. & S. P. 8 Co. 142. S. C. cited. Leighton v. Garnons, Cro. Eliz. 707. S. P. But Weaver v. Clifford, Ro. Abr. tit. Escape (F. pl. 2.) *contr.* || This last case seems to have depended several years, and there are many reports of it, which are not quite consistent. *Yelverton* states the judgment of the court below to have been that the action did not lie, and so does *Brownlow*, whose report is almost a transcript of *Yelverton's*. *Yelv.* 42. *Brownl.* 82. But *Croke* says that the court inclined in favour of the action, but adjourned; Cro. Ja. 3. and *Bulstrode* expressly states that judgment was entered in the King's Bench for the plaintiff, 2 *Bulstr.* 62. a statement which agrees with Lord *Rolle's* account of the result of the writ of error in the Exchequer-chamber, that the judgment in B. R. was reversed, because there was no award of the *capias* by the court, but it was taken out without warrant, and so merely void. ||

So, where in debt for an escape, it was found by special verdict, that the plaintiff had outlawed *J. S.* after judgment upon a *capias ad satisfaciend.* sued out within the year, and that two years after the outlawry he was taken up upon a *capias utlagatum*, and the sheriff suffered him to escape; it was admitted, that if a *capias utlagatum* had been sued out within the year, no prayer to charge him in custody had been necessary, because the plaintiff might have had a *capias ad satisfaciend.* without a *scire facias*; but this being after the year, the question was, Whether he could be said to be in execution for the plaintiff in the original action without prayer? and the court held that he was, though no prayer was entered, because he would have been (a) so, if he had been taken within the year; (b) and here is no difference, for the plaintiff was at the end of his process at the exigent, and no continuance or *scire facias* after a *capias utlagatum*, and the very *capias utlagatum*, which is sued at his charge, imports an election of the body.

"died, so no judgment was given, but *Holt C. J.* on hearing thereof said, they were inclined to "give judgment for the plaintiff." This fact is not noticed either in *Salkeld* or the 5th *Modern*: indeed in the last, it is expressly said, that judgment was given for the plaintiff. || (a) 5 *Co.* 88. a. *Garnon's case*, adjudged. *Bridgm. 6.* *Ro. Abr. 810.* *S. P.* adjudged. (b) || *Holt* said, according to the report in *Comberbatch*, that "he never understood the difference taken in the "cases within the year or after, and that it was taken suddenly." ||

If at the petition of *A.* and the rest of the creditors of *B.*, a commission upon the statute against bankrupts is issued out against *B.*, and thereupon the commissioners sit and offer interrogatories to *C.* and he refuses to be examined, and by them is thereupon committed to prison, and the gaoler suffers him to escape; as the commissioners had sufficient authority to commit, and *A.* was prejudiced by the escape, he may maintain an action against the gaoler.

Salk. 319.
Wolf and Davison.
5 *Mod. 200.*
S. C. adjudged.
|| *Comb. 373.*
S. C. that the court inclined to give judgment for the plaintiff, but adjourned, that they might hear *Mr. Serjeant Levinz's* argument. *Mr. Viner*, in his abridgment of this case, adds, "N. B. The "defendant

So, if there be a suit in the ecclesiastical court between *A.* and *B.*, in which *B.* is excommunicated, and afterwards taken upon an *excommunicato capiendo*, and suffered to escape, *A.* may bring an action on the case for the escape, though it was objected that this was a spiritual matter, and that *A.* had other remedy, as by writ of recaption.

Also, upon this rule, that the sheriff cannot take any advantage of the irregularity of the proceedings of a court which hath jurisdiction of the matter, it hath been holden (c), if a nobleman be taken in execution, and the sheriff let him go, it will be an escape. *

Clifford. * *Qu.* the defendant not being liable to be taken in execution, and no court having power to award an execution against the person of a peer, in a civil suit?

Upon the second part of the distinction, that an officer shall not be liable to an action for the escape of a person taken on a writ, which issued out of a court that had not jurisdiction of the matter; it hath been (d) holden, that if *A.* bring an action against an officer of an inferior court for an escape, and declare that he brought

Barnes and Cary, adjudged, *Ro. Rep. 47.*
Moore, 834.
S. C. adjudged; and note, according to *Moore*, the action was debt.

Slipper v. Mason, adjudged. *Lutw. 121.* 2 *Ld. Raym. 788.*
S. C.

(c) 2 *Bulst. 65.*
per Coke C. J. in the case of *Weaver v.*

(d) *Ro. Abr. 809, 810.*
Richardson

and Barnard, adjudged. || In 2 Lutw. 1567. this case is cited by Powell (John) J. who observes, that the reason of the judgment was, because it appears in the body of the declaration, that the place where the obligation was made was in the body of the county, out of their jurisdiction. But, where nothing of this sort appears, he says, it ought to be notified to the court by plea to the jurisdiction, which plea if the court refuse, or receive it and proceed afterwards, if the plea be offered as it ought to be, before imparlance, and upon oath, all proceedings after shall be void, and the judge and officer will be liable to actions. || (a) So, though a writ issue out of a superior court, yet, if such superior court had not jurisdiction of the matter, it will be void, and the officer may take advantage thereof, as, if a *formedon* issue out of the King's Bench, or an appeal out of the Common Pleas. 2 Bulst. 64. & vide 5 Mod. 413. Ld. Rayn. 397. 5 Mod. 413. Carth. 234.

Squibb v. Hole, adjudged by three judges against Justice Ellis, 2 Mod. 29. || Freem. 193. S. C. According to this report, North C. J. said, that although the

So, if *A.* declares that he prosecuted one *J. S.* in the court of *Ely*, upon a bond made *infra jurisdictionem*, upon which he was in execution, and that the defendant suffered him to escape; if the jury find that there was such a prosecution, but that the bond was not made *infra jurisdictionem*, the action does not lie; for all that was done was *coram non judice*, and therefore no legal commitment; and though the defendant in the court below pleaded *non est factum*, yet that could not give the court any jurisdiction which it had not originally in the cause.

proceedings in this case (the action being of such kind as was cognizable in the court of *Ely*) should not be said to be *coram non judice*, so as to have made the bailiff or officer subject to an action of false imprisonment for executing the process of the court; yet he conceived, that as this case is, it shall be said to be *coram non judice* as to the plaintiff, to excuse the officer from this action, because it was a thing that lay in his cognizance, that the bond was made out of the jurisdiction of the court, and so the court had nothing to do with it. But, perhaps, if an executor had brought the action, it might have been otherwise, because he shall not be presumed to know where the bond was made. And the other judges seemed to agree with him; *sed adjournatur*. ||

Bull v. Steward, 1 Wils. 255.

[In an action on the case against the defendant, bailiff of the borough court of *Southwark*, for an escape upon mesne process, it was moved in arrest of judgment, that the declaration was ill, because it appeared that the plaint in the court below was levied against two persons, but only one was proceeded against, so that the plaintiff, by process against one only, could not have had the effect of his suit below. To this it was answered, and resolved *per curiam*, that even supposing the plaint to be erroneous, yet the officer shall not take advantage thereof in a collateral action as this is; he may justify the arrest under the process, and shall not be suffered to say in this action, that the plaintiff could not have the effect of his suit below. It was then objected, that the declaration

declaration did not allege in what manner the defendant below was indebted to the plaintiff: but only in general that he was indebted: it might be on a judgment, or such a debt as that court had no jurisdiction of: nor did it appear, that the cause of action arose within the jurisdiction. To this it was answered, and resolved *per curiam* (a), that this being after a verdict, they would suppose every thing proved at the trial which was necessary to be proved; and that the cause of action arose within the jurisdiction, unless the contrary could be made to appear upon the face of the record.

(a) [But see Trevor v. Wall, 1 T. R. 151.]

See tit. TRESPASS, (D).]

2. *Where the Form of the Commitment, or being in Custody, shall be said to be regular.*

The sheriff cannot be charged with an escape (b) before he had the party in his actual custody by (c) a legal authority; and therefore if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an (d) escape.

(b) Bro. Escape, 22.
(c) And therefore it seems that an officer who arrests a person on a Sunday con-

trary to the 29 Car. 2. c. 7. cannot be charged with an escape for letting him go again, *vide* 6 Mod. 95. Salk. 78. (d) But, if an officer refuses to arrest a person that he may, an action on the case lies against him; and hence it hath been adjudged, that if a *cupias ad satisfaciend.* is directed to the coroners of a county, and one of them, when he may arrest the party, refuses so to do, the plaintiff must bring his action singly against the coroner so refusing, for this is a personal tort. 2 Mod. 23, 24.

But, if A. is arrested, and in the actual custody of the sheriff, and afterwards another writ is delivered to him at the suit of J. S. upon the delivery of the writ, A. by construction of law (e) is immediately in the sheriff's custody, without an actual arrest; and if he escapes, the plaintiff may declare, that he was arrested by virtue of the second writ, which is the operation it hath by law, and not according to the fact.

5 Co. 89.
Frost's case.
(e) So, if the sheriff of Northumberland has a man in custody in Northumberland, and the

sheriff himself is in London, and a writ is delivered to him against that person, he is in his custody immediately upon that writ: otherwise, if the man was out of the county at the delivery of the writ; as in case the sheriff was bringing him to Westminster on a *habeas corpus*. Salk. 273. *per Holt* Ch. Just.

So, in escape against the sheriffs of London, the plaintiff may declare, that he levied a plaint in the sheriff's court against J. S. being then in the counter in custody on a former plaint levied against him by J. N., and being so in custody was suffered to escape; for the entering of the plaint is of the nature of a writ or precept in another court, upon which the *serjeant at mace* arrests the party by his general authority; and therefore, by entering the plaint, and charging the defendant in the counter, he is in actual custody of the sheriff.

Jackson v. Humphreys, 1 Salk. 273. cited in Bull. N. P. 66.

|| So, if a writ of execution be delivered to the sheriff against A. at the suit of B. and a warrant made out thereon, and before the return of that writ A. is taken in execution at the suit of C.

Benton v. Sutton, 1 B. & P. 24.

and

and then escapes, *B.* may maintain debt against the sheriff for the escape, although the party was not arrested under the writ at the suit of *B.*||

2 Show. 17.
Bourne and
Cooling, ad-
judged, and
judgment ar-
rested accord-
ingly. (a) If
A. obtains
judgment
against *B.* in
B. R., and also another judgment in *C. B.*, upon which he is taken in execu-
tion and committed to the Fleet, and afterwards he removes himself to the Marshalsea by
habeas corpus cum causa; if the marshal suffer him to escape, he is liable to both debts.
Dyer, 152.

If *A.* declares against the Marshal of the King's Bench for the escape of a prisoner (*a*), formerly in the *Fleet*, that he *virtute brevis de habeas corpus*, directed to the warden of the *Fleet*, was *debito modo commissus* to the King's Bench; this will not be sufficient, without alleging an actual commitment, for he cannot be committed on a *habeas corpus*, and the *debito modo* will not help it.

Farneley v.
Bassett, Cro.
Ja. 203.

If by *habeas corpus* the body of *J. S.* together with a plaint entered against him in the court of *Norwich*, be removed before the chief justice of *B. R.*, who upon the return of the writ accepts bail; the acceptance of bail, though before the filing thereof, is a discharge of the prisoner; and though afterwards a *procedendo* should be awarded, yet the sheriff cannot be charged with the escape.

Watson v.
Sutton,
1 Salk. 273.

If a person out upon bail renders himself in discharge of his bail, and a *redditi se* is entered in the judge's book, and a *committitur* filed in the office, and the prisoner afterwards escapes; yet, if no notice was given the marshal of such render, nor any entry made of the commitment in his book, the prisoner shall not be deemed in custody so as to charge the marshal with an escape; but it seems this matter cannot be insisted upon after trial.

Sid. 220.
Keb. 775.
Conny and
Jacob.

It hath been held, that entering a *committitur* upon the roll was not sufficient evidence to charge the marshal with an escape, without proving an actual imprisonment; but that proving the party to be actually in prison, though there be no entry made in the marshal's book (without which he pretends he knows not how to take charge of them) is sufficient.

And now for the greater security of creditors, and the better to enable them to prove the actual custody of the prisoner, by the 8 & 9 W. 3. c. 27. § 9. it is enacted, "That if any person
" or persons whatsoever, desiring to charge any person with
" any action or execution, shall desire to be informed by the
" marshal or warden, or their respective deputy or deputies, or
" by any other keeper or keepers of any other prison or prisons,
" whether such person be a prisoner in his custody, or not, the
" said marshal or warden, or such other keeper or keepers of
" any other prison or prisons, shall give a true note in writing
" thereof, to the person so requesting the same, or to his lawful
" attorney, upon demand at his office for that purpose, or, in
" default thereof, shall forfeit the sum of 50*l.* and if such mar-
" shal or warden, or their respective deputy or deputies exer-
" cising the said office, or other keeper or keepers of any other
" prison or prisons, shall give a note in writing, that such per-
son

“son is an actual prisoner in his or their custody, every such
“note shall be accepted and taken as a sufficient evidence that
“such person was at that time a prisoner in actual custody.”

(B) What Degree of Liberty, or going at large, shall be deemed an Escape: And herein,

1. *With what Strictness Prisoners are to be kept.*

EVERY person in prison by process of law is to be kept in *salva & (a) arcta custodia*, in order to compel him the more speedily to pay his debts, and make satisfaction to his creditors. *(a)* And by Westm. 2. c. 11. *Carceri mancipentur. in ferris*, which, my Lord Coke says, was enacted in order to oblige them to a more speedy compliance with their duty. and 2 Inst. 381. in his comment on this statute, he says, that though prisoners, if need require, may now be kept in irons, yet that it could not be done by the common law. — And Co. Litt. 260. a. he says, imprisonment must be *custodia & non pœna*, for *carcer ad homines custodiendos, non ad puniendos, dari debet*.

Plowd. 36.
3 Co. 44.
2 Inst. 381.
Ro. Abr. 806.
Coke says, was
3 Co. 44. a.
and 2 Inst. 381.
Dyer, 166.
Hetly, 34.

Therefore, if the sheriff or other officer who hath the custody of a prisoner, either bail him when he is not bailable by law, or suffer him to go out of the (b) limits of the prison, though with a keeper, and for ever so short a time, it is an escape.

(b) For the limits of the Fleet prison, *vide* 2 Mod. 221, 222.

But the law and provision made by Westm. 2. c. 11. being eluded by the acts and contrivances of sheriffs, and other keepers of prisons, by the 8 & 9 W. 3. c. 27. § 1. it is enacted, “That all prisoners, either upon contempt or mesne process, or in execution, who are or shall be committed to the custody of the marshal of the King’s Bench prison or warden of the Fleet, shall be actually detained within the said prisons of the King’s Bench and Fleet, or the respective rules of the same, until they shall be from thence discharged by due course of law; and if at any time the said marshal or warden, or any other keeper or keepers of any prison, shall permit and suffer any prisoner committed to their custody, either on mesne process, or in execution, to go or be at large out of the rules of their respective prisons, (except by virtue of some writ of *habeas corpus*, or (c) rule of court, which rule of court shall not be granted, but by motion made, or petition read in open court,) every such going or being out of the said rules shall be adjudged and deemed, and is hereby declared to be, an escape.”

hall, and by indulgence they have been allowed to go to any of the inns of court, to consult with their counsel or attornies; but suffering them to go on their pleasure, as to a playhouse, &c. is an escape. 2 Show. 298.

(c) The intent of a day-rule is, that the prisoners may be brought to Westminster-

|| This statute having made the rules to all purposes the same as the walls of the prison, it follows, that an escape from them without the marshal’s knowledge is a negligent and not a voluntary escape; for the escape is not voluntary, unless it be

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Bonafons v. Walker, 2 T.R. 126.

with the consent or by the default of the marshal, and his allowing the rules of the prison is not any default in him, because the law gives a sanction to it; and it cannot be inferred thence, that he consents to the escape, if he has taken security that the prisoner shall not go beyond the rules, and immediately on his return has confined him in close custody.

Field v. Jones,
9 East, 151.
Sir Thomas
Tipping's case,
cited in 1 Str.
503. S. P.

In an action for an escape against the marshal of the King's Bench, it appeared, that the prisoner, who was in execution in the marshal's custody, at the suit of the plaintiff, was seen at large about 11 o'clock on the first day of *Michaelmas* term. The defence was, that he was out upon a day-rule granted by the court on the same day, and by the above statute that rule could only have been granted at the sitting of the court, and the court, in fact, did not sit till after the time he was at large. It further appeared, that the plaintiff had actually filed his bill against the marshal in this action before the sitting of the court on the same day. The petition had been signed by the prisoner in the morning before he went out of prison. The court were of opinion, that the day-rule was a justification to the marshal for the liberation of the prisoner on the whole of the day by relation; that though it was only granted, as legally it could only have been, when the court sat on the first day; yet, when granted, it was a liberty for that day, and covered the antecedent part of the day; because, generally speaking, there is no fraction of a day, but where it is necessary to look to it in order to answer the purposes of justice.

Anon. 1 Str.
503.

But the rule when made would not extend to a prisoner who had not signed the petition at the time. ||

2. *What on this Account shall excuse the Sheriff, Gaoler, &c. when acting in Obedience to some Authority, as removing a Prisoner on a Habeas Corpus, &c.*

(a) Cro. Car.
14. Ro. Abr.
808. (b) Hob.
202. 3 Co. 44.
Cro. Car. 14.
Hard. 476.
agreed by
Hale Chief
Baron, and the
whole court.

The writ of *habeas corpus* is an (a) ancient writ, and what the subject is by law entitled to; yet (b) if a sheriff or other officer, who hath the custody of a prisoner, by colour thereof, suffer the prisoner to go at large, it is an escape.

As, if a *habeas corpus* be returnable the next term, and the sheriff or gaoler in the meantime suffer the prisoner to go at large, it is an escape, though he appear at the return of the writ; for the writ only empowers the gaoler to bring him directly to the court, and if he gives him any liberty in the meantime, it is at his peril.

Mod. 116.
Mosedel's
case. So ruled
upon evi-
dence, and the
plaintiff had a
verdict for

So, where a *habeas corpus ad (c) testificandum* was directed to the marshal to carry one *Reynolds* to the assizes at *Wells* in *Somersetshire*, who after the assizes was suffered to go sixty miles beyond *Wells*; though he returned again to the marshal, yet it was held an escape.

6200. 3 Keb. 305. S. C. (c) If *J. S.* is in execution, and a *habeas corpus ad testificandum* is directed to the gaoler, who, according to the command of the writ, carries the prisoner to give his testimony; this is an escape. Sid. 13. said by *Twisden* to have been adjudged by all the judges.

So,

So, if the gaoler carry him round about (a) a great way for the accommodation of the prisoner, it is an escape; but he is not bound to bring him the direct way for fear of being rescued. *Mod. 116. per Hale. [2 Bl. Rep. 1050.]* (a) That he is to bring him in convenient time, and the most convenient way; and this is to be judged of by the judges. *Cro. Car. 14. Dalt. Sheriff, 561.* || If the officer take him out of the direct road, it is an escape. *Per Baller J. in Benton v. Sutton, 1 B. & P. 68.*||

Also, it hath been adjudged, that if the sheriff hath one in execution, and a *habeas corpus* issues to have his body in court such a day, and before the return of the writ the sheriff brings the prisoner to an inn in *Smithfield* in his way to *Westminster*, and the prisoner of his own head goes without any keeper to *Southwark*, and next morning returns again to the sheriff, so that at the return of the *habeas corpus* the sheriff delivers the prisoner into court, this is no escape. *3 Co. 44. Boyton's case.*

[If a sheriff, having arrested a defendant on *mesne* process, keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action as for an escape, if the jury find that the plaintiff has not been delayed or prejudiced in his suit.] *Planck v. Anderson, 5 T. R. 37.*

As the sheriff must be careful that he does not give the prisoner more liberty than by law he ought to do, when he acts in obedience to a lawful authority; so he must take care that he does not let him go at large by colour of a void authority. *Dalt. Sheriff, 486.*

Therefore, if one in execution at the suit of the king and a private person be, by warrant from the lord chancellor or treasurer, suffered to go at large with a keeper, in order to collect the money due to the king; this is an escape, as to the private person, although he return again to prison; for the king himself cannot license one in prison to go at large with a keeper. *Dyer, 297. a. Ro. Abr. 808. S. C.*

So, where the sheriffs of *York* pleaded, that they let the prisoner go at large by virtue of a writ of privilege directed to them from the council of *York*; and it not appearing to the court that the writ was a sufficient warrant for that purpose, or that the council of *York* could in such case discharge a prisoner, the plea was held ill. *Cro. Eliz. 893. Colston v. Ross and Levett.*

If an act of parliament is made for the relief of confined debtors, and pursuant thereto the justices of the peace are enabled to discharge such and such prisoners, if they authorize the sheriff to discharge a person that does not come within the description of the act, and he lets the party go at large, it will be an escape. (b) *Anon. Salk. 273. (b) [The contrary was adjudged in Sir Thomas Orby's case, 1 Ld. Raym. 399. 4 Mod. 353.]*

but Lord *Raymond* questions the law of that decision, because, if the sum, for instance, exceeds that which the statute allows a discharge for, the justices have no jurisdiction, and the sheriff is bound to take notice at his peril for what sum his prisoner is charged in execution. || It has since been denied to be law in the case of *Brown v. Compton, 8 T. R. 424. supra.*||

[Debt was brought by the plaintiff, executor of *A.*, against the defendant as executor of *B.* formerly sheriff of the county of *D.* Upon *nil debet* pleaded, the jury found a special verdict, viz. that *A.* recovered a judgment against *F.* and sued a *capias ad satisfaci-* *Langton v. Wallis, 1 Ld. Raym. 399. 1 Lutw. 582. S. C.*

satisfaciendum directed to *B.* then sheriff, &c., which writ was executed by the under-sheriff, and *F.* being in custody, assigned a term for years to the under-sheriff in satisfaction of the money recovered by the judgment, and to be discharged out of execution, which assignment was to be void upon payment of the money recovered by the judgment at a day, after *B.*'s office would determine. Upon this *B.* was discharged out of execution, and at the day, &c. he paid the money to the under-sheriff; but the under-sheriff did not pay the full money to *A.* *B.* died; and *A.* died; and the plaintiff as executor of *A.* brought this action. — It was adjudged, that it did not lie; because the release of *F.* out of custody was an escape in the sheriff, and the receipt of the money afterwards could not purge it.]

3. *What by Construction of Law shall be deemed an Escape, though the Party be still in Confinement.*

Style, 465. *per*
Glyn C. J. &
vide Dalton
Sheriff, 487.

The marshal of the King's Bench being sued to judgment, if he be afterwards taken in execution, he can be admitted to no other prison but the Marshalsea; and if he is committed to that prison whereof he is keeper, without securing the prisoners there first, it will be an escape in law of all the prisoners.

Plowd. 17.

If a woman warden of the Fleet prison marries her prisoner, or if a sheriff, &c. marries a woman in execution with him, in either case it will be deemed an escape in law.

Ro. Abr. 810.
(a) So, if baron
and feme are
taken in exe-
cution, if the
feme escapes,
the sheriff shall
answer the whole debt, though the baron continues still in execution. Ro.
Abr. 810. Cro. Ja. 657. S. P.

If a man hath judgment against two (a) persons, and both are taken in execution, if the sheriff suffer one of them to escape, he shall be answerable for the whole debt, though he hath one of them still in custody.

By the 8 & 9 W. 3. c. 27. § 8. it is enacted, "That if the
" marshal or warden for the time being, or their respective
" deputy or deputies, or other keeper or keepers of any other
" prison or prisons, shall, after one day's notice in writing
" given for that purpose, refuse to shew any prisoner committed
" in execution to the creditor, at whose suit such prisoner was
" committed or charged, or to his attorney, every such refusal
" shall be adjudged to be an escape in law."

(C) Of the Difference between voluntary and negligent Escapes.

Leon. 73.
Arundell and
Wytham.
Hob. 202. S. P.
per Hobart, in
the Sheriff of
Essex's case.

IT was formerly held, that where the sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was in such case absolutely discharged from the creditor, and that the right of action was entirely transferred against the sheriff, who by means of such escape became *debitor ex delicto*.

But the latter resolutions have been contrary; and it has

been (a) adjudged, that where a sheriff suffered a voluntary escape, the plaintiff might have a new action of debt or *scire facias quare executionem non* against the prisoner.

and Home, 2 Mod. 136. Basset and Salter, Vent. 269. W. Jon. 21, 22. Mod. 174. Buxton and Ireland. 2 Lutw. 1264. Sudal and Wytham.

(a) Sid. 330.
Allanson and
Butler. Show.
174. Buxton
194. Compton

Also, the statute 8 & 9 W. 3. c. 26. § 7. hath taken away all distinction between voluntary and permissive escapes with regard to the plaintiff's remedy; for thereby it is enacted, "That if any prisoner, who is or shall be committed in execution to either or any of the said respective prisons, shall escape from thence by any ways or means howsoever, the creditor or creditors, at whose suit such prisoner was charged in execution at the time of his escape, shall or may retake such prisoner by any new *capias* or *capias ad satisfaciendum* or sue forth any other kind of execution on the judgment, as if the body of such prisoner had never been taken in execution."

But yet there remains a difference as to other purposes between permissive and negligent escapes; for if a sheriff suffer a prisoner voluntarily to go at large, the sheriff cannot retake him even upon fresh suit; and if he does, the prisoner may have an action of trespass against him.

Carter, 212.
[2 Wils. 295.
5 T. R. 25. &
vide the autho-
rities *supra*.]

[And where the escape is voluntary, nothing afterwards can purge it; for whenever a gaoler permits a voluntary escape, from that moment he commits a tort.]

Ravenscroft v.
Eyles, 2 Wils.
295.

If the marshal of the King's Bench or warden of the Fleet, or any other who hath the keeping of prisons in fee, suffer a voluntary escape, it is a forfeiture of the office.

3 Mod. 146
Carter, 212

And now a further penalty is added by the 8 & 9 W. 3. c. 26. § 4. which enacts, "That if any marshal or warden, or their respective deputy or deputies, or any keeper of any other prison within this kingdom, shall take any sum of money, reward or gratuity whatsoever, or security for the same, to procure, assist, connive at, or permit any such escape, and shall be thereof lawfully convicted, the said marshal or warden, or their respective deputy or deputies, or such other keeper of any prisons, as aforesaid, shall for every such offence forfeit the sum of 500*l*. and his said office, and be for ever after incapable of executing any such office."

(D) Of the Difference between an Escape in Mesne Process and Execution.

IF the sheriff suffer a person arrested on mesne process to escape, an action lies against him at (b) common law, from the delay and prejudice which the party suffers thereby.

Cro. Eliz. 623. 652. 868. Cro. Ja. 280. (b) And by the express words of 8 & 9 W. 3. c. 26. [2 Bl. Rep. 1049.]

2 Ro. Abr. 99.
807. Broby
and Lumley.
Moore, 852.

But there is this difference between an escape on mesne process, and execution, that if the sheriff arrests a person on mesne process, and he is rescued by J. S., he may return the rescue, and such return is good, and no action of escape lies against him

2 Ro. Abr.
807. Jon. 207.
Ro. Rep. 388.
3 Lev. 46.

after such return; but the court will issue process against such rescuer, or fine him; for in this case, though the sheriff may, yet he is not obliged to raise the *posse comitatus*.

Ro. Abr. 807.
vide the authorities
supra.

(a) Cro. Car.
240. 255.

Ro. Abr. 904.

8 Co. 142. [Upon the same principle the gaoler will be liable for an escape upon the rescue of one brought out of gaol by *habeas corpus* between judgment and execution. *Crompton v. Ward*, 1 Str. 429.]

Atkinson v. Matteson,
2 T. R. 72.
Hawkins v. Plomers, 2 Bl. Rep. 1048.
If the escape be involuntary, and the defendant, though he were in execution, return before action brought, the gaoler may

¶ After an arrest on mesne process, the gaoler may suffer the prisoner to go at large, provided he has him at the return of the writ. But, if a defendant taken in execution be afterwards seen at large, for any the shortest time, even before the return of the writ, the sheriff will be chargeable for an escape; for it is his duty to obey the writ, and the writ commands him to take the defendant, and him safely keep, so that he may have him ready to satisfy the plaintiff. Hence in *Noy*, 72. a distinction is taken, that in actions for escape on mesne process, the writ surmises, that *ad largum ire permisit, et non comperuit ad diem*: but on process of execution, *ad largum ire permisit* is sufficient. And so are the precedents. (b)

plead it, as he may a re-taking on fresh pursuit. *Chambers v. Gambier*, C. R. 554. 2 T. R. 129. S. C. cited by *Buller J.* But such plea of return before action brought must shew a detention of the prisoner, and that it continued to the time of the action, or that it has been legally terminated. *Chambers v. Jones*, 11 East, 406. This plea cannot be received without an affidavit, that the escape was not voluntary; for otherwise by stat. 8 & 9 W. 3. c. 27. § 6. the plea of fresh pursuit is not allowable. *Rex v. Huggins*, C. R. 422. 1 *Barnardist*, K. B. 350. 416. S. C. If a gaoler retakes a prisoner in execution after a voluntary escape, he is liable to an action of false imprisonment. 3 Co. 52. b. & per *Grose J.* in *Atkinson v. Matteson*, *ubi supra*. (b) *Rast*. 171.

Houlditch v. Birch,
4 Taunt. 608.

But a sheriff who carries a prisoner taken in execution to a lock-up-house within his own bailiwick, and keeps him there for some time before the return of the writ, is not thereby chargeable with an escape.¶

2 Mod. 177.
Ellis and Yarborough, adjudged.

1 Mod. 227.
S. C. 1. *Freem*.
219. S. C.
Gilb. C. P.

22. S. C. See
1 Ld. Raym.
425. 1 Salk.
99. 6 Mod.
122. *Noy*, 72.
Semb. contra.

¶ But these cases are not law, and the

case of *Etherick v. Cowper*, in 1 Ld. Raym. and 1 Salk. in which Lord *Holt* is made to say, that if the sheriff takes insufficient bail, he is liable to an action, as well as to amercements, is noticed by *Salkeld* to be contrary to the case of *Grosvenor v. Soame*, 10 Mod. 288. where it

was

was adjudged, that no action lies against the sheriff for taking insufficient bail, but he shall be amerced if he has not the body.||

||It was determined in one case (that case professing to go upon the authority of *Ellis v. Yarborough*) that putting in bail after the return of the writ, though before the expiration of the rule to bring in the body, was no defence to an action against the sheriff for returning *cepi corpus* where he had permitted the defendant in the original action to go at large without taking a bail-bond, and had him not at the return of the writ. But this decision hath been over-ruled; for if in such case bail is put in before the expiration of the rule to bring in the body, it is put in within due time according to the practice of the court, and the sheriff is, consequently, not liable to an action either for an escape or a false return. It was decided, it is true, by the Court of King's Bench, that where the sheriff permits the party to go at large and does not take a bail-bond, it is a breach of his duty, if bail are not put in within due time. But the result of that case is, that putting in bail to the action in due time is an answer to the action, and that he is only liable where he has not done so.||

Jones v. Eamer, Anstr. 675.

Pariente v. Plumbtree, 2 Bos. & Pull. 35.

Fuller v. Prest, 7 T. R. 109.
See also *Murray v. Durand,* Esp. N. P. C. 87, and *Allingham v. Flower,* 2 Bos. & Pull. 246.

(E) What Persons are answerable for, and to be charged with an Escape: And herein,

1. Of the preceding or succeeding Sheriff, Warden, &c.

WHERE a new sheriff is appointed, his predecessor ought to deliver over by (a) indenture all the prisoners in his custody, charged with their respective executions; for the prisoners, until they are turned over to the new sheriff, remain in the custody of the old sheriff, and if he omits to deliver them over, every omission will be deemed an escape, wherewith he will be chargeable.

Hob. 266.
2 Ro. Abr. 457.
Cro. Eliz. 365.
Bulst. 70.
2 Leon. 54.
4 Co. 72.
(a) See the form thereof, *Dalt. Sheriff*, 18.

As, where one *Bustard* was in execution in the custody of the defendants, then sheriffs of *London*, as well at the suit of *A.* as at the plaintiff's suit, and the defendants at the end of the year delivered over the body of *Bustard* to the new sheriffs by indenture, wherein the execution at the suit of *A.* was mentioned, but the execution at the plaintiff's suit was omitted, and afterwards *Bustard*, in the time of the new sheriffs, escaped; it was resolved by the whole court, that the defendants being the old sheriffs should be charged with this escape, for that the old sheriffs ought to have given (b) notice to the new sheriffs of all the executions wherewith any person was charged in their custody.

3 Co. 71.
Westley's case. (b) That such notice may be by word only, or by some note in writing under the old sheriff's hand, or under the hand of his under-sheriff, and need not be by indenture. *Cro. Ja.* 588.

Moore, 689. *Dalt. Sheriff*, 16. *Poulter v. Greenwood, Barnes*, 367.

But, if the sheriff dies during his shrievalty, the new sheriff, as soon as he is appointed, must take notice of all persons in custody, and of the several executions with which they are

3 Co. 72.
[By stat.
3 Geo. 1. c. 15.
§ 8. the duties

of the office of sheriff are, in this case, to be executed by the under-sheriff, until a successor is appointed. And it is not usual to appoint a new sheriff till the end of the year.]

2 Lev. 109.
Lenthal and
Lenthal, ad-
judged.
3 Keb. 487.
S. C. Vent.
269. James
and Pierce.
S. P. adjudged,
and the case
of the sheriff
of Essex, in
Hob. 202.
(ante C) cont.
denied to be law.

J. S. being in execution in the Fleet, was suffered to make a voluntary escape, after which he returned again to the Fleet; and the defendant being made warden in the place of the former warden, *J. S.* was turned over with the other prisoners, and afterwards suffered to escape; and the question was, Whether the voluntary escape suffered by the former warden did not so entirely discharge the execution, that the prisoner could not be retaken, nor judged in execution, by law, even though he should yield himself to it? And it was held, that it did not, and that the succeeding warden should be chargeable with the escape suffered in his time.

6 Mod. 183.
Grant v.
Southers.
Stra. 423.

So, in the case of one *Grant*, who being in the custody of the former marshal was suffered by him voluntarily to escape, after which he returned voluntarily to prison, and being found in prison, the succeeding marshal detained him; in an action of false imprisonment brought by him, the court held that he might, and that if he had suffered him to go at large, it would have been an escape.

2 *Where Sheriffs, Wardens, &c. their Superiors or Deputies, are liable, at the Election of him who is injured by the Escape.*

(a) But in
what cases at
common law,
and upon the
statute of

Westm. 2.

c. 11. the rule

of *respondent superior* will hold, vide 2 Inst. 382. 466. 9 Co. 98. T. Jon. 60. 2 Lev. 158.

Vent. 314. 2 Mod. 119. 3 Keb. 591. 656. 701. 754. 758. 773. Noy, 69. Comb. 95.

Where one hath the custody of a gaol of freehold or inheritance, and commits it to another person who is insufficient, the (a) superior is answerable for all escapes suffered by his inferior; but, if the inferior be sufficient, the action must be brought against him, and not against the superior.

Also, by the 8 & 9 W. 3. c. 27. § 11. it is enacted, "That the offices of marshal of the King's Bench prison, and warden of the Fleet, and each of them, shall be executed by the several persons to whom the inheritance of the prisons, prison-houses, lands, tenements, and other hereditaments of the said prisons of King's Bench and Fleet, or either of them, shall then belong or appertain respectively, in his or their respective proper person or persons, or by his or their sufficient deputy or deputies, for which deputy or deputies, and for all forfeitures, escapes and other misdemeanours, in their respective offices by such deputy or deputies permitted, suffered, or committed, the said person or persons in whom the aforesaid inheritances respectively are, or shall then be, shall be answerable, and the profits and aforesaid inheritances

" of

" of the said several offices shall be sequestered, seised, or extended to make satisfaction for such forfeitures, escapes, or misdemeanours respectively, as if permitted, suffered, or committed by the person or persons themselves, or either of them, in whom the respective inheritances of the said prisons shall then be." *

* Note: By 27 G. 2. c. 17. the power of

appointing the marshal of the King's Bench is revested in the crown.

If the (a) bailiff of a franchise suffer an escape, and be insufficient, the lord of the franchise shall answer for him.

2 Brownl. 50.
per totam cur.
2 Lev. 160.

S. P. (a) If his deputy suffers an escape, he shall answer for it himself. Litt. Rep. 33. per curiam.

If a gaoler, who is the sheriff's servant, suffers a prisoner to escape, the action must be brought against the sheriff, not (b) against the gaoler; for an escape out of the gaoler's custody is by intendment of law an escape out of the sheriff's custody, (c) for by the 13 E. 3. c. 10. sheriffs are to put in such keepers of gaols as they shall answer for.

2 Lev. 159.
T. Jon. 62.
2 Mod. 124.
(b) Vide
5 Mod. 414.
416. Ld.
Raym. 424.
Salk. 272.

where it is said in general, that gaolers are liable for escapes; but the question being there touching the escape of a person committed for a criminal offence, must be understood of escapes in those cases, for which whoever *de facto* occupies the office of gaoler is liable to answer; nor is it material, whether his title to the office be legal, or not. Hale P. C. 114. 2 Ro. Rep. 146. 2 Hawk. P. C. c. 19. § 28. & vide Hard. 29 to 35., that where actions for escapes are said to lie against gaolers, such absolute gaolers are intended, as writs are directed to. (c) || The sheriff is answerable *civiliter*, though not *criminaliter*, for the acts of his officers; *their* acts are by intendment of law *his* acts. But, though not answerable *criminaliter*, that is, not liable to be indicted, for the acts of his officers, he is liable in a penal action for them. *Sturmy q. t. v. Smith*, 11 East, 25. *Stanway q. t. v. Perry*, 2 B. & P. 157.||

So, an arrest by the sheriff's officer is in judgment of law the (d) same as if the arrest were by the sheriff in person; and if such officer suffer the party arrested to escape, the action must be brought against the sheriff.

5 Co. 89. Ro. Abr. 94.
(d) Although in law the custody of the bailiff be the

custody of the sheriff; yet the sheriff cannot return, that such a one was in his custody, and rescued out of the custody of his bailiffs, because of the repugnancy; but he may return, that he was rescued out of his own custody, although he was never in his actual custody, or out of his bailiff's custody. 3 Salk. 586. & vide Sid. 332. T. Jon. 197. || A return made by a sheriff that the person arrested was rescued out of the custody of the bailiff has been holden to be bad: the return must be, that the person was rescued out of the sheriff's custody. *Per Buller J.* in *Woodgate v. Knatchbull*, 2 T. R. 156.||

But, if the sheriff directs his warrant to his bailiff, and afterwards *J. S.* puts in his own name as special bailiff, and thereupon arrests the defendant, who escapes; here *J. S.* shall be only chargeable, and not the sheriff, because the defendant was never in the sheriff's custody, but only in the custody of *J. S.*

Cro. Eliz. 745.
Dalt. Sheriff, 560. [It hath been repeatedly holden, that where a special bailiff

is appointed on the nomination of the plaintiff in the action, the sheriff is not answerable for the acts of such bailiff. *De Moranda v. Dunkin*, 4 T. R. 120.]

So, if a writ comes to the sheriff, and he makes out his mandate to the bailiff of a liberty, who takes the party, and after suffers him to escape, (e) an action lies against the bailiff of the franchise, and not against the sheriff.

Ro. Abr. 98,
99. Bro. Escape, 40.
Noy, 27.
(e) [And if the bailiff

bailiff in such case remove the party to the county gaol situate out of the liberty, and there deliver him into the custody of the sheriff, he will subject himself to an action for an escape. *Boothman v. Earl of Surry*, 2 T. R. 5.]

Cro. Eliz. 26. So, where a *capias ad satisfaciendum* was awarded to the sheriff of *Berks* to arrest *J. S.* who then was in custody of the mayor and burgesses of *W.* and thereupon the sheriff made a warrant to the mayor, &c. to take him, and afterwards they let him escape; it was clearly held, that the mayor, &c. and not the sheriff, were chargeable with the escape.

Ro. Abr. 806. If a *capias* issues against *A.* out of the sheriff of *London's* court, directed to one of the serjeants, who arrests *A.* and lets him escape before he is carried to the counter, the serjeant, in this case, and not the sheriff, is chargeable with the escape; for the sheriff is judge of the court, and not a ministerial officer. But, if *A.* had been carried to the counter, and escaped thereout, the sheriff would then have been answerable, as gaoler or keeper of the counter.

Ro. Abr. 806. So, if a serjeant at mace arrest a man by virtue of a warrant issuing out upon a *latitat*, and afterwards suffer him to escape before he brings him to the counter; in this case, an action lies against the sheriff only for this escape, because he was in the custody of the sheriff presently upon this arrest; and the sheriff is the officer of the court of King's Bench, and not the serjeant.

Cro. Eliz. 743. If upon a plaint levied in the court of *B.* before the bailiffs of *B.* according to the custom there, a warrant is directed to the under-bailiffs, to take *J. S. ita quod habeant corpus ejus coram ballivis ad prox. curiam*, and the under-bailiffs take him and commit him to the prison *sub custodia* of the gaoler of the prison of *B.*; if they have him not at the day, &c. an action lies against them, and not against the gaoler; for there was no commitment to him by any lawful authority, and that custody the gaoler had was only as a servant to the under-bailiffs.

Carth. 145. A prisoner in *Wood-street* counter, upon a mesne process on a plaint levied against him, &c. escaped, whereupon the plaintiff brought his action against both the sheriffs of *London*; and, upon a demurrer to the declaration, the plaintiff had judgment; and it was resolved, that though the plaint was levied before one of the defendants only, and the prisoner escaped out of his counter, and by his negligence alone, yet that both sheriffs had the custody of the prisoners in both counters, and, by consequence, the action was well maintainable against both.

Cro. Eliz. 625. If there are two sheriffs of the same place, and an action of escape is brought against them both, if one of them dies, yet the writ shall not abate; for it being in nature of a trespass, and (a) merely personal, the party can only have remedy against the survivor.*

executor or administrator of a person who suffers an escape, because it is a personal tort, and comes within the rule *actio personalis moritur cum persona*, vide *Dyer*, 271. 322. *W. Jon.* 173. *Noy*, 87. *Latch.* 167. *Poph.* 187. *Vent.* 31. 6 *Mod.* 125, 126. — * By 8 & 9 *W. 3. c. 11. § 7.* the death of a plaintiff or defendant, where there is another surviving, shall not abate the suit.

3. *Where the Party injured may have his remedy against the Person escaping, and therein of Escape Warrants.*

It has been already observed, that if the sheriff suffers the prisoner voluntarily to escape, the party at whose suit he was in custody may, notwithstanding, sue out any new execution against the person escaping; for it would be unreasonable that he should be allowed to take advantage of his own act, or that the creditor should be compelled, whether he will or no, to take his remedy against the sheriff, who may die or become insolvent.*

Therefore, where to a *scire facias quare executionem non* upon a judgment the defendant pleaded, that he was formerly taken in execution by a *capias ad satisfaciendum* upon the same judgment, and the sheriff suffered him to escape, to which escape the plaintiff then and there consented; this was held an ill plea: for the assent (a) subsequent will not make it an escape with the consent of the plaintiff, and therefore he has either his remedy against the sheriff, or may retake the party.

But, if (b) a man in execution upon a judgment for debt or damages be delivered out of execution by the sheriff or gaoler who hath him in execution, with the (c) assent of him at whose suit he is in execution; and after by colour of this judgment he take him again and put him in prison, an *audita querela* lies upon this matter, and thereupon he shall be delivered.

delivered out of execution on a joint *capias ad satisfaciendum*. Style, 387. *Clarke v. Clement*, 6 T. R. 525. — So, if he consent that one of the bail shall be delivered out of execution, he shall not take the other. 2 Leon. 260. || Though a discharge by act of law, as under an insolvent debtor's act, of one of several defendants taken on a joint *capias ad satisfaciendum*, has been holden not to operate as a discharge of the other defendants. *Nadin v. Battie*, 5 East, 147. So, where the prisoner in execution has been discharged upon terms which are not afterwards complied with; as, upon an undertaking to pay the debt by instalments; *Vigers v. Aldrich*, 4 Burr. 2482. or to render himself on a given day, if he did not in the mean time pay the debt; *Clarke v. Clement*, 6 T. R. 525. or to pay the debt at a future time; *Tanner v. Hague*, 7 T. R. 420. and on failure, that he should be liable to be taken in execution again; *Blackburn v. Stupart*, 2 East, 243. || (c) Where the consent was only, that he should come to a tavern out of the rules. Style, 117. — Where one was in execution in the King's Bench, and some proposals were made to the plaintiff in behalf of the prisoner, who seeing there was some likelihood of an accommodation, consented to a meeting in London, and desired the prisoner might be there, who came accordingly; this was held to be an escape with the consent of the plaintiff, and he could never after be in execution at his suit for the same matter.

[In an action against the warden of the Fleet, for an escape on mesne process, a verdict was given for the plaintiff with 300*l.* damages. The facts of the case were as follows:—The plaintiff had recovered against one *Fakeney* a debt of 11,000*l.*, but at the time of the escape a writ of error was pending, and final judgment not entered up. On *Friday* the 24th of *November* last, the deputy warden of the Fleet (the warden himself being not in town,) received a notice in writing (which notice it was in proof was duly served,) from the plaintiff, to discharge *Fakeney*. The deputy warden having some doubts whether the notice were really the

* It is put out of doubt by the stat. 8 & 9 W. 3. c. 26. which *vide ante*.

Salk. 271. Scott and Peacock. (a) Show. 174. S. P. adjudged on the like plea.

Ro. Abr. 307. Welby and Andrews, adjudged. (b) So, if the plaintiff consent that one defendant only shall be

Holland v. Eyles, C. P. M. 28. G. 3. MSS.

the handwriting of the plaintiff in the suit, and those doubts being increased by its having been brought by one *Knight*, a man of very bad character; he did not immediately obey it, but employed himself in inquiring into the matter, and endeavouring to discover whether this were actually the handwriting of the plaintiff, or not. On the *Saturday*, the next day, he met the plaintiff's attorney, who told him, he was not enough acquainted with plaintiff's handwriting to be able to give any opinion on it. On the following day, *Sunday*, in the afternoon, he met the plaintiff and his attorney; the plaintiff then acknowledged that the notice which defendant had received was written by him, but after some conversation, swore that he had been made a dupe of in giving it, and immediately served the defendant with a countermand of it. The defendant disregarded this countermand, and that evening discharged *Fakeney*. Lord *Loughborough's* idea at the trial was, that this first notice could amount to nothing more than merely to entitle *Fakeney* to a *supersedeas*, that it by no means warranted an immediate discharge, and therefore as the defendant had taken upon him to judge of the legal effect of it, he thought he ought to take the consequences, and told the jury that they should find for the plaintiff.

Bond Serjeant, moved, that a nonsuit should be entered upon the above evidence as it appeared on the judge's notes. He insisted, that by the letter of discharge all claims by the plaintiff on the defendant for the detention of *Fakeney* were put an end to, and that that letter of discharge could not be countermanded. For in the first place, this notice from the plaintiff was a legal discharge; a parol direction to the gaoler by the plaintiff in the suit, to let the prisoner go out of prison, is a good discharge. *Brown Anal.* 29.; and such direction is a good defence by the gaoler in an action for an escape. 2 *Inst.* 382. Lord *Coke*, commenting on the words *sine assensu domini*, says, this assent may be by parol, and shall be a sufficient bar in an action of debt for the escape. *Dy.* 275. a. *Cro. Car.* 329. *Vezey v. Harris and wife*, *Goulds.* 81. These cases prove, that where there is the consent of the plaintiff, a discharge without writ is a sufficient defence in an action against the gaoler for an escape. But this order of discharge having been thus properly given, could not in law be countermanded. To see whether it were countermandable or not, it will be necessary to see what was to be its operation on the prisoner. As with respect to him, it was a grant of liberty, a grant of an interest of the highest nature, and therefore not countermandable. For wherever a valuable interest is given by grant or manumission, it cannot be countermanded. A villein enfranchised for an hour, is so for ever; an express manumission of a villein cannot be upon condition, for once free in that case, and ever free. *Co. Litt.* 274. b. *Finch*, 29. The law invariably makes the distinction between matters of profit or interest, and matters of pleasure, ease, trust, authority, and limitation; with respect to the former it allows of no countermand; with respect to the latter, they may be countermanded,

countermanded, though a power of revocation be taken away in the most positive terms, for a man cannot by his own act make that not countermandable, which by law and in its nature is countermandable. This was settled in *Viner's case*, 8 Co. 82., where it was determined that a submission to an award is revocable, though the party have declared it to be irrevocable; but the grant of a valuable interest is in its nature irrevocable. *Sheph. Abr. tit. Countermand*, 464. If I present *J. S.* to a church, I cannot after vary and present anew, for a kind of interest passeth out of me. *Finch*, 32. *Dyer*, 348. a. In *Plowd.* 36. a. it is stated *arguendo* that if a personal thing be once in suspense, or the person of a man be once discharged for a personal thing, that is a discharge for ever. From all these authorities then it is clear, that where a valuable interest is derived to a party, it is not subject to a countermand. And further, by this order of 14th of November, *Fakeney* can never be deprived of his liberty gain for this debt. It is said in the case of *Alanson v. Butler*, cited in *Show.* 17. that in an escape by consent of plaintiff, neither the plaintiff nor the sheriff can retake, though the debt be unsatisfied. And in *Freem.* 213. in the case of *Basset v. Salter*, *North C. J.* says, Since the law is so strict that matters of deed shall not be discharged but by deed, he wondered that the law should permit an execution to be discharged by a mistake of the plaintiff's; and he cited a case, where a creditor went over to the King's Bench to treat with a prisoner, and brought him over the water to a tavern to treat, and it was held, that he could never take him again, and so the law is clear when he is once discharged by the consent of the plaintiff. *S. C.* in 2 *Mod.* 136. These words ought to have the more weight, because the *C. J.* seems to express a dissatisfaction in declaring the law to be so settled. But when this order was delivered to the warden, he was bound to obey it, otherwise he would have been guilty of a trespass, and he actually was guilty of one, in detaining *Fakeney* till the Sunday. That the action of trespass will lie in this case is determined in 3 *Bulstr.* 96. *Withers v. Henley*. But, if the defendant is chargeable in an action at the suit of *Fakeney* for detaining him, he cannot be chargeable in an action at the suit of *Holland* for discharging him.

On the other side it was answered by *Adair Serjeant*, that as to the first set of cases which were cited by the council for the defendant, and which went to prove that an interest once granted cannot be revoked; admitting that position to be true, yet liberty is not the interest meant in those cases; all those cases relate merely to property. That as to the case that was cited from *Freem.* 213. and 2 *Mod.* 136. in the second set of cases, which struck the court as pressing rather hard upon the plaintiff, where it was held, that if a creditor had once taken his debtor out of prison, though for the express purpose of a compromise, he could not afterwards detain him; in that case it should be considered that there was an actual discharge, not as in this, a mere assent to a discharge. There is another distinction,

See *Fytche v. Bishop of London, House of Lords.*

tion,

tion, which was exceedingly material; and that is, between a party in prison under an execution, and under mesne process; execution is much more like an interest than a detention under mesne process; for the discharge of the party under mesne process by no means annihilates the debt; for the creditor, though he cannot arrest the debtor again, yet he may sue him for the debt, and then take him in execution.

An authority to a gaoler to discharge a prisoner on mesne process is merely a licence not coupled with an interest, therefore may be countermanded.

Lord *Loughborough*. — The point made at the trial was this, that a discharge once given, no matter by what means obtained, whether by fraud or fairly, was irrevocable. I did not leave it to the jury to inquire whether there had been any fraud used in obtaining the discharge, but summed up the evidence without adverting to that part of the case. I thought the counsel extremely judicious in not pressing upon that ground, as I was strongly of opinion that the plaintiff had been grossly imposed upon, and should most certainly have summed up to the jury with very strong observations. The case therefore now comes before the court, bearing as an admitted fact upon the face of it, that the plaintiff had been duped, and therefore it is for the defendant's counsel to contend that the original order of discharge was effectual, notwithstanding it was obtained by a fraud upon the plaintiff.

The defendant's counsel, after some hesitation, confessed, that if the case were put upon that ground, they should be unable to support it, and not choosing to let the whole go again to a jury, the rule was discharged.]

By the 1 Ann. st. 2. c. 6. it is enacted, " That if any person
 " committed or rendered to, or charged in the custody of the
 " marshal of the Queen's Bench for the time being, or to or in
 " the prison of the Fleet, either in execution, or upon mesne
 " process, or upon any contempt in not performing orders or
 " decrees (a) made by any of her majesty's courts at *Westmin-*
 " *ster*, and such person shall at any time after such commit-
 " ment, render, charge, or being in execution, and before he
 " shall have made payment or satisfaction to the plaintiff or
 " plaintiffs, creditor or creditors, or shall have cleared himself
 " of such contempt as he shall be charged with at the time of
 " such his commitment, render, charge, or being in execution
 " as aforesaid, make any escape from the custody of the mar-
 " shal of the Queen's Bench for the time being, or from the
 " prison of the said Queen's Bench, or from the prison of the
 " Fleet, or either of them, or shall go at large at any time after
 " the three-and-twentieth day of *January* in the year 1702,
 " it shall and may be lawful, upon oath thereof in writing, to be
 " made by one or more credible person or persons, before any
 " one of the judges of (b) that court where such action was en-
 " tered, or judgment and execution were obtained, or where
 " the

(a) [The escape warrant not grantable for any contempt, but not performing an order. *Hinchcliffe v. Payne*, 1 Str. 99.]

(b) If a person charged in execution in

“ the party was so committed or charged as aforesaid, to and
 “ for such judge before whom such oath shall be made as above-
 “ said, and such judge is hereby authorized and required from
 “ time to time to grant unto any person whatsoever, who shall
 “ demand the same, one or more warrant or warrants under his
 “ hand and seal, therein reciting the action or actions, execu-
 “ tion or executions, contempt or contempts, with which such
 “ person so escaping or going at large stood charged, or was
 “ committed, at the suit of any person or persons on whose be-
 “ half such warrant or warrants shall be demanded, at the time
 “ of such escape or going at large, (which warrant or warrants
 “ shall be in force in all places whatsoever within the kingdom
 “ of *England*, dominion of *Wales*, and town of *Berwick-upon-
 “ Tweed*;) directed to (a) all sheriffs, mayors, bailiffs, constables,
 “ headboroughs, and tithingmen, therein and thereby com-
 “ manding them and every of them in their respective counties,
 “ cities, towns, and precincts, to seize and (b) retake such per-
 “ son (c) so escaped or going at large; and such person so re-
 “ taken upon such warrant, forthwith to convey and commit to
 “ the common gaol of such county (d) where such person so
 “ escaped or going at large shall be retaken, there to remain
 “ without bail or mainprize, or being thence (e) upon any ac-
 “ count whatsoever delivered or removed until he shall have
 “ made full payment or satisfaction to the plaintiff or plaintiffs,
 “ creditor or creditors, in such action or actions, execution or
 “ executions, named, or until the judgment or judgments on
 “ which such execution or executions was or were sued out
 “ against such person shall be reversed or discharged by due
 “ course of law, or until judgment in such action or actions be
 “ given for such person or persons so committed as aforesaid, or
 “ until the contempt or contempts for which such person shall
 “ be committed be cleared and discharged,” &c.

the King's
 Bench be
 turned over
 to the Fleet,
 and he escape,
 either a judge
 of the King's
 Bench or Com-
 mon Pleas
 may grant an
 escape war-
 rant. Pasch.
 10 G. 1. The
 King and
 Dunbar. [And
 by 5 Ann. c. 9.
 § 2. the war-
 rant may be
 granted on an
 affidavit made
 in the country
 before a com-
 missioner, such
 affidavit being
 first duly filed].
 8 Mod. 240.
 ruled on mo-
 tion. (a) If
 one who is no
 officer, by vir-
 tue of the war-
 rant, seize a
 person escap-
 ing, and bring
 him before the
 sheriff, he can-
 not detain
 him; for, being
 illegally exe-
 cuted, it is the
 same thing as

if there had been no warrant at all. 6 Mod. 154. (b) [By 5 Ann. c. 9. § 3. escape warrants may be executed on a *Sunday*.] (c) If a person is taken upon an escape warrant at eight in the morning, and the same day obtains a day-rule, pursuant to a petition, which was not read in court till after eight, yet he shall be discharged; for as to this purpose there shall be no fraction of a day. Trin. 8 Geo. 1. *Wilkinson and Matthews*. 8 Mod. 80. (d) [By stat. 5 Ann. c. 9. § 1. persons taken by virtue of 1 Ann. c. 6. instead of being committed to the common gaol of the county where they are taken, are to be committed to the prison where the sheriff keeps prisoners for debt, from which, if they escape, the sheriff shall be answerable as in other cases of escape.] (e) Cannot be discharged upon bringing the money into court. 6 Mod. 21. — Cannot come out on a day-rule. 6 Mod. 63. — [The warrant shall be superseded, if the party was entitled to his discharge at the time he escaped. *Webb v. Thompson*, 1 Str. 401.]

(F) *Of the proper Remedy and Nature of the Action to be brought for an Escape.*

AT common law the plaintiff had no remedy against the sheriff for an escape, whether upon mesne process, or in execution, but by special action upon the case.

2 Inst. 382.
 Show. 176.
 2 Saund. 34.
 Hard. 30.

But

(a) This action being founded *in maleficio*, and also given by statute, is not within the statute of limitations of 21 Ja. 1. c. 16., which speaks of debts arising by lending or contract. Saund. 34. Jones and Pope, adjudged. Sid. 305. and Lev. 191. S. C. adjudged. (b) Extends to all gaolers and keepers of prisons, though infants, or feme covert. 2 Inst. 382.

Cro. Ja. 288. Also, the plaintiff, at his election, may maintain either an action upon the case, or debt, for an escape in execution.

Cro. Eliz. 767. [If he adopt the latter the jury *must* give him the whole sum, that is, the whole which he would have been entitled to have recovered against the prisoner, viz. the sum indorsed on the writ, and the legal fees of execution. Bonafous v. Walker, 2 T. R. 126. Hawkins v. Plomer, 2 Bl. Rep. 1048. Gabel v. Perchard, Anstr. 522. But see the words of Buller J. in 5 T. R. 40. Debt lies as well where the escape is negligent, as where it is voluntary. Stonehouse v. Mullins, 2 Str. 873.]

Whiting v. Sir George Reynell, Cro. Ja. 657. If there be judgment against baron and feme, and the feme only taken in execution, and suffered to escape, an action of debt lies against the marshal; for as the plaintiff may elect to take either the baron or feme in execution, so by his election he has made her a sole debtor within the statute of R. 2. and she only is imprisoned, although it was objected, that the sole and principal debtor did not escape; for the baron is the principal, and he remained subject to the execution.

Cro. Ja. 361. 533. 619. If a prisoner in custody upon a (b) *capias utlagatum* is suffered to escape, the plaintiff may either maintain an action *qui tam* against the sheriff, or bring an action of debt against him in his own right. Cro. Eliz. 877. 1 P. Wms. 685. S. P. adjudged. (b) So, an action on the case will lie for the escape of one taken upon a writ *de excommunicato capiendo*. Lutw. 123.

(c) Dyer, 278. An action of escape is not a local action, and therefore (c) if one escapes out of the Marshalsea, which is in *Surry*, the action against the marshal may be laid in *Middlesex*. b. adjudged, & vide W. Jon. 144. Sid. 364. S. C.

Hundred of Laress v. —, Fitzg. 296. || If the plaintiff, in an action against a hundred, is nonsuited, and judgment entered against him for the costs, upon which he is taken in execution, and the sheriff permits him to escape; the hundred may bring debt against the sheriff for the escape.

Doe v. Jones, 2 M. & S. 473. The nominal plaintiff in ejectment, in whose name the mesne profits have been recovered, may sue for an escape of the defendant in execution for such mesne profits. ||

[By 1 Ann. st. 2. c. 6. § 2. "If any person so retaken by warrant as aforesaid, shall at any time make any escape out of the gaol to which he shall be so conveyed or committed as aforesaid, the sheriff, in whose custody he was, shall be liable to answer for such escape, as in the case of any other escape."

By § 3. "It shall be lawful for any person or persons that shall be bail in any of her Majesty's courts of record at *Westminster*, for any such person that shall be retaken and conveyed to such gaol as aforesaid, by virtue of such warrant as aforesaid, to have and prosecute out of such of her Majesty's courts

" courts where he or they shall be bail, a writ directed to the
 " sheriff of the county, to the gaol whereof such prisoner so
 " retaken shall be committed and detained, commanding him to
 " detain and keep such prisoner in custody in discharge of his
 " bail; which writ, with an account whether he hath the said
 " prisoner in his custody, shall be returned by the said sheriff
 " into court, at a day therein to be mentioned; and the delivery
 " of every such writ to the sheriff, or his deputy, shall be
 " deemed and taken to be an effectual render of such prisoner to
 " all intents and purposes whatsoever in discharge of the said
 " bail; and in case such sheriff, his deputy, or other his infe-
 " rior officer, shall thereafter suffer the person or persons so
 " rendered in discharge of his, her or their bail to escape, they
 " and every of them so offending shall be liable to such action
 " and actions as the marshal of the Queen's Bench, or warden
 " of the Fleet prison, is or are liable to, for permitting any
 " person to escape out of his or their custody or prison, who
 " was committed to such custody or prison upon render in dis-
 " charge of his, her or their bail."

It is enacted by stat. 5 Ann. c. 9. § 4. " That if any person
 " or persons shall be in custody of any sheriff, or other officer,
 " either by virtue of the above stat. of 1 Ann. or of this pre-
 " sent act, or otherwise, for not performing any decree of the
 " high court of Chancery, or court of Exchequer, whereby any
 " sum of money is ordered or decreed to be paid, and shall af-
 " terwards make any escape from the said sheriff or other officer,
 " then and in such case the person and persons, their executors
 " or administrators, to whom the money was to be paid by the
 " said decree (a), shall have the same remedy against the said
 " sheriff, as if such person or persons so escaping had been
 " in custody upon an execution at law, and shall and may re-
 " cover the several sum and sums of money decreed to be paid
 " to him, her or them in and by such decree, against such
 " sheriff or other officer, together with his or their costs of suit,
 " in any action or actions of debt, or upon the case, to be
 " brought or commenced against such sheriff or other officer in
 " any of her Majesty's courts of record at *Westminster*, wherein
 " no protection or wager of law shall be admitted, or any more
 " than one imparlance."

(a) If in a suit
 by husband
 and wife, it
 appear by the
 decree that
 the wife is in-
 terested in the
 case, she
 ought to join
 with her hus-
 band in the
 action, not-
 withstanding
 the order

should appoint the money to be paid only to the husband. *Huggins v. Durham*, 2 Str. 726.

By 5 G. 2. c. 30. § 18. a penalty of 500*l.* is inflicted on gaolers
 suffering bankrupts to escape.]

(G) Of the Manner of laying the Action.

IN this action it is not necessary to set forth all the (b) formal-
 ities required by law in other cases.

Cro. Eliz. 877.

(b) *Vide*

2 Show. 424.

Carth. 148.

Gold and

Therefore if, upon a judgment obtained by the testator, the
 executor brings a *scire facias*, and has judgment, whereupon a

Strode.
3 Mod. 324.
S. C. Cro.
Eliz. 877. S. P.
adjudged.

capias ad satisfaciendum issues, and *B.* is arrested, and suffered to escape; the plaintiff in an action against the sheriff for this escape may declare briefly upon the judgment in the *scire facias*, without shewing the gradual proceedings at length, as is usually done in an action of debt upon a judgment.

Saund. 37, 38.
Jones and
Pope. Lev.
191. and 1 Sid.
306. S. C. but
the plaintiff
had leave to
discontinue.

But, if the plaintiff declares, that he sued out a writ of execution against *J. S.* without setting forth any judgment, and that the defendant suffered him to escape; this is an incurable fault; for by this means the defendant lost the benefit of pleading *nil tiel record*, (a) which he might do, if the plaintiff had set forth the judgment.

(a) 8 Co. 142. Drury's case.

Lutw. 893.
Glover and
Kendal, ad-
judged.
Comb. 114.
S. C. adjudged.

If *A.* recovers as executor against *B.* and has him in execution, and the sheriff suffers him to escape, the action must be brought as executor in the (b) *detinet* only, and not in the *debet* and *detinet*.

[But see Bonafous v. Walker, 2 T. R. 126. contra.] (b) For this vide 5 Co. 31. Hargrave's case. Cro. Ja. 545. Hob. 264. 3 Bulst. 112. Lan. 79. Savil, 130.

Waites v.
Briggs, 2 Salk.
565. 1 Ld.
Raym. 35.
S. C. 5 Mod. 8.
S. C. & vide
3 Lev. 393.

If the plaintiff declares, that the prisoner was committed, and escaped, but does not say *prout patet per recordum*; yet, upon a general demurrer, this shall be good; for the gist of the action was the escape, and the commitment only inducement.

Norden v. Fox. Vide infra Turner v. Eyles.

Sid. 5. Roberts
and Herbert,
adjudged.
(b) As, where a
man assigns,
for breach of
a condition,
that he was
turned out of
his house by two,
and the jury find
that it was done
by one only. Cro.
Ja. 475. Hingen
and Pain, adjudged.

If in escape the plaintiff declares, that he had *J. S.* and his wife in execution, and that the defendant suffered them to escape, and the jury find specially, that the husband only was taken in execution (it being for a debt due from the wife before coverture), and that he escaped; this is sufficient, and the plaintiff shall have judgment; (b) for the substance of the issue is found, though not pursuant to the declaration.

Cro. Ja. 380.
King v. And-
rews, ad-
judged. Sid. 5.
S. C. cited.

So, in an action on the case for the escape of *A.* where the jury found that *A.* was taken by *J. S.* the former sheriff, and not by the defendant, the present sheriff; but finding that he was legally in his custody, and that he suffered him to escape, the plaintiff had judgment.

Oates v.
Machen, 1 Str.
595. at Nisi
Prius, before
Fortescue and
Raymond Jus-
tices.

|| So, where in debt for an escape against the marshal, it was alleged, that the prisoner was surrendered to him at the chief justice's chambers in the parish of *St. Bride*, whereas it appeared in evidence, that it was in the parish of *St. Dunstan*; it was holden to be well enough, this being debt, and the surrender being the only thing material; and that it differed from trespass, where every part of the declaration was descriptive.||

2 Lev. 85.
Gunter and
Cleyton. [4 T.
R. 611. Alex-

The plaintiff declared, that whereas he had good cause of action against *A.* and sued out a *latitat* against him; the defendant being sheriff arrested him, and suffered him to escape; upon

upon trial at *Nisi Prius* the plaintiff was nonsuit, because he could prove no cause of action against *A.*; but *Hale C. J.* said, that if the plaintiff had declared of a debt of 40s. and upon evidence could prove but 30s. it had been sufficient; but the book adds a *quare*, it being a special action upon the case.

[In debt against the sheriff for an escape, the indorsement of *non est inventus* upon the *capias ad satisfaciendum* is sufficient evidence of its having been delivered to him. So, the bailiff's name indorsed on the writ is sufficient evidence that he was authorized by the sheriff to arrest, without proving the warrant.]

¶ The under-sheriff's confession of an escape has been admitted as evidence of the fact in an action against the sheriff; because the under-sheriff gives the sheriff a bond to save him harmless, and therefore such confession goes in effect to charge himself.

upon this case in *Drake v. Sykes*, 7 T. R. 113.

If a prisoner in the custody of the sheriff, is brought up by *habeas corpus* before a judge and committed to the custody of the marshal of the King's Bench, who suffers him to escape, in an action against the marshal for such escape, it must be averred in the declaration, that the commitment was of record, otherwise it will be bad on a special demurrer; for the prisoner is not in point of law in the marshal's custody, until the commitment is entered of record.

cution: if the former, its authority has been shaken by the case of *Wigley v. Jones*, *infra*.

So, in debt for an escape, where the party, who had been taken in execution by the sheriff, was afterwards brought up by *habeas corpus* before a judge of the King's Bench, the declaration alleged, that the prisoner had been so brought up before the said judge, and by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon, now remaining in the said court, more fully appears." It was holden, that the production of the writ of *habeas corpus* with the commitment of the judge indorsed thereon, which appeared to have been brought from the office of the marshal, but had not been filed of record in the court, was not sufficient to support this allegation; and that the above allegation (even if unnecessary) must be proved as laid.

But, where an action was brought for an escape after a commitment on a *habeas corpus* of a person arrested on *mesne process*; it was holden in that case that "the *prout patet per recordum* remaining in court" might either be rejected as surplusage, on the ground of such commitments not being of record, nor capable of becoming so; or, if considered as *quasi* of record, the allegation was sufficiently proved by the production of the writ with the *committitur* annexed by the clerk of the papers of the King's Bench prison, with whom, as servant of the marshal, such papers are usually deposited.¶

By the 8 & 9 W. 3. c. 27. § 12. reciting, that the way of proceeding

ander v. Macauley, S. P.]

Blatch v. Archer, Cowp. 63. *M'Neil v. Archer*, 1 Espin. N. P. C. 263.

Yabesley v. Doble, 1 Ld. Raym. 190. But see the remarks of *Lawrence J.*

Wightman v. Mullens, 2 Str. 1226. It does not appear from the report, whether the commitment in this case was upon *mesne process* or in execution.

Turner v. Eyles, 3 B. & P. 456.

Wigley v. Jones, 5 East, 440.

proceeding against the warden of the Fleet prison, by bill in the courts of Common Pleas and Exchequer at *Westminster*, is found to be very dilatory; it is enacted, "That it shall and may be lawful to and for any person or persons, having cause of action against the warden of the Fleet prison, upon bill filed in the said courts of Common Pleas or Exchequer against the said warden, and a rule being given to plead thereto, to be out eight days at most after filing such bill, to sign judgment against the said warden of the Fleet, unless he plead to the said bill within three days after such rule is out."

(H) Of the Party's Defence who suffered the Escape:
And herein of pleading fresh Suit.

2 E. 6. 66. 15. IF the prison takes fire, (a) by means whereof the prisoners
Ro. Abr. 808. escape, this shall excuse the sheriff, and he may plead it.
(a) This must mean fire by lightning; for *Rolle* (and *Dyer*, from whom he cites) say "fire which is the act of God." And Lord *Loughborough*, delivering the opinion of the court in *Alseip v. Eyles*, 2 H. Bl. 113. says, that "as the law stands, nothing but the act of God or the king's enemies will be an excuse."

4 Co. 84. So, if the prison is broken by the king's enemies, this shall
Ro. Abr. 808. excuse the sheriff, for he can have no remedy over against them.

4 Co. 84. But, if the prison was broken by rebels and traitors, the king's
Ro. Abr. 808. subjects, this shall not excuse him, for he may have his remedy
[*Elliott v. Duke of Norfolk*, 4 T. R. 789. *O'Neil v. Marson*, 5 Burr. 2812.] over against them.

White v. Jones, 5 East, 292. || Where *B.* in custody at the suit of *A.* in a joint action against *B.* and *C.* justified bail in an action entitled by mistake against *B.* only, and a rule so entitled was served on the marshal of the King's Bench, who thereupon discharged *B.* out of custody; the marshal was holden liable in an action for an escape. ||

Cro. Ja. 657. If a prisoner in execution escape without the assent of the
Jon. 144. sheriff, &c. and he make fresh pursuit and retake him (b) before
Ro. Abr. 808. any action brought against him, this shall excuse the sheriff.
[And a voluntary return of the prisoner, before action brought, is equal to a retaking upon fresh pursuit. *Bonafous v. Walker*, 2 T. R. 126.] (b) But, if he retake him after the action commenced against him, this shall not excuse him; nor can it be pleaded to an action that was well attached before. Ro. Abr. 808, 809. Jon. 145. Cro. Ja. 657. *Harvey and Reynell*, adjudged. [2 Str. 873. *Stonehouse v. Mullins*, S. P.]

Ro. Abr. 809. So, the sheriff may plead, that the prisoner escaped the six-
Dalt. Sheriff, 562. teenth day of *December*, and that he made fresh suit, and retook him, the seventeenth day of *December*, and retained him in execution; for it is sufficient if he did all he could, though he lost sight of him in the night, or otherwise.

Ro. Abr. 809. So, if a prisoner escapes, and several days after, but as soon
See 3 Co. 52. as the sheriff has notice of it, he makes fresh suit, and retakes
Vide Ent. 195. him before any action brought, this shall excuse him.
198.

Vent. 211. 217. If in debt upon an escape the plaintiff sets forth in his declara-
Sir Ralph tion a voluntary escape, the defendant may plead that he took
Bovy's case. him

him upon fresh pursuit, without traversing the voluntary escape; for it was impertinent for the plaintiff to allege it, and no ways necessary to his action. [2 T. R. 126. Bonafous v. Walker, S. P. Under a count for a voluntary escape, the plaintiff may give evidence of a negligent escape. *Ibid.*]

It was formerly held that the sheriff, &c. might give fresh pursuit in evidence, and need not have pleaded it. *Vide Mod. 116. Sid. 13.*

But now by the 8 & 9 W. 3. c. 27. § 6. it is enacted, "That no retaking on fresh pursuit shall be given in evidence on the trial of any issue in any action of escape against the marshal or warden, or their respective deputy or deputies, or against any other keeper or keepers of any other prison or prisons, unless the same be specially pleaded; nor shall any special plea be taken, received or allowed, unless oath be first made in writing (a) by the marshal or warden, or their respective deputy or deputies, or by such other keeper or keepers of any other prison or prisons against whom such action shall be brought, and filed in the proper office of the respective courts, that the prisoner for whose escape such action is brought did, without his consent, privity, or knowledge, make such escape; and if such affidavit shall at any time afterwards appear to be false, and the marshal or warden, or other keeper or keepers of any other prison or prisons, shall be convicted thereof by due course of law, such marshal or warden, or other keeper or keepers of any other prison or prisons, shall forfeit the sum of 500*l.*" (a) An Affidavit that the escape mentioned in the declaration (if any such escape there was) happened without the defendant's knowledge, was allowed to be sufficient; for, if the defendant knows nothing of any escape, he is not to be bound to admit by his affidavit that an escape has actually happened. *West v. Eyles*, 2 Bl. Rep. 1059.]

If an action of escape be brought against the sheriff, and the judgment upon which it is found be reversed before such time as the defendant is forced to plead, he may plead (b) *nul tiel record*; for (c) collateral things executory are as if no judgment had ever been, when reversed. 8 Co. 142. Dalt. Sheriff, 563. (b) In debt for an escape of one committed on a *capias utlagatum*, the sheriff may plead *nul tiel record*. Hob. 209. Brownl. 51. (c) But, if in debt, upon escape, the plaintiff recovers, and hath execution, and after the first judgment is reversed, yet the judgment for the escape remains in force. 8 Co. 142. b. 3 Mod. 325. S. C. cited.

If a prisoner taken on a *capias ad satisfaciendum* pays the debt to the marshal for the use of the plaintiff in the original action, and is thereupon discharged, yet he cannot plead it to an action brought against him for the escape; for the marshal had no authority to receive the money, the words of the writ being *quod capias, &c. et eum salvo custodias ita quod habeas corpus ejus coram justiciariis*. *tiel jour ad satisfaciendum* the plaintiff. Cro. Eliz. 404. Mod. 194. 2 Jon. 97. Lutw. 587. Ld. Rayn. 399. Slackford v. Austen, 14 East, 468. S. P.

ESTATE IN FEE-SIMPLE.

(a) It was a common practice among the Northern nations that invaded the Roman empire, for the lords, who held great districts, to give lands to such persons as had behaved themselves well in the wars, sometimes for life only; and when they married their daughters to any of those soldiers who were usually their vassals or tenants, they gave the lands to them and the issue of that marriage, which brought in the notion of succession amongst us. Dig. lib. 1. tit. 1. How from this notion of succession a fee-simple arose, by letting in all heirs, whether lineal or collateral, of the exclusion of the ascending line, bastards and the half-blood, and why the male line was preferred, *vide* title *Descents*, *ante*. My Lord Coke divides, *fee*, which he says signifies the same with inheritance, into fee-simple or absolute, conditional and qualified, or base. Co. Lit. 21. b. And this, which is the most ample estate of inheritance, may be in things (b) *real, personal, or mixed*; real, as in lands or tenements; personal, as when an annuity is granted to one and his heirs; mixed, as when an earl is created of such a county. Co. Lit. 1. b. 2. a.

In fee-simple we shall consider,

- (A) Who may purchase or inherit such Estate.
- (B) The Import of the Word *Heir* that creates the Estate.

- 1. *When it is a Word of Limitation.*
 - 2. *When it is a Word of Purchase.*
-

(A) Who may purchase or inherit such Estate.

Vau. 227. 291. 7 Co. 16, 17, 18. Dyer, 2. But for this *vide* head of *Aliens*. AN alien cannot purchase any lands in *England*; the reason is, because every person is presumed to have a natural and necessary allegiance to that society that first protected and preserved him; and therefore he cannot pay any allegiance to any other society, unless he be afterwards received into it.

(c) Co. Litt. 8. a. of such crimes there were many by the ancient feudal law, for which *vide* Digest. Feudorum, lib. 2. All persons attainted of treason or felony are incapable of purchasing. Felony, by the ancient feudal law, was a (c) crime for which a vassal forfeited his feud to the lord, because he broke his oath of fealty in the highest manner: his body with which he had engaged to serve the lord is forfeited to the king; and his blood is said to be corrupted, because no man can represent his person, that person itself being forfeited by the law, and the note of infamy resting upon his family; so that no representative of

of his can be received to do any feudal service: such tenant, therefore, dying without heirs, the land is in the lord by forfeiture. But, if the tenant commits treason, the lands are forfeited to the king, because there is an exception in the oath of fealty that saves his allegiance to the king; so that if he forfeits his allegiance, even those lands held of another lord are forfeited to the king, for the lord himself cannot give out lands, but upon that condition, as appears by the reservation in the oath.

tit. 23, 24.
Vigellius, 242.
350. Spelm.
Gloss. 214,
215. Co.
Litt. 64.

If a man be attainted of felony, and after purchase land, and die, the king shall have it by his prerogative, and not the lord of the fee; because his person being forfeited to the king, he cannot purchase but for the king.

Co. Litt. 2. b.

If there be grandfather, father, and son, and the father be attainted, the son cannot inherit the grandfather, because the father cannot be represented; but, if the father be attainted, two brothers may inherit each other, because there is no disability in the one to be represented, or in the other to represent. If the father be attainted, the son may inherit the mother. If the eldest son be attainted, and the father die in the lifetime of such eldest son, the younger cannot inherit, because there is the line of the elder brother in being before him; but, if the eldest son die in the lifetime of his father, without issue, the younger brother shall inherit; but if he leave issue, neither the issue nor younger brother can inherit.

Noy, 158 to
170. Co. Litt.
8. 4 Leon
Mo. 569.
Dyer, 48.

If the father be attainted and die during the life of the grandfather, yet the son shall not inherit the grandfather, because he must represent his father, who cannot be represented; but, if the grandfather be seised in tail, and the father be attainted of treason since the 26 H. 8. c. 13. and die in the lifetime of the grandfather, the son shall inherit the grandfather; for the son is heir *per formam doni* to the tail, which is originally not forfeitable, and by that statute the father only forfeits the lands and right that he hath in him.

Co. Litt. 8.
2 Co. 10.
Dowtie's case.

If a man attainted be pardoned by act of parliament, he is totally restored and inheritable to all persons; but, if he be pardoned by charter, he may thenceforth purchase lands, but cannot inherit his former relations; for the king's charter cannot alter the law, or take away the right of others, or restore the relation that was lost.

Co. Litt. 8.
But, if a man
be attainted,
and after par-
doned by
charter, the
children born
before such

pardon shall not inherit; but if they fail, the children born after such pardon may inherit him, for the pardon makes him capable of new relations as well as of new purchases, though all the old legal benefits and relations are lost. Noy, 170.

All customary estates are within this rule, unless there be some particular custom to the contrary, as in gavelkind, because the person is *civiliter mortuus* by the attainder, and therefore is disabled to have or hold any estate, or to have any property in any thing: and therefore if a person be seised in fee of a copyhold, and be attainted of treason or felony, the copyhold is in the lord without any presentment of the homage, because it is against the nature of a court-baron to inquire of criminal matters or of-

Pollex. 617.
2 Keb. 451.
456. 2 Vent.
38, 39.
2 Brown. 118.
vide Co. Cop.
§ 58. cont.

Leon. 1.
Pollex. 615
to 621.

fences against the king, and such homage is at the will of the lord, and often influenced by him: but, if a copyholder be convicted of felony, and presented by the homage, by special custom, the estate may be forfeited to the lord. But this is only by the special custom, since the copyholder is not disabled by the conviction to hold the estate, as he is if he were attainted; and therefore, since it is by the custom only that such forfeiture accrues, it must be in the manner in which the custom settled it, which is by presentment of the homage. But, if a copyhold is granted for life, and by another copy the reversion is granted to another, *habendum* after the death of the first copyholder, or surrender, forfeiture, or other determination of the first estate, the first copyholder commits murder, and is thereof attainted, and the king pardons the murder and the attainder, and all forfeitures thereby; in this case, he in the reversion is entitled to the estate; for the king cannot have it for the baseness of the tenure, since he cannot be tenant at will to any person; and the lord cannot have it, because he cannot be tenant to himself; therefore the particular estate of tenant for life being extinguished, the reversion immediately commences.

Co Litt. 3. b.;
but for this
vide tit.
Bastardy.

A bastard cannot inherit; but, if he hath gotten a name by reputation, he may purchase by it, for all surnames were originally acquired by reputation.

Notwithstanding the charters and immunities granted to the Jews, yet their whole estates were taxable at the pleasure of the king, and might at any time be seized by him.

About the
18 E. 1. when
their usuries
and extortions
were very

As to Jews, they were translated from *Roan*, by *William* the Conqueror, *ob numeratum pretium*, and were allowed by several kings following the Conqueror, because they dealt with one another chiefly in money, and so drew a great deal of money into the kingdom, which they let out to Christians on usury, and were taxable to the king at his pleasure. *Richard* the First erected a court where all their real and personal estates were registered; which, all, upon the death of any Jew, came to the king, but was redeemable by his children, paying their fine, and all the children equally inherited; the wives sued for dower in this court, and could not sue at common law for it; and therefore if a Jew born in *England* took to wife a Jew also born in *England*, if the husband was converted to the Christian faith, and purchased lands and enfeoffed another and died, the wife could not demand dower at common law against a Christian.

grievous to the people, they were banished by proclamation, and their estates seized to the king, and a statute made against their taking usury in this land, for ever afterwards; but now all the records touching their courts, their immunities, and the power of the crown over them, are lost and obsolete, so that those that are born here seem inheritable at this day. But *quære* how far those old laws, of which there are footsteps in history, may be revived upon them? Hollingshead, vol. 3. p. 15. Co Litt. 31, 32. 2 Inst. 506, 507. *Vide* Molloy, 397 to 410. a good account of the Jews. — [Jews, it seems, were not incapacitated from taking gifts or land, unless there was an express clause, usual in former times, in the original charter, forbidding an alienation to them. Braet. 13.]

Vide tit.
Charitable
Uses and Mortmain.

Religious persons are prohibited to purchase in mortmain.

Co Litt. 2.

Villeins and bondmen have power to purchase lands, but cannot retain them against their lords.

As to persons who are naturally incapable to purchase or inherit, a monster not having human shape cannot purchase or inherit: but an hermaphrodite shall inherit or purchase *secundum prævalentiam sexûs incalescentis*. One born deaf and dumb may inherit; so may any born deaf, dumb, and blind, because it is for their advantage; but they cannot contract, because they cannot understand the signs of contracting. An infant, an idiot, and a person of *non sane memory* may inherit, because the law, in compassion to their natural infirmities, presumes them capable of property. So also an infant, or a person of *non sane memory* may purchase, because it is intended for his benefit; and the freehold is in him till he disagree thereto, because an agreement is presumed, it being for his benefit, and because the freehold cannot be in the grantor, contrary to his own act; nor can it be in abeyance, for then a stranger would not know against whom to demand his right: if at full age, or after recovery of his memory he agree thereto, he cannot avoid it; but, if he die during minority or lunacy, the heir may avoid it; for the heir shall not be subject to the contracts of persons who wanted capacity to contract. So, if after his memory recovered, the lunatick or person *non compos* die without agreement to the purchase, his heir may avoid it.

Co. Litt. 8.

Inst. 2.

2 Vent. 203,

204. *Vide tit.**Infancy and**Age, and**Idiots, &c.*

A feme covert is capable of purchasing; for such an act does not make the property of the husband liable to any disadvantage, nor does it suppose a separate will or power of contracting in the wife; but here the will of the wife is supposed the mind of the husband, since no man is supposed not to assent to that which is for his benefit: but in this case the husband may disagree, and it shall avoid the purchase; for since husband and wife, according to the institution of marriage, are reckoned one person, they can have but one will, and that must be seated in the husband, as fittest to govern; therefore the supreme direction of all affairs in his family must belong to him: but, if he neither agrees nor disagrees, the purchase is good, for his conduct shall be esteemed a tacit consent, since it is to turn to his advantage. But in this case, though the husband should agree to the purchase, yet after his death she may waive it; for having no will of her own at the time of the purchase, she is not indispensably bound by the contract; therefore if she does not, when under her own management and will, by some act express her agreement to such purchase, her heirs shall have the privilege of departing from it. introduced as well for the greater ornament and grandeur of the monarchy, by enabling the queen to support and keep a court of her own, as to encourage princes to court the alliance of our princes by marriages attended with so much ease and dignity.

Inst. 3. 2. But the queen consort, as she is a woman of greater dignity than any other of her sex in the kingdom, so she hath greater privileges than any of them, for she is considered by the law as a person exempt from the king, and hath ability to purchase and grant without him; which economy seems to be

(B) The Import of the Word *Heir* that creates the Estate.

1. When it is a Word of Limitation.

Co. Litt. 9.

IF land be given to *J. S.* and his heirs, *J. S.* can claim it, because he is particularly named, and whoever can make himself heir to *J. S.*, that is, can support the character of a legal representative to *J. S.* may claim it also by the words of the gift. But, if land be granted to *J. S.* for ever, no person can stand in his place after his death, or claim any interest, because the party that is next of kin by the law cannot bring himself within the words of the conveyance.

Co. Litt. 9.

It is therefore a general rule, that nothing but the word *heir* will create a fee. But this general rule has the following exceptions:

For when the act of disposal relates to another thing,

If the father enfeoff the son, to hold to him and his heirs, and the son enfeoff the father as fully as the father enfeoffed him; this conveyance passeth a fee to the father. that thing becomes in a manner part of the disposition, for in such cases the mind is carried to the notion of an heir as truly and surely as if the word had been in the instrument itself; so that there is a great difference between this case and the case where other words are substituted instead of the word *heir*; for scarce any other word can express all the notions that make up the idea of an heir; but where there is a relation to a legal heir, it is the same thing as if it were expressed in the conveyance itself, because the word is but to put us in mind of the thing which is done already by the relation; for as we say not only that is certain which is so in itself; but that, also, which by some other standard is reducible to a certainty; so that not only that conveyance hath force, which hath words in it to answer the intent of the party, but that also which borrows strength from any other thing to answer the same design; and this will appear plain by the following instances:

Co. Litt. 9.

By a fine come *ceo*, &c. a fee-simple will pass without the word *heirs*, because it hath relation to a precedent feoffment, which is supposed to pass the fee.

Co. Litt. 9.

If the lord releases all his right to the tenant, the seignior is extinct without the word *heirs*; for this instrument is to discharge the estate of the tenant, and therefore hath a necessary relation to the estate, which the lord at first created, and, consequently, it refers to those words that in the original of the estate gave him a fee-simple.

Co. Litt. 9.

If there be two coparceners, and one of them release all her right to the other, without the word *heirs*, this passes a fee; for each coparcener till partition is seised of the whole estate in fee, though each of them hath right or legal demand to the fee of a moiety only: when, therefore, one releases all her right, it hath a necessary relation to the estate whereof the other is seised, and to which she hath a right, which is the fee.

Co. Litt. 9.
200. b.

If there be two jointenants, and one release to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee which they jointly took, and are possessed of by force of the first conveyance. But tenants in common cannot release

to

to each other, for a release supposeth the party to have the thing in demand; but tenants in common have several distinct freeholds, which one cannot transfer to the other, without the solemnity of livery.

A common recovery is in nature of an action commenced, and judgment upon it, and therefore passeth a fee without the word *heirs*; for it hath relation to a precedent right in the recoveror, which must be supposed a right to the fee. Co. Litt. 9.

If one coparcener grants a rent to another for owelty of partition, the grant is good without the word *heirs*; for, coming in recompence of an inheritance, it has a plain relation to the inheritance departed with, as if the word *heirs* had been in the gift. Co. Litt. 9.

A restitution to a person attainted and pardoned will not pass a fee without the word *heirs*; for, since the party forfeited the estate, the restitution is in nature of a *new* grant; and here are no words that create a necessary relation to that fee, which the person formerly attainted had, for he may be restored to his estate during his own life. It is a new grant in nature of a restitution.

Where a man is called to parliament by writ, the inheritance is in him without the word *heirs*, because the writ is in nature of a citation to appear at the court of parliament, and the heir cannot be cited to appear, and therefore there is no mention made of him. Inst. 9. b. [But the blood of the person summoned is not ennobled, till he takes

his seat in parliament. Id. 160.]

There are some species of fees that are expressed without the word *heirs*, for the words whereby they are created signify inheritance, as the word *frankmarriage* signifies an inheritance given in consideration of marriage, which, being for the peopling of the country, had several privileges annexed to it. So, *frankalmoigne* signifies an inheritance devoted to God, which was mightily favoured by the superstition of ancient times. So, if a feoffment or grant be made by deed to a mayor and commonalty, or any other corporation aggregate of many persons capable to purchase, they have a fee-simple without the word *successors*, because in judgment of law they never die (a). For the same reason, if lands are given to the king by deed enrolled without the words *successors* or *heirs*, a fee-simple passeth (b). Co. Litt. 9. b.

(a) [A fee will pass to a sole corporation without words of limitation or succession, when the grant is made to the corporation by its corporate or collective name. Thus a gift *ecclesie de A.* will pass a fee, though the deed of gift contain no words of succession. 11 H. 4. 84. b. 1 Atk. 437. (b) That is, if the king takes them in his royal politick capacity, *jure coronæ*.]

There are likewise particular kinds of laws within the kingdom, that allow of the transferring of inheritances without the word *heirs*, as the law of the forest, which dependeth on the mere pleasure of the king, and not on the solemnities and forms of a contract; and therefore, if the king granted an assart at a justice-seat, *habend. & tenend. sibi in perpetuum*, the party had a fee without the word *heirs*, inasmuch as the king had signified his Co. Litt. 10. a. Co. Litt. 7.

his pleasure, that the party should have the privilege of tillage for ever.

Co.Lit. 9. But
for this vide
tit. *Devises*.

In wills and testaments, where the mind of the party appears to transfer a fee; for the mind of dying persons delivered in haste ought to receive a benign interpretation.

2. *When it is a Word of Purchase.*

Litt. § 578.
2 Ro. Abr. 415.
417. Co. 104.

The first rule to be observed is this, that where the ancestor takes an estate for life, and a limitation is afterwards made to his right heirs, there, the ancestor has the reversion executed in himself, and the right heirs are not purchasers; as, if a lease for life be made to *A.*, remainder to *B.*, remainder to the right heirs of *A.*, such remainder is executed in *A.* and he may grant it over; but, if a lease for years be made to *A.*, remainder to the right heirs of *A.*, this is a contingent remainder to the right heirs of *A.*, and *A.* himself takes nothing by such limitation. The reason of the difference is this; in the first case *A.* having an estate for life is *feoffatus* within the statute *quia emptores, &c.*, and, consequently, capable of performing the feudal services; and then to make the right heir a purchaser would be to suspend the services of the feud during the life of *A.* who is capable of performing them; which would apparently tend to the weakening of the tenure and state of the kingdom; and therefore such interpretation ought to be made as best supports the tenure, when the words will bear both senses. For if, after such limitation to the right heirs of tenant for life, he still continued but barely tenant for life, he would not be in the homage of the lord, nor would he be obliged to venture his life in the wars for such estate; and he in remainder would not be obliged to do the feudal services, because, during the life of the tenant for life he has no interest in the land; for his remainder cannot execute during the particular estate, and, consequently, he is not obliged to do the services of the feud; and if such remainder was to vest in the right heirs as purchasers, it could not vest during the life of tenant for life, *quia non est hæres viventis*; and then by such construction the services of the feud would be neglected during the life of *A.*, for there would be no one to perform them. But in the last case you cannot vest the remainder in the lessee for years, for he is not *feoffatus* within the statute; for the person that properly takes by the feoffment is the freeholder, and then, consequently, although you should construe a limitation to such right heirs a remainder vested in the lessee for years; yet he, having not the immediate freehold in him, would not be obliged to do the feudal services till the intermediate remainder was spent; and therefore the remainder to the right heirs is not immediately vested in the lessee for years, because the heir is the first that can have the freehold as feudal tenant to the lord, and therefore by the words of the donation must be the first purchaser of such remainder. And though

in the first case they admit such limitation to be a remainder executed for publick convenience, viz. that the feudal services, if possible, may be answered; yet it would be ridiculous to admit such construction in the last case, since it would not make a feudal tenant to answer the services; and to run counter to the tenor of a man's grant, without a benefit to any body, would be most absurd; for such construction would not make a feudal tenant, because the lessee for years would not hold of the lord, nor could the lord avow upon him.

But, if a feoffment be made to the use of *A.* and *B.* during their joint lives, and after the death of either of them, to the use of *C.* for life, and after to the heir of the body of *B.*, though *B.* hath an estate of freehold, yet the remainder limited to the heirs of his body does not vest, but is in abeyance; because by this limitation the estate of freehold may determine in *B.* during the continuance of his life; and since *B.* is not let into the estate during his whole life, his heir cannot take as representative of him, for such representative must be of an estate of which *B.* was seised; and since by the intention of this conveyance the feoffor hath not limited it in such a manner, that *B.* in all events should die seised of the estate, it is plain he designs only a contingent benefit to the heirs of the body of *B.* as original purchasers, and not by derivation from him.

If a lease for life be made to *A.*, remainder to the right heirs of *B.*, this is a good contingent remainder if livery be made, because such act of notoriety delivers over the freehold to *A.* at the time it is made, and thereby creates a tenant, who is *seffutus* within the statute to hold of the lord, who is capable of doing the feudal services, except homage, and on whom the lord may avow: and by this construction there is no inconvenience, or suspension of all the feudal services; for if *A.* should die during the life of *B.*, the contingent remainder would become void, because there would be no feudal tenant to attend the services; for the right heir could not take it during the life of *B.*, and then the land would return to the donor, who would be again tenant to answer the services.

But, if *A.* makes a lease for life, or a gift in tail, remainder to his right heirs; this is a void limitation in its original creation; for it cannot vest immediately any more than in the former case, *quia non est hæres viventis*; and to construe it a contingent remainder would be to suspend the services of the feud to no purpose; for it is not possible that it can vest during the life of the grantor, for so long as he lives he can have no representative or heirs, and therefore not like the former case, which may possibly vest the minute after the grant is made, or at least during the life of the grantor. Besides, that in this case, where the feoffor has not parted with the whole estate out of him, the feoffee does not hold of the lord within the statute *quia emptores, &c.** and to construe this limitation to the right heirs a parting with the whole estate, would be an absurd construction, because the ancestor, in case he outlives the particular estate, must be in of his

2 Ro. Abr. 418.

Ro. Abr. 418.

And. 3. Co.
Litt. 20. b.
Dyer, 156.
Ro. Abr. 827.
2 Ro. Abr. 415.
Leon. 182.
Fenwick v.
Mitford.
Moore, 284.

* See tit.
*Remainder
and Reversion.*

his old reversion, since he cannot have an heir during his life; and the ancestor cannot be supposed to design the heir should take as a purchaser, since it were an absurd intention, that that estate, which would of course descend to him, should vest in him in the same manner as a purchaser; and, by consequence, since there is no alteration by the conveyance from the course in which the estate would have descended, it must be a void limitation.

ESTATE IN TAIL.

See this statute expounded, 2 Inst. 333. Fee-tail was originally termed the

feudum novum, in opposition to fee-simple absolute, or the *feudum antiquum*, and went only to the descendants, either male or female, according to the words and limitation of the feudal donation, and thence came to be distinguished into *feudum masculinum* and *femininum*.

Co. Litt. 19. a.

If lands were given to a man and the heirs male of his body, the issue female were not inheritable, because the feudal donation expressing particularly what heirs of the donee were to inherit, no heir, though of the body of such feudatory, could inherit, that did not come under the words and limitation of the donation.

Co. Litt. 19. a.
7 Co. 35. a.

(a) For the collateral heirs were excluded. Ro. Abr. 341.

And if the donee had issue two sons, and died, and the eldest died leaving a daughter, the youngest son came into the succession of the feud, and excluded the daughter; and if there had been no son, the feud (a) reverted to the donor; for the express words of the first donation, which regulated all subsequent descents, excluded all females from inheriting such feud. So, *e contra*, if the feud had been given to a man and the heirs female of his body, the descent was to be conveyed to the females only, exclusive of all males, according to the words of the first donation.

Co. Litt. 13. a.

(b) And therefore this at this day is a fee-simple. Jon. 105.

But, if the limitation of the feud had been to a man and his heirs male, such donation did not exclude the females, but let them and (b) all collateral heirs in, because such donation, not limiting the feud to the descendants of any body, could not be good as a *feudum novum*; and if it were construed a *feudum antiquum*, the course of descent cannot be altered by any man's private fancy; and since it appeared by the words of the donation, that the donor intended an estate of inheritance, his words were to be taken most strongly against himself, and should pass the

the most absolute estate of inheritance, which is a fee-simple, to which not only his lineal heirs, but also his collateral heirs, are inheritable.

The power of alienation was not absolute in the *feudum novum*, because such power might have been employed to disappoint the lord of his reverter; and yet they did not absolutely take away from such feudatories the power of alienation, because that would have created a perpetuity, which was against the original policy of the *English* law. To come therefore to a temper between these extremes, the donee was not allowed to alien till issue had, because till then he had not a descendible estate in him, and therefore could not transfer a descendible estate to others; and if he should have been allowed to have aliened whether he had issue or not, such alienations would have disappointed the limitations and restrictions in the gift, which brought it back to the lord on failure of issue; and therefore they construed the words of the feudal donation not only as a limitation but condition, which the feudatory was obliged to perform before he had an absolute power over the estate; for such donations were generally made for the propagation of families, and therefore it best answered the design of such gifts, to suppose the power of alienation to arise on the begetting of issue, because in such cases the feudatory had the contingencies of a family; for when issue was had, they looked upon the lord's possibility to be at a great distance, and they admitted of an absolute power of alienation: therefore, if a man had aliened before issue had, the lord could not have entered for a forfeiture, because that would have been contrary to his own donation, which carried it to the feudatory and his descendants; and therefore, if descendants were afterwards born, the lord was excluded during the continuance of such issue, and the issue born after the alienation could not have entered, because they only claim as representatives to their ancestor, and therefore his actual alienation barred them.

But, if such tenant had aliened before issue had, and afterwards had issue, and then the tenant and such issue had died, such alienation had not barred the donor of his right of reverter, because the condition was not performed at the time of the alienation, so that the tenant had not an absolute property vested in him for the purpose; wherefore, since the alienation was before the tenant had such power, it was subject to the lord's claim as if no such alienation had been, and, by consequence, the lord might have entered as in his reverter, as if the tenant had died without issue; and the subsequent birth of the issue is not a sufficient performance of the condition to make the precedent alienation valid, since that were to allow of the alienation of a person who had no power to alien.

But, if a gift was made to a man and the heirs of his body, and the donee had died leaving issue, such issue, without having issue, might have aliened, because, coming in by descent, he had the same power over it as he had over other estates descendible; and succeeding to his ancestor's estate, who had an absolute power

Co. Litt. 19. a.
Plow. 246. b.
7 Co. 34. b.
Ro. Abr. 840,
841. 2 Inst.
333. 13 Ven.
137.

Plow. 235.
Co. Litt. 19.

7 Co. 34, 35.
Co. Litt. 19. a.

power of alienation, he took it in the same manner discharged of any restraint from the condition; and the rather, because otherwise the issue could not have made the necessary provisions on his own marriage by a family settlement. But, if the issue had not aliened, it had followed the limitation of the first donation, because the estate had continued in the same condition without alteration, and, consequently, on failure of issue according to the first donation, the lord had been in in his feudal right of reverter.

Co. Litt. 19. a.
Ro. Abr. 840.

And as the feudatory had power to alien the land after he had issue, so likewise might he have charged it with a rent, common, &c. for this power necessarily follows an absolute and entire property; for if he might have aliened the feud from his issue, it is but part of that power to transmit it to his issue under any charge or incumbrance he thought fit.

Co. Litt. 19. a.
Ro. Abr. 840.

So, the feudatory, by having issue, might have forfeited the feud for treason or felony.

Co. Litt. 19.
except where

If there was no express reservation of services in the first feudal donation, the donee held of the donor, as he held over.

a man made a
gift in frankmarriage, for in such case the donee held free from all services till the fourth degree was past; because these gifts being made by the feudatory on the marriage of his daughter, or some other relation, such promotion was thought a sufficient consideration for the gift, without an acknowledgment of an annual service; or where the tenant in grand serjeanty made a gift in tail generally, without any special reservation. Co. Litt. 23. a.

6 Co. 40. a.
Sir Anthony
Mildmay's
case. Co. Litt.
21. 2 Inst. 335.
Mo. 155, 156.
Vent. 299.
2 Mod. 131.
Co. Litt. 392.

Thus the law stood till the 13 Ed. 1. c. 1. when the statute *de donis conditionalibus* was made, which deprived the feudatory of his ancient power of alienation, upon his having issue, or performing the condition. The pretence of making this statute, as appears from the preamble, was to comply with the will of the donor, who in all such grants intended that the feud should be transmitted to the descendants of the feudatory in the same plight he received it; and upon failure of the descendants, that it should revert to the donor himself: but the real design of making the statute was to introduce a perpetuity to other purposes. For, towards the end of the barons' war, the crown took up a new method of politicks to break the interest of the baronage; for when any feud, that was then subsisting in large districts and territories, escheated, or was forfeited to the crown, the king divided it, and gave it out in lesser feuds, thereby to destroy the power of the peerage: this the barons saw would tend to the ruin of their body, and therefore passed this act to make all such new feuds unalienable, and by that means not forfeitable for treason, though the condition should be performed by having issue; and from the time of this statute, the donor's possibility or right of reverter was turned into a reversion; and the donee, who before had a fee-simple conditional, has now but an estate-tail.

Under this head we shall consider,

(A) What Things may be entailed within the Statute *de donis conditionalibus*.

(B) What

(B) What Words are requisite to create an Estate-tail in a Deed or Gift.

(C) Of the several Sorts of Estates-tail.

(D) How far Tenant in Tail may charge his Estate, and what Acts of his relating to the Inheritance shall bind the Issue, though the Entail continues.

(A) What Things may be entailed within the Statute *de donis conditionalibus.*

THE statute makes use of the word *tenementum*, and therefore the estate to be entailed may be as well incorporeal as corporeal inheritances, because the word *tenementum* comprehends the one as well as the other, and, consequently, not only lands may be entailed, but all rents, commons, estovers, or other profits arising from lands. Co. Litt. 19. b.
20. a.

But it is not necessary that the thing to be entailed should issue out of land; for if it be annexed to lands, or any ways concern or relate to them, it may be entailed within the statute; and therefore offices and dignities may be entailed; and accordingly it has been (a) resolved, that if the king creates a man earl of D. to him and the heirs male of his body; this is a good entail of the dignity within the statute, because the title or dignity relates to lands; and anciently they were computed from their possessions, as a baron's fee, an earl's fee, &c. Co. Litt. 20. a.
(a) 7 Co. 33.
Nevil's case.

So, offices may be entailed; as the office of earl-marshal of England; or the office of a steward, bailiff, or receiver of a manor; because these are demandable in a *præcipe, ut tenementa*, and being exercisable within the manor, are therefore looked upon as members or branches of it. Co. Litt. 20. a.
1 Ro. Abr. 838.
7 Co. 33.
Plowd. 2.

An equity of redemption is entailable, because the mortgage being a pledge for money, equity looks upon the estate in the same plight as it was before. Hard. 465.

Charters may be entailed, because they are muniments belonging to the land itself; but, if the entail be barred by collateral warranty, then the heir shall not have detinue for them, for then he cannot make title by virtue of the entail. Co. Litt. 20.

But things merely personal, which only charge the person, and neither issue out of land nor relate to it, nor can be demanded *ut tenementa* in a *præcipe*, cannot be entailed within the statute; and therefore, if I grant to B. and the heirs of his body, to be master of my hawks, or keeper of my hounds, with a fee or salary annexed to it, this is no entail within the statute, because this can no way fall within the notion of *tenementum*. Co. Litt. 20. a.
Plowd. 2. b.
Maxwel's
case. Ro. Abr.
837.

Plowd. 3. a. So, if *A.* for him and his heirs grants an annuity to *B.* and the
 Ro. Abr. 837. heirs of his body; this, having no manner of relation to land, is
Vide tit. "An- no entail within the statute, for such grant only affects the per-
 nuity and son of the grantor.
 Rent-charge."

Co. Litt. 20. a. No chattels real can be entailed; and therefore though a
 10 Co. 87. Ro. man, possessed of a term for years, should devise his term to
 Abr. 837. Cro. *J. S.* and the heirs of his body, yet the term would go on in its
 Eliz. 143. old channel to the executors, and the issue of the body of the
 Chanc. Rep. donee has no interest in the term, and *J. S.* may sell or dispose
 200. Vent. 194. of it as he pleases; for this being no *tenementum* within the sta-
 2 Chan. Rep. tute, the devisee is not tied up from alienating it by that act.
 233. but for So it is of a trust, for a man can no more entail a term in gross
tit. Devise. by way of trust, than by way of devise. But a term for years,
 [Two things which is created or kept on foot to attend the inheritance, is al-
 seem essential lowed in Chancery to wait upon the entail of the inheritance
 to an entail within the

statute *de donis*. One requisite is, that the *subject* be land or some other thing of a *real* nature. The other requisite is, that the *estate* in it be an *inheritance*. Therefore, neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of *cestuy que vie*, nor *terms for years*, are entailable any more than personal chattels; because, as the latter not being interests either in things *real* or of *inheritance*, want both requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in one requisite. However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled as to answer the purposes of an entail, and be rendered unalienable almost for as long a time as if they were entailable in the strict sense of the word. Thus, estates *pur autre vie* may be devised or limited in strict settlement, by way of remainder, like estates of inheritance; and such as have interests in the nature of estates tail may bar their issue and all remainders over by *alienation* of the estate *pur autre vie*, as those, who are strictly speaking tenants in tail, may do by *fine* and *recovery*: but then the having of issue is not an essential preliminary to the power of alienation in the case of an estate *pur autre vie* limited to one and the heirs of his body, as it is in the case of a conditional fee, from which the mode of barring by alienation was evidently borrowed. The manner of settling terms for years and personal chattels is different: for in them no remainders can be limited; but they may be entailed by *executory devise*, or by deed of trust, as effectually as estates of inheritance, if it is not attempted to render them unalienable beyond the duration of lives in being, and 21 years after, and perhaps, in the case of a posthumous child, a few months more; a limitation of time not *arbitrarily* prescribed by our courts of justice, but wisely and reasonably adopted in analogy to the case of freeholds of inheritance, which cannot be so limited by way of remainder, as to postpone a complete bar of the entail by *fine* or *recovery* for a longer space. It is also proper to observe, that in the case of terms of years and personal chattels, the *vesting* of an interest, which in reality would be an estate-tail, bars the issue and all the subsequent limitations, as effectually as *fine* and *recovery* in the case of estates entailable within the statute *de donis*, or a simple alienation in the case of conditional fees and estates *pur autre vie*; and further, that if the executory limitations of personality are on contingencies too remote, the whole property is in the first taker. Upon the whole, by a series of decisions within the last two centuries, and after many struggles in respect to personality, it is at length settled, that every species of property is in *substance* equally capable of being settled in the way of entail; and though the modes vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed almost as nearly within the same limits as the difference of property will allow. As to the entail of estates *pur autre vie*, see 2 Vern. 184. 225. 3 P. Wms. 262. 1 Atk. 524. 2 Atk. 259. 376. 3 Atk. 464. 2 Ves. 681. As to the entail of terms for years and personal chattels, see Manning's case, 8 Co. 94. Lampet's case, 10 Co. 46. b. Child and Bailey, W. Jon. 15. Duke of Norfolk's case, 3 Ch. Ca. 1. a case in Carth. 267. and one in 1 P. Wms. 1. Foley v. Burnell, 1 Br. Ch. Rep. 274. Hargr. note, Co. Litt. 20. a. b. — The doctrine upon this part of the subject is stated in the above note with such neatness, perspicuity, and succinctness, that the editor, feeling it impossible to deliver it in fewer or better words, has taken the liberty of transcribing it at length.]

As to the entail of copyholds, *vide tit. COPYHOLD*, vol. ii.

(B) What

(B) What Words are requisite to create an Estate-tail in a Deed or Gift.

WHEN the notion of succession prevailed, it was necessary in feudal donations to use the word *heirs* to distinguish such descendible feud from that which was granted only for life; but as to the word *body*, it was not necessary to make use of that in the donation, but it might be expressed by any equivalent words; and (a) therefore, a gift to a man, and *hæredibus de se*, or *de carne*, *quos sibi contigerit habere*, or *procreavit*, is a good estate-tail, for these sufficiently circumscribe the word *heirs* to the descendants of the feudatory.

only derived from the law, the law requires the word *heirs* that comprehends the whole notion of such legal representation; but the limiting of the inheritance to the descendants of this or the other body, is only the particular intention of the person that forms the gift, and therefore the law leaves every man to express himself in such manner as may manifest that intention.

Therefore, if lands are given to a man & *hæredibus*, *quos sibi contigerit habere de uxore sua*, this is an estate-tail, though the word *body* be omitted: so, if the gift had been to him & *hæredibus suis de primâ uxore sua*; for this confines the word *heirs* to the descendants of his body, since his heirs, who can inherit that gift, must be of his wife, which no collateral heir can possibly be.

A feoffment was made to the use of *A.* for life, remainder to the use of *B.*, and of the heirs male of the said *B.* lawfully begotten, and for default of such issue, remainder over; *A.* dies: this is no estate-tail in *B.*, but a fee-simple, because there are no words to shew from whose body the heirs male of *B.* must proceed; for, to the creation of an estate-tail it is requisite that there be words sufficient to shew from what body the heirs mentioned in the gift are to proceed, though the word *body* be not expressly used; for in this case such may be heirs male of *B.* as were never proceeding from his body, since the words of the donation leave it at large, and do not require that they should be begotten by any particular person.

made without the assistance of a lawyer, receives always a favourable

So, where *A.* seised in fee of a copyhold, surrendered the same to the use of himself for life, and after to *B.* and *C.* his wife, *pro & durante termino vitarum suarum naturalium & hæred. & assignat. prædict. B. & C. & pro defectu talis exitus*, to the use of himself and his hers; it was held by *Holt C. J.* and two judges, against *Gould*, that *B.* and *C.* had a fee-simple, and that *pro defectu talis exitus* imported nothing of their dying without issue, but was to be taken generally, and every heir is the issue of some body.

For the words which create an entail in a will, *vide tit. Devise.*

(a) *Co. Litt.* 20. 7 *Co. 41. b.* and the reason of the difference is, for that inheritances being

the whole notion of such legal representation; but the limiting of the inheritance to the descendants of this or the other body, is only the particular intention of the person that forms the gift, and therefore the law leaves every man to express himself in such manner as may manifest that intention.

7 *Co. 41, 42*

Cro. Eliz. 478. *Mo.* 424.

7 *Co. 41. S. C.* between *Abraham* and *Twigg.* *Lit. Rep.* 344.

Plowd. 541.

3 *Leon.* 5.

Hob. 32. 37.

2 *Sid.* 41.;

but it would

be otherwise

in a will,

which being

interpretation.

2 *Salk.* 620.

Idle v. Cook.

2 *Ld. Raym.*

1144. *S. C.*

1 *P. Wms.* 70.

S. C. Pasch.

4 *Ann.* in

B. R. and

per cur. it is

the rather a

fee-simple in

this

this case, because of the word *assigns*, for an estate-tail is not assignable; but *Gould cont.* because the intent of the party was to create an estate-tail.

Carth. 343.
5 Mod. 266.
Ld. Raym.
101. 3 Salk.
337. S. C.
adjudged be-
tween Leigh
and Brace.
Hil. 6 W. 3.
in *B. R.* and
Coke and Roberts, Hil. 2 W. 3.

But, if *A.* seised in fee makes a voluntary feoffment to the use of himself for life, remainder to the use of *J. S.* and his heirs for ever; and for default of issue of the body of *J. S.* then to the use of the right heirs of *A.*, this being in a conveyance by way of *use*, which is always construed like a will and according to the intention of the party, gives *J. S.* but an estate-tail.

7. Co. 41.

If land be given to *A.* and *B.* his wife, and their heirs, & *aliis hæredibus* of the said *A.* *si dicti hæredes de A. & B. exuñtes obierint sine hæredibus de se*, this is a good estate-tail, though the word *body* be omitted, because there are words equivalent, which equally circumscribe the general import of the word *heirs* to the descendants of the body of *A.* and *B.*

Ro. Abr. 838.
Co. Litt. 20. b.
[A settlement
was made on
A. for life, re-
mainder on *B.*
and the heirs-
male of his
body, with
power of re-
vocation to *A.*
of *B.*'s re-
mainder. — *A.*
reciting the
settlement to
be on *B.* and
his heirs male,

If lands are given to a man and the heirs of his body, remainder to *J. S.* and his heirs in *formã prædictã*; this is a good remainder in tail to *J. S.* for by a necessary relation the mind is carried to the words of the first gift, which circumscribe the heirs of the donee to the descendants of his body. So, if the remainder had been limited to *J. S.* in *formã prædictã*, this limitation, without the word *heirs*, had vested a good estate-tail in him in remainder: or, if a lease for life had been made to *A.*, the remainder to *B.* and the heirs of his body, remainder to *J. S.* in *eãdem formã*, these words, having such a necessary relation to the words which immediately precede them, represent to us the intention of the donor as plainly as if he had expressed himself in all the terms of the first limitation.

omitting the words of *his body*; revoked the old uses, and by the new deed limited the said estate in the said deed named to *B.* and his heir-male, omitting the words of *his body*, and subjected the estate thus limited to a charge of 100*l.* It was holden, that this was a good revocation and a good limitation of a new estate-tail; for that the recital, though inaccurate, referred to the limitation in the settlement to the heirs of the body; the revocation was of those uses which the recital had referred to and professed to state; and the new limitation was of the estate described in the settlement, subject only to the charge of 100*l.* *Gilmore v. Harris* 3 Lev. 213. Carth. 292. S. C. Skin. 325. S. C.]

Co. Litt. 20. b.
* Note: Co.
Litt. 385. b.
says, "If a
man letteth
lands for
life, the re-
mainder
in *eãdem formã*,

But, if a gift be made to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *J. S.* in *formã prædictã*, this, according to my Lord *Coke*, is a void limitation to *J. S.*; for though the mind is carried to the former limitations, yet finding no necessary relation to one more than the other, it can determine nothing positively as to the intention of the donor, and therefore such limitation is void for uncertainty.*

"this is a good estate-tail, *quia idem semper refertur proximo præcedenti.*" And this seems to be law, for the reason assigned.

Co. Litt. 21. a.
8 Co. 54. b.

If lands be given to a man and his heirs, *habendum* to him

and the heirs of his body; this is but an estate-tail, because the *habendum* expounds the general word *heirs* in the premises; for though it cannot change or alter them, so as to retract the gift in the premises; yet it may well construe and explain them while such construction is consistent with the premises, and does not destroy the operation of the words mentioned in them, but only explains in what sense they are to be taken, and what heirs are comprehended. But, if the limitation in the premises had been to a man and the heirs of his body, *habendum* to him and his heirs, it had been a tail with a fee-simple expectant; because this *habendum* cannot be construed an exposition, for that it comprehends all heirs in general, and doth not confine or interpret the premises, and therefore, being more comprehensive than the premises, passes the fee-simple expectant.

If lands be given to a man and his heirs, *habendum* to him and his heirs, if the donee has heirs of his body, and if he dies without heirs of his body, that the land shall revert to the donor; or *habendum* to him and his heirs, if he hath issue of his body begotten, and if he dies without heirs of his body, that the lands shall revert to the donor; this is but an estate-tail in the donee; because the *habendum* plainly shews in what sense the word *heirs*, which is used generally in the premises, is to be taken; nor does such explanation retract the gift in the premises, because the word *heirs* hath still its operation, and by such construction is more conformable to the will and intention of the donor. But, if the *habendum* had been for life, that had been a void limitation, because no explication can reconcile the *habendum* to the premises; and where the last words of the donation retract the former gift, they are taken as insignificant and void, because no man is allowed to vacate his own grant.

If a feoffment be made to *A.* and his heirs, with warranty to him and his heirs, and if it happens that he dies without heirs of his body, that it shall remain to *J. S.* in fee; this limitation of the remainder explains what heirs of the donee shall take; for it is plain that the donor intended the word *heirs* in the premises should not be taken in their most extended sense, for then they would convey an absolute estate, which would bear no limitation of a remainder over to *J. S.*, and then that part of the gift would be void, which, by an easy explication of what heirs the donor meant in the premises, is made good and consistent, without any force or violence to the premises.

If lands are given to a man and a woman and their heirs, *habendum* to them and the heirs of their bodies, remainder to them and the survivor of them for life, to hold of the *chief lord*; this has been adjudged an estate-tail with a fee-simple expectant; for though the *habendum* explains what heirs are meant in the premises, and there is no mention of the word *heirs* in the remainder; yet it is plainly the intention of the donor, that the interest in the land shall not cease upon the determination of the estate-tail, because there is a remainder limited over to take effect when the tail is spent; and if the limitation of the remainder

2 Ro. Abr. 66.
68.Ro. Abr. 838.
Co. Litt. 21. a.
Bro. tit. Tail,
20.Ro. Abr. 839.
2 Ro. Abr. 68.Cro. Car. 476.
2 Ro. Abr. 68.
Thurman and
Cooper.
[2 Ro. Rep.
19. 23. In this
case there was
also a war-
ranty to the
grantee and
his heirs.
However, the

court intimated, that their opinion would have been the same, if these special circumstances had not occurred.]

passes any thing, it must be a fee, because they had a greater estate already in them than for life; and this the rather, because the *tenendum* is expressly to be of the *chief lord*, which shews they intended to leave no estate in themselves.

Hob. 172.

If I give land to a man and his heirs, *viz.* the heirs of his body; this is but an estate-tail; for here I restrain the general import of the word *heirs* to the descendants of the body of the donee.

Cro. Ja. 400.

Cooper and Franklin.

2 Co. 78.

Plowd. 555.

Bro. tit. Feoffment to Uses,

40. Co. Litt.

19. b.

A feoffment was made to *A.*, *habendum* to him and the heirs of his body, to the use of him and his heirs and assigns for ever: this is only an estate-tail in *A.* and no fee-simple; for the lands are so appropriated by the first words to the donee and his issue, that no act or limitation of the parties can take it out of them; nor does the statute 27 H. 8. c. 10. execute the possession to the use; for the statute never intended to execute any use but that which the legal tenant had been obliged to execute before the statute; but the act *de donis*, as it tied down the donee from alienating, so it would not permit the Chancery to oblige the donee to give the land away from his issue. The same law, if the use had been limited over to a stranger, for the same reason.

Jenkins v.

Young, Cro.

Car. 230.

Meredith v.

Jones, *Id.* 245.

Lands were given to baron and feme, *habendum* to baron and feme to the use of them and the heirs of their bodies. This was adjudged an estate-tail; for though such limitation of a use to a stranger had not been a good estate-tail, because the legal estate in baron and feme had only been for their lives; yet here being no feoffee distinct from the *cestui que use*, but they being all the same person, by consequence, there is no use distinct from the legal estate, and therefore, the word *use* may be very properly rejected, in order to establish the intention of the conveyance, and then the case amounts to no more than if an estate were limited to baron and feme for their lives, with remainder to them and the heirs of their bodies.

Hebblethwaite

v. Cartwright,

Ca. temp.

Talb. 30.

Long v. Beau-

mont, 1 P.

Wms. 231.

Hewitt v. Ire-

land, *Id.* 427.

Gore v. Gore,

2 P. Wms. 33.

S. P. But it hath been holden, that where the words were *in posterum procreandis*, sons born before shall be excluded, on account of the peculiar force of *in posterum*. Adj. M. 26 Eliz. B. R. 3 Leon. 87. Hargr. Co. Litt. 20. b. n. 3.

[Lands were given to one for life, remainder to the heirs male of his body hereafter to be begotten. This was adjudged to be an estate-tail; for the words *hereafter to be begotten* do not confine it to the issue born after, but will take in that born before, the words *procreatis et procreandis* being of the same import, according to 1 Inst. 20. and 24 E. 3. pl. 15. And this is to prevent the great confusion that would otherwise be in descents by letting in the younger before the elder.]

(C) Of the several Sorts of Estate-tail.

IF lands are given to a man and the heirs of *his body*, this is a *tail general*; because all his descendants may possibly come into the succession; so that if the donee has several wives, the descendants of every wife may inherit, because they fall within the words of the donation: but the donor might by particular expressions have confined the succession to any particular descendant, as to the heirs male or heirs female; and hence the distinction between estates in *tail male* and *tail female*. Litt. § 14.

If lands are given to a man and the heirs male and female of *his body*, this is a *tail general*; because by such limitation all the descendants of the feudatory may inherit. Co. Litt. 25. b. but great care must be taken to limit the

estate to the descendants of *the body* of the donee; for if lands be given to a man and his heirs male, this is a fee-simple. Co. Litt. 13. So, if the limitation had been to the donee and his heirs female, or to the donee and his heirs male or female. Litt. § 31.

If land be limited to the son and his heirs of the body of his father, this is a fee simple in the son, and no entail at all, not being limited to the son's descendants; nor is there in this case any proper limitation or restriction of the word *heirs*, because it limits it to his heirs of the body of the father. Now there is plainly a design to place the interest that is to vest it in the son; and yet it should not go merely to the son's descendants, but to all collaterals, as far as they could claim under the body of the father: but such a limitation the law will not endure, it not being an estate-tail confined to the descendants only; and therefore it must be a fee-simple; for to allow men to form such new sorts of estates would be very inconvenient, as it would put it in the power of private persons to make new limitations touching the course of descents, and thereby render all descents uncertain. Co. Litt. 27.

But, if the estate were limited to the son, and to the heirs of the body of the father, though the father was dead at the time of the gift; yet it is a good entail, because here the word *heirs* is a word of purchase; and it is a good name of purchase after the father's decease; and the son, being only tenant for life by the words of the gift, by the second words takes the entail as a purchaser; but in the other case, the words *his heirs* are merely words of limitation, and therefore affect an entail, which the law will not endure. Litt. § 30. If there had been grandfather, father, and son, and the father dies, and the limitation had been to the grandfather and to his heirs of the

body of the father, this is a good entail; for it goes to the descendants only, and it limits what sort of descendants it shall go to, viz. such only as were begotten by the father. Co. Litt. 20. b. Bro. Tail, 10.

If lands be given to husband and wife, and the heirs of the body of the survivor; this is a good donation to vest an estate-tail general in the survivor; but the estate-tail does not vest till one of them dies; and then, because all the descendants of the survivor may inherit the gift, it is a *tail general*. Co. Litt. 26. a. 10 Co. 51. Reg. 239. b.

Litt. § 16.

Tail special is where the estate is limited to some particular heirs, of the body of the donee, as to the heirs of such a woman; as, if lands be given to a man and his wife, and the heirs of their two bodies begotten; for though all the descendants of that marriage may inherit the gift, yet all the heirs of the body of the donee cannot inherit; for if the woman should die, and the man take another wife, the issue of the donee by the second wife should not inherit, because the limitation of the gift was only to the descendants of the feudatory by the first marriage.

Co. Litt. 25. b.
Bro. Estate,
22. Tail, 16.

If land be given to a man and a woman unmarried, and the heirs of their bodies, this is a tail special, for the possibility that they may marry, and then the descendants of that marriage can only inherit. So, if the gift be made to a man that hath a wife, and to a woman that hath a husband, and the heirs of their bodies; this is a tail special presently in them, for the possibility that they may marry; and the descendants of such marriage may inherit according to the limitation of the gift.

Plowd. 35. a.
Co. Litt. 25. b.

But, if land be given to two men and their wives, and the heirs of their bodies begotten, they have a joint estate for life, and several inheritances, but no joint estate in tail; because, though the husband and the wife of the other may die, and the survivors may marry, yet the gift being made to them all, and the heirs of their bodies, it is impossible that there should be one heir or descendant of all their bodies, and therefore it can be no joint estate-tail in them all; but they all four take jointly for life, and each husband and his wife have a several inheritance in a moiety.

Litt. § 233.

If lands be given to two men, and the heirs of their bodies begotten, they have but a joint estate for life, and several inheritances; for though the gift be limited to the descendants of their bodies; yet, it being impossible there should be one descendant of both their bodies, they cannot have a joint estate-tail.

Litt. § 233.
Co. Litt. 25.

So, if lands be given to one man and two women, and the heirs of their bodies begotten, they have a joint estate for life, and several inheritances; because there can be no one issue of both the women's bodies; and if the man should marry one of them, yet it is not limited in the donation, which of them, in case of such intermarriage, should first take.

3 H. 6. 42.
7 H. 7. 16.

If an estate be limited to husband and wife, and the heirs of their bodies, and they are divorced *a vinculo matrimonii*, they are only tenants for life; because they shall not be presumed to intermarry after they are once legally divorced by church censures.

Co. Litt. 24. b.
Hob. 32.

But there are other sorts of estates-tail; as, when the donation is limited not only to the descendants of the donee by one woman, but more particularly to one sort of descendants of such marriage, exclusive of others; as, if lands be given to a man and a woman, and the heirs male of their bodies; this is an estate in tail-male; for the donor having expressed what heirs shall inherit, none can claim under such gift that does not come under such

particular description. So, if the limitation had been to the heirs female; for the donee being capable of taking by purchase, the donor may limit the succession of the land to which of the descendants of the donee he pleases. But, if the limitation had been to *A.* for life, remainder to the heirs female of the body of *J. S.* and *J. S.* has issue a son and a daughter, the daughter can take nothing by such gift; the reason of the difference is this; because in the first case the donation specifies what sort of descendant of the donee shall take; but in the last case it specifies who shall take originally; and the first purchaser must come fully up to the description in the donation, else there can be no gift, and while there is a son of *J. S.* no female can be heir, and, consequently, not a person capable of taking originally by the gift. But, if *J. S.* hath issue a son and a daughter, and the son hath issue a daughter, and dies, and a lease for life is made, remainder to the heirs female of the body of *J. S.* the daughter of the son shall be the purchaser, because she comes within the description, being both heir, and likewise a female, though she was descended from a male.

If lands be given to a man and his wife and the heirs male of the body of the husband; this is a special tail in the husband, and but an estate for life in the wife. So, if the limitation had been to the heirs male of the body of the wife by the husband begotten, it is an estate for life in the husband, and a tail in the wife; for to whichever body the word *heirs* inclines by the limitation, it creates a descendible estate in such person. But, if it be not more particularly limited to the body of one than the other, but inclines to each alike, then it creates a descendible estate in both of them; as, if lands be given to husband and wife, and the heirs which the husband shall beget on the body of his wife, both of them have an estate-tail, because the word *heirs*, which creates the descendible estate, is not limited to one more than the other.

If a feoffment be made to the use of *A.* and *B.* husband and wife, and the longest liver of them, and after the decease of the said *A.* and *B.* then to the use of the heirs of the body of the said *A.* begotten on the body of *B.*, this is an estate tail in the husband; for the word *heirs* is limited to the body of *A.* though to be begotten on the body of the wife.

So, if lands be given to baron and feme, and the heirs of the body of the feme, by the husband and *J. S.* engendered; this is an estate-tail in the feme, but so far enlarged by the last words, that the heirs of her body begotten by *J. S.* may inherit after the issue by the present husband.

band begotten, whether this had been an estate-tail in them both, is left a Q.

[Where an estate for life was limited to *S.* wife of *L.*, remainder to the heirs to be begotten on the body of *S.* by *L.* her husband, no estate being previously limited to the husband himself; it was holden, that the word *heirs* related to both their bodies, and, consequently, did not create an estate tail in *S.*

Litt. § 26, 27,
28. Yelv. 13.
Repps v. Bon-
ham.

Hob. 84.
Skeat v.
Oxenbridge.

Yelv. 131.
If the limita-
tion had been
to the heirs
super corpus
of the feme
by the hus-

Gossage v.
Taylor, Sty.
325.

Sir

Frogmorton
v. Wharley,
2 T. R. 435.
2 Bl. Rep. 728.
S. C. 3 Wils.
125. 144. S. C.

Sir *R. F.* on the marriage of his son levied a fine, and declared the uses to himself during the joint lives of himself and his son *L. F.*, and after the decease of either of them, to the use of *S. C.* for her life, and after her decease to the use of the issue male of the said *S.* and *L.* and the heirs of their bodies, and in default of such issue, to the use of the heirs to be begotten on the body of *S.* by the said *L.* remainder to the right heirs of the said Sir *R. F.* The marriage took effect, and *S.* died leaving six daughters, but no son. Sir *R.* died leaving *L.* his son and heir. A question arose on the estate which *L.* took; and the court resolved, that, if he had been joint-tenant with the wife for life, this had been an estate-tail in both; as the word *heirs* is not applied to any body particularly, as Litt. § 28. Secondly, that neither the husband nor wife had an estate-tail: not the husband, because he had no prior estate for life: not the wife, because though she took an estate for life, yet the heirs are not applied to her body.

Denn v. Gil-
lott, 2 T. R.
431.

On a marriage the husband covenanted to stand seised of lands to the use of himself and his intended wife for their lives, and the life of the longer liver, remainder to the use of the heirs of the husband *on* the body of his said intended wife *by* him lawfully to be begotten, remainder to the use of his own right heirs. The husband having survived the wife, levied a fine of the lands, and after his decease, a question arose on the operation of this fine; which depended on the point, whether the words "to the use of the heirs *on* the body of the wife *by* the " husband to be begotten" gave an estate-tail to the wife only, or a joint estate-tail to both? It was decided, that the limitation gave an estate-tail to both, as well upon the authority of the above case in *Styles*, as of the case cited by Lord *Coke*, from 3 E. 3. p. 32., where, upon a gift to *I.* and *M. uxori ejus et hæredibus quos idem I. de corpore ipsius M. procrearet, &c.* it was adjudged an estate-tail in both, because the estate was equally entailed to the heirs of the baron, as to the heirs of the wife.

Co. Litt. 26.

Rose v.
Aistrop, 2 Bl.
Rep. 1228.

A freehold estate was settled on husband and wife for life, and on the survivor, remainder to the use of the heirs of the husband on the body of the wife to be begotten, remainder to the right heirs of the husband. A copyhold estate in Borough-English was likewise settled to the use of husband and wife and the heirs of their two bodies to be begotten in like manner and to the same uses as the freehold was settled and conveyed. *De Grey C. J.* This is an estate executed, and seems to be an estate-tail in the husband and wife. *Blackstone J.* I think the freehold is clearly vested in the husband only in special tail; the copyhold in both husband and wife.]

Litt. § 24.

And it is to be observed, that in all instances of such special tails, which limit the lands to one particular sort of heirs, no descendant of the donee can make himself inheritable to such gift, unless he can convey his descent through that particular sort of heir to which the succession of the land was first limited; therefore if lands be given to a man and the heirs male of his body, and

and he has issue a daughter, who has issue a son, this son shall never inherit that gift; for the son, being obliged to claim through the daughter, must necessarily shew himself out of the words of the first donation, which limited the lands only to the heirs male of the donee, which the daughter cannot possibly be taken to be.

For the same reason, if the lands be given to a man and the heirs male of his body begotten, the remainder to him and the heirs female of his body, and the donee have issue a son, who hath issue a daughter, who hath issue a son; this son can inherit neither of these gifts: not the tail male, because whoever claims as heir to such a gift, must convey his descent wholly through males, which the son cannot do in this case, because he must necessarily shew himself a descendant of the daughter, before he can make himself heir to the first son. Nor can he inherit the tail female, because that limitation being to that particular sort of heir, no male, though the immediate descendant of a female, can inherit, because he is another sort of heir than is described in the donation. But, if in this case the gift had been to a man and the heirs male of his body, remainder to him and the heirs of his body; such son might claim under that gift, because every descendant of such donee may claim under the remainder, it not being limited to one sort of heir more than another.

[Lands were settled to the use of husband and wife for their lives, remainder to the use "*of the heirs of the husband on the body of the wife lawfully begotten or to be begotten, the male to be preferred before the female, and the elder before the younger.*" The lessor of the plaintiff claimed as heir male under this settlement, that is, as son of the second son of the marriage: the defendant claimed as heir at law, that is, as the son of a daughter of the eldest son of the marriage. It was argued on behalf of the defendant, that there was nothing to hinder the descent to the heir at law, though claiming through a female; that the limitation was to *all* the heirs; and that the words of regulation were referable merely to the immediate children of the marriage, to shew how they should take. But the court said, that if these words had any meaning, they described an estate-tail; and it was not to be supposed that they were inserted without any meaning at all.

If lands be given to a man to have and to hold to him and the heirs male of his body, and to him and the heirs female of his body, the estate to the heirs female is in remainder, and the daughters shall not inherit any part so long as there is issue male; for the estate to the heirs male is first limited, and shall be first served; and it is as much as to say, and after to the heirs females, and males in construction of law are to be preferred.]

Land given to a man and his wife & *heredi de corpore & uni heredi tantum*, was adjudged an estate-tail, though the limitation be to the heir in the singular number, because the word

heir

Co. Litt. 25. b.

Denn. v. Hobson, 5 Burr. 2609. 2 Bl. Rep. 695. S. C. See Preston on Estates, ch. Estates Tail.

Co. Litt. 377. a.

Vent. 228.

heir is *nomen collectivum*, and extends to all that descend from him.

(D) How far Tenant in Tail may charge his Estate, and what Acts of his relating to the Inheritance shall bind the Issue, though the Entail continues.

THE statute *de donis* affecting a perpetuity restrained the donee in tail, either from alienating or charging his estate-tail; and by that act the tenant in tail was likewise to leave the land to his heirs as he received it from the donor; and the heir in tail might have avoided any alienation or incumbrance of his ancestor; and, as the law stood upon the act, so might he in reversion, when the heirs of the donee failed, who were inheritable to the gift. The crown long struggled to break through the perpetuity which was established by this law; and in the reign of E. 4. we find the pretended recompence given against the vouchee in the common recovery to be allowed an equivalent for the estate-tail; and because this recompence was to go in succession as the land in tail should have done, therefore they allowed the recovery to bar the reversion as well as the issue in tail, because he in the reversion was to have the recompence upon failure of issue of the donee.

6 Co. 40.
10 Co. 39.
Vent. 299.

2 Inst. 336.
Plowd. 57. b.
But how these
recoveries or
fines affect the
issue in tail,
or him in reversion or remainder,

vide tit. Recoveries, and *tit. Fines*. The statute *de donis*, by an express clause, provides against the operation of a fine, and by that law a fine levied by tenant in tail amounted to no more than a discontinuance, like a feoffment *in pais* by tenant in tail at this day.

Litt. § 613.

At the common law the tenant in tail could not grant or alien, or make any rightful estate of freehold to another, but for term of his own life; for though a feoffment in fee, or for life, made by tenant in tail, is good against the tenant himself, because the law allows no man to avoid his own act; yet after his death the issue in tail, or those in reversion after failure of issue, may by proper actions avoid such feoffments, and recover against the feoffee.

Bro. Contract,
26. 11 Co. 50.
Poph. 194.

The tenant in tail is master of the inheritance, and as such has power over all the lasting improvements growing on it; so that he may cut down the timber-trees, and dispose of them as he pleases, without barring the entail. But this must be understood with this restriction, that, if tenant in tail sells the trees growing on the inheritance, the vendee must sever them during the life of tenant in tail; for if he dies before they are cut down, his heirs in tail shall have them as part of the inheritance, and the vendee, though obliged to pay the whole sum contracted for, yet shall not be allowed to cut down one tree after the death of tenant in tail. For as the tenant in tail has power over the inheritance

heritance but during his own life, so he can delegate that power to another but for the same time; and, consequently, whatever remains part of the inheritance at the death of the tenant in tail, at which time his power over it ceases, must necessarily go to the heir to whom the inheritance belongs.

So, if tenant in tail grant estovers to another, or the vesture of his woods, these grants determine with his death; for as they are charges on the inheritance, so they must necessarily cease when his power who granted them is determined. Ro. Abr. 841, 842.

If tenant in tail acknowledge a statute or recognizance, upon which the land is extended, the issue may oust the conusee after the death of his ancestor; for the tenant in tail can charge the entail but during his life, because the statute *de donis* preserves it free from all incumbrances for the issue in tail, *ut voluntas donatoris observetur*. Ro. Abr. 842.

But, if tenant in tail acknowledge a recognizance, and die, and the conusee bring a *scire facias* against the heir in tail, who pleads *riens per descent* in fee-simple, and pending the *scire facias* makes a lease for years to *J. S.*, and the jury find the issue in tail had land in fee-simple by descent, the conusee shall extend the land against the issue in tail, and *J. S.* cannot falsify; for after the verdict the issue shall not be allowed to say, that he is tenant in tail; but the verdict, though a perverse one, shall bind him, and be in force till disproved by attain. Nor can the lessee falsify, because the lease was made after verdict given, when the issue himself was bound, and, consequently, all that claim under him must be so too. Crawley and Marrow, 2 Bulst. 245.

Yet, if a disseisor make a gift in tail to *A.*, and *A.* in consideration of a release from the disseisee of all his right to the land, grant him a rent-charge in fee, this shall bind the issue; for this turns upon the reverse of the former cases; for as the issue in tail may avoid those grants and charges, because they tend to the prejudice of the issue and destruction of the entail; so this grant to the disseisee is good to bind the issue, because it tends to the advantage of the donee and his issue by strengthening their title, and making that an indefeasible, which before was a precarious estate. Co. Litt. 343. b. Ro. Abr. 842. Plowd. 436. 10 Co. 37.

So, where a devise was made of land in tail, upon condition that the donee should grant a rent-charge out of the land to another and his heirs; the donee granted the rent pursuant to the condition; and adjudged the rent should not determine with the death of the donee, but should bind his issue; for this is in preservation of the entail, and for the benefit of the issue, and is not *contra formam doni*, but in compliance with the will of the donor. Cro. Ja. 427. Dutton v. Ingram. Ro. Abr. 842.

A. seised of lands in tail, agrees with *B.* that he and his heirs shall enjoy the entailed lands, if *A.* and his heirs may enjoy his fee-simple lands; this agreement is executed accordingly; and *B.* has a decree against *A.* to levy a fine, and settle it pursuant to the agreement; but *A.* dies without doing it: though it was decreed that *A.* himself was bound by his agreement to convey; yet Ross v. Ross, Chan. Cases, 171. || Jenkins v. Keymes, 1 Lev. 239. S. P. For the heir comes in by the statute

de donis singly, yet since he died before he executed the fine, his issue was not and not as deriving from the ancestor, who contracted. But, if the issue in tail had approved of his ancestor's agreement, as he did in this case, by entering on the land of *B.*, then it becomes his own agreement, and, consequently, in equity he shall be obliged to perform it.

Ibid. Wharton v. Wharton, 2 Vern. 5. Weale v. Lower, cited in Fox v. Crane, *Id.* 206. Powell v. Powell, Pr. Ch. 278. Frederick v. Frederick, 1 P. Wms. 720. Cotter v. Layer, 2 P. Wms. 626. Holt v. Holt, *Id.* 652.||

Norcliffe v. Worsley, 1 Ch. Ca. 234. Sayle v. Freeland, 2 Ventr. 350. (a) Legate v. Sewell, 1 P. Wms. 91. Harvey v. Parker, Vin. Abr. tit. Estate (X. 2. pl. 6.) Kirkham v. Smith, Ambl. 318. Radford v. Wilson, 3 Atk. 815. Boteler v. Allington, 1 Br. Ch. Rep. 72. Burnaby v. Griffin, 3 Ves. 266. See Fletcher v. Tollett, 5 Ves. 12.

|| But it has been said, that where the ancestor is only equitable tenant in tail, the courts will relieve against the issue; because equitable estates tail are mere creatures of the court, and not within the statute *de donis*. But, as an equitable estate tail in freeholds (a) cannot be barred by a mere deed, but only by a fine or recovery; it would seem that the issue in tail could not be considered as bound by a mere agreement entered into by their ancestor.

Sugd. Law of Vendors, 165. And the law would seem to be the same in copyhold estates; for the legal entail can only be barred according to the custom of the manor of which the copyhold estate is holden; and perhaps, the better opinion is, that the same steps must be taken to bar an equitable estate tail in copyholds, as must be pursued in the case of a legal entail. Lord *Hardwicke*, however, seems to have thought, that a mere surrender was in every case sufficient to bar an equitable estate-tail in copyholds; but the contrary opinion now prevails and appears authorized by a case, (b) in which it was holden, that a covenant by a tenant in tail in equity of a copyhold, in his marriage settlement, to surrender his copyholds to uses in strict settlement, was not of itself sufficient to dock the equitable entail; for if such an entail be created, a recovery in the court baron is necessary to dock it; *it being a rule, that the same steps must be taken to bar an equitable estate in tail, as would be requisite to bar it, were it a legal estate-tail.* (c)

(c) And see 1 Watk. Copyh. 181. 1 Prest. on Convey. 155.—The power of tenants in tail to bind their issue, ought to be the same, as Mr. *Sugden* well observes, whether the estate be freehold or copyhold; and whether the entail be legal or equitable, the analogy preserved between legal and equitable estates tail, and between limitations in freehold and copyhold estates, ought to be observed in this instance. Sugd. Law of Vendors, 166.

Edwards v. Applebee, 2 Br. Ch. Rep. 652. Toulser v. Rand, *Id.* 650. Pye v. Daubuz, 3 Br. Ch. Rep. 595. But see Beck v. Welsh, 1 Wils. 276. *contra*.

If tenant in tail make a conveyance, and covenant for further assurance, and then become bankrupt; such covenant will bind the lands in the hands of the assignees.

Tay v. Slaught- An appointment by tenant in tail under the statute 43 Eliz. tar, Pr. Ch. 16. c. 4. of Charitable Uses, without levying a fine, or suffering a recovery,

recovery, is good both against the remainder-man, and the issue in tail. Attorney General v. Rye, 2 Vent. 453. 1 Eq. Ca. Abr. 172. pl. 7. S. C.

Where a tenant in tail with remainders over obtained an act of parliament enabling him to charge the estate; it was holden, that the right of those in remainder was barred, though not excepted out of the saving clause, as is usual, where the act passes upon the application of tenant for life; for the tenant in tail might have barred the remainders by a recovery. Westby v. Kiernan, Ambl. 697.

By 39 & 40 G. 3. c. 56. reciting that "by the practice of courts of equity, in cases in which money under the control of such courts is subject to be laid out in the purchase of lands to be limited to uses capable of being barred by fine, (a) the said courts direct such money to be paid to the party or parties who could by fine bar the uses to which such lands, in case the same had been purchased, would have been limited, and do not require or compel the actual investment of such money in the purchase of lands, notwithstanding other persons might take estates or interests therein, if the same were purchased, and be entitled to hold such estates or interests until such fine was actually levied: and that nevertheless where money under the control of the said courts is subject to be invested in the purchase of lands to be limited to uses, not capable of being barred by fine, but capable of being barred by recovery, (b) the said courts, according to the practice thereof, refuse to direct the same to be paid to the party or parties, who in case such lands had been purchased, could by recovery have barred all the uses to which the same would have been limited, and require and compel the actual investment of such money in a purchase or purchases of some lands, and such last mentioned practice is attended with great inconvenience and expence to the party or parties who by a recovery could bar the uses to which such lands are to be limited when purchased, and the interest and benefit of others who might take estates barrable by such recovery when suffered is not according to such last mentioned practice materially promoted or secured; and it may therefore be expedient to alter such practice; and that it may also be expedient to provide some satisfactory and summary proceeding, whereby trustees possessed of money subject to be laid out in lands, may be required in proper cases to pay such money to the parties entitled and under this act to become entitled to receive the same; It is enacted, that in all cases where money, under the control of any court of equity, or of or to which any individuals as trustees are possessed or entitled, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, to be settled upon any person or persons, in such manner that it would be competent in case such money had been invested in the purchase of real estates for the person or persons who would be tenant or tenants of the first estate or estates tail therein, either alone or together with the person

(a) Benson v. Benson, 1 P. Wms. 131. Short v. Wood, *Id.* 471. Edwards v. Countess of Warwick, 2 P. Wms. 173. Trafford v. Boehm, 3 Atk. 447. Cunningham v. Moody, 1 Ves. 176. (b) The practice seems to have been the same where a recovery was necessary, till the case of Colwall v. Shadwell, 1 P. Wms. 471. 483. where Lord Cowper held the remainder man should have his chance, as it could not be barred but by recovery, which required time, and would not direct it to be paid in money; and the accident of the death of the tenant in tail in that case before a recovery, shewed the remainder-man's interest in so glaring a light, that it

"or

established the precedent ever afterwards.

Lord King
upon this principle refused to decree it so in the case of a fine. *Eyre's case*, 3 P. Wms. 13.
Onslow's case, *Ibid.*

“ or persons who would be the owner or owners of the particular preceding estate or estates therein, if any, by deed, fine, or common recovery, or any of them, or other lawful act in the case of freehold hereditaments, or by surrender and recovery, or either of them, or other lawful act in the case of copyhold hereditaments, to bar the first estate or estates tail, and the rights and interests of all persons in remainder, it shall not be necessary to have such money actually invested in lands or hereditaments in order that such estates tail and remainders over may be so barred; but that it shall and may be lawful to and for the High Court of Chancery, or such court of equity, under the control of which such money shall be, and in the case of trustees, to and for the said High Court of Chancery, in a summary way, upon petition of the person or persons who would be tenant or tenants of the first estate or estates tail, and of the person or persons who would be the owner or owners of the antecedent particular estate or estates, if any, in the lands and hereditaments in case the same were purchased, such petitioners being adults, and in case where any of the parties are or is *femes covert* or a *feme covert*, she or they being first separately examined in court, or upon a commission, and consenting to order the money subjected to such trusts to be paid to the petitioners or any of them, or to be paid and applied in such manner and for such purposes as the petitioners shall appoint and the court shall approve of.

§ 2.

“ And in all cases where money subjected to be laid out in the purchase of hereditaments to be settled as aforesaid shall happen to be invested in government or real or other securities, all such securities shall, for the purposes of this act, be considered as money, and shall and may accordingly be transferred, assigned, and disposed of, under an order of the respective courts aforesaid, made in a summary way upon the petition of such persons, and with such examination and consent, where necessary, as aforesaid, in such and the same manner as monies subjected to be laid out in the purchase of hereditaments, to be settled as aforesaid, are herein before authorized to be paid, applied, and disposed of.”

Baynes v. Baynes, 9 Ves. 462.

Ex parte Bennet. Ex parte Dolman, 6 Ves. 116.
Ex parte Hodges, Id. 576. *Ex parte Frith*, 8 Ves. 609.

Ex parte Sterne, 6 Ves. 156.

This act having directed that the application shall be by petition, the court has no jurisdiction under it by any other mode of proceeding.

The court will make no order under the act without previous reference to the Master to ascertain whether the parties are entitled to the money, and under and subject to what charges and incumbrances. Nor will they hear the petition on the last day of term; and, to obtain the order in term, the application must be made early enough in it to admit of a recovery being suffered.

Nor will they act at all in this summary way where any serious question arises, the statute applying only to cases in which the right is clear and indisputable. ||

ESTATE-TAIL AFTER POSSIBILITY OF ISSUE EXTINCT.

- (A) Who may be Tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created.
- (B) The Power this Tenant has over the Inheritance, and in what Respects he is considered as a bare Tenant for Life.

- (A) Who may be Tenant in Tail after Possibility of Issue extinct, and how their Estates are to be created.

SUCH person is tenant in tail *apres* possibility of issue extinct, (a) as survives the person by whom, or on whom, the issue was to be begotten; as, where lands are given to a man and his wife in special tail, if the husband dies without issue, the wife is tenant in tail after possibility, &c. because the husband, by whom the issue inheritable to such special tail was to be begotten, is dead, so that, there being no issue living at his death, there is now no possibility of any by him: so *e converso*, if the wife dies without issue, the husband is tenant in tail after possibility, because she being the person on whom the issue inheritable to the estate-tail was to be begotten, when she dies without issue, there is no possibility of the husband's having any issue by her inheritable to the tail.

Litt. § 32.
Doct. &
Stud. 6r.
(a) ["This long periphrasis, Sir William Blackstone saith, the law makes use of as absolutely necessary to give an adequate idea of such person's estate. For had it called him barely

tenant in fee-tail special, that would not have distinguished him from others; and besides, he has no longer an estate of inheritance or fee, for he can have no heirs, capable of taking *per formam doni*. Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition therefore could so exactly mark him out, as this of *tenant in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone." 2 Comm. 124.]

If the lands be given to a man and his heirs which he shall beget on the body of his wife; in this case, though the wife takes nothing by the gift, yet if she dies without issue of her body begotten by her husband, he is tenant in tail after possibility, because

because the wife, on whose body the issue was to be begotten being now dead without issue, he can have none by her.

Litt. § 32.

If baron and feme be tenants in special tail, and one of them die, leaving issue, though the survivor cannot be tenant in tail *apres* possibility during the life of such issue; yet, if that issue dies without issue, so as that there is not any issue living which can inherit by force of such entail, then the survivor becomes tenant in tail after possibility, &c.; for since the issue inheritable to such entail was to proceed from both the bodies of the donees, upon the death of either of them without issue, it is plainly impossible the survivor should have any issue inheritable to the entail.

Co. Litt. 28. a.

But, if baron and feme, tenants in special tail, live till each of them be 100 years old without issue, yet they still continue tenants in special tail; for however improbable it may seem that they should have issue at that age, yet the law sees no impossibility of having issue, and there must be no possibility of having issue, before the donees or either of them can be tenants in tail *apres* possibility. Besides, there is not any particular and certain period of time in which the possibility of issue ceases, and therefore the law cannot make either of them tenant in tail after possibility, till after the death of one of them.

21 Co. 80. b.

Co. Litt. 28. a.

If lands are given to baron and feme and the heirs of their two bodies, and they are divorced *causâ præcontractus* or *affinitatis*; here, there is no possibility of their having issue which can inherit by force of the gift, and yet they are not tenants in tail after possibility, &c. but the inheritance is turned into a baron and feme joint estate for life; for the impossibility of having issue must proceed from the act of God, to make them tenants in tail after possibility, &c. but in this case it proceeded from the act of the parties.

21 Co. 80. b.

So, if lands be given to a man in tail upon condition, that if he does such an act, that he shall have the land but for life; such donee, upon breach of the condition, is but barely tenant for life, and not tenant in tail *apres* possibility, &c. because here by his own act it becomes impossible to have issue inheritable to the tail, which by his own act he has destroyed and forfeited.

21 Co. 80, 81.

Co. Litt. 28. a.

Lewis Bowles's

case.

A feoffment was made to the use of a man and his wife for their lives, remainder to the use of their next issue male to be begotten in tail, remainder to the use of the husband and wife, and the heirs of their two bodies begotten, they having no issue male at the time of the feoffment; in this case the husband and wife are tenants in tail executed; and upon the birth of any issue male, their estate opens, and they become tenants for life, remainder to the issue male in tail, remainder to themselves in tail; and if the husband dies without having any other issue, the wife continues but tenant for life, because the estate-tail, which was once executed in her and in her husband, was changed into an estate for life by their own act; yet she shall have the privileges of tenant in tail *apres* possibility, &c. for the inheritance which was once in her; for this is not like the former case,

where the breach of the condition respects what was granted; for in this case the birth of issue male shall not be presumed to divest the privileges of tenant in tail, which were once legally vested in her.

¶ A settlement was made before marriage by which the husband's estate was conveyed to trustees to the use of the husband for life; remainder to trustees to preserve contingent remainders; remainder to the use of the wife for life for her jointure and in bar of dower; remainder to the first and other sons in tail male; remainder to the first and other daughters in tail male; remainder to the heirs of the bodies of the husband and wife; remainder to the right heirs of the husband: the wife survived the husband, and had no issue; and held, that she became tenant in tail after possibility of issue extinct.¶

Williams v. Williams,
12 East, 209.
15 Ves. 419.
S. C.

Lands were given to a man and his wife and the heirs of the body of the husband, remainder to the husband and wife and the heirs of their two bodies begotten; upon the death of the husband without issue, the feme shall not be tenant in tail *apres* possibility, &c.; for by the first limitation she took only an estate for life, and the husband an estate in tail general, and the remainder over was a void limitation, because it could never take effect; for whatever issue the husband and wife had must inherit by force of the first limitation of the tail general, because all such issue are of the body of the husband; and when the tail general is spent in him, there cannot possibly be any issue to inherit the remainder in tail special, because such issue must be of the body of the husband and wife; and while there is any issue in being of the body of the husband, it inherits by force of the general tail; so that the remainder being void in its original creation, the wife had never an estate of inheritance in her, and, consequently, cannot be tenant in tail *apres* possibility, &c. because such an estate can be carved only out of an estate-tail.

Co. Litt. 28. a.

¶ In a case noticed by *Atkins*, upon a surrender of a copyhold estate to the husband for life, then to the wife for life, and to the heirs of the bodies of the husband and wife, remainder in fee to the use of the survivor, it is said, that the limitation did not vest an absolute estate-tail in the wife who survived, but only gave her an estate-tail after possibility of issue extinct, and that the estate-tail vested in the person who was heir of the bodies of both husband and wife. The reasons for this opinion are not mentioned, nor is it stated that it was the resolution of the court; nor does it appear whether that point entered the question then before the court.¶

Sutton v. Stone, 2 Atk. 101. It is, says Mr. Fearn, no easy matter to account for this opinion, or even to reconcile it to itself in all its points. The limitation to the heirs of the bodies of

the baron and feme, must, as he conceives, either have been executed in the baron and feme jointly as an estate-tail in possession, or have vested in them jointly as a remainder, or have been a contingent limitation to the heir of both their bodies. In the first case the estate-tail in possession would have survived to the wife on her husband's death. In the second, the joint remainder in tail surviving to her would have merged her estate for life, and she would thereby have become tenant in tail in possession; and in neither of these two cases could she be tenant in tail after possibility of issue extinct, so long as any issue of her body by her deceased husband was living; for neither husband nor wife tenants in special tail are tenants in

tail after possibility of issue extinct, till the death of the other of them, and failure of issue of their two bodies; and if there were any such issue then living, it could not vest in such issue till her death. In the third case, she could take no estate at all, and, consequently, could not be tenant in tail after possibility of issue extinct; therefore the only cases in which she could be tenant in tail after possibility of issue extinct are those two, in which it was impossible there should be any such person at all as the heir of both their bodies. Its being a surrender of a copyhold made no difference in the construction; as it was agreed in the same case, that surrenders of copyholds should be construed as other conveyances at common law. — The resolution of this case upon common law principles, Mr. *Fearne* apprehends, must have been thus: the husband and wife taking distinct and successive estates for life, the joint limitation to the heirs of their bodies was not executed in them, but vested in them jointly as a remainder in tail; this remainder survived to the wife upon the decease of her husband, and merging her estate for life, made her tenant in tail in possession; but having had no issue by her deceased husband, or such issue being extinct at the time of this resolution, she thereby became only tenant in tail after possibility of issue extinct. F.'s C. R. 81. 4th Edit.

(B) The Power this Tenant has over the Inheritance,
and in what Respects he is considered as a bare
Tenant for Life.

Co. Litt. 28.
11 Co. 80. b.
Doct. & Stud.
60.

IF tenant in tail *apres* possibility, &c. alien in fee, it is a forfeiture of his estate; because, having no longer a descendible estate in him, he cannot transfer it to another, without the prejudice and disherison of him in remainder.

Co. Litt. 28. a.
11 Co. 80. b.
Doct. & Stud.
60.

If tenant in tail *apres* possibility be empleaded, and make default, he in reversion shall be received, as upon the default of any other tenant for life; because he having the inheritance in him only shall be admitted to defend it.

Co. Litt. 28. a.
11 Co. 80. b.

An exchange by tenant in tail *apres* possibility, &c. with a bare tenant for life, is good, because both their estates are of equal continuance and duration only. So for the same reason, if any estate of inheritance in reversion or remainder descends upon him, the estate-tail *apres* possibility, &c. is merged; because as to its duration, it is merely an estate for life, and in these respects we may call him but tenant for life; yet in other respects he has the privilege of one who has an estate of inheritance.

Doct. & Stud.
61. Co. Litt.
27. b. 11 Co.
80. a. || Where
an estate *ex*
provisione viri
was settled to
the husband
for life expressly
without impeachment
of waste,
and afterwards
to the wife for
her jointure,
and in bar of
dower, but
without the
words "*without impeachment of waste*," and the leasing power given to the tenants for life was
on condition that the leases should not be made disherisonable of waste; yet the wife having

For he is disherisonable of waste, so that he has power over the lasting improvements of the land; for since he formerly had the inheritance in him, which the act of God has stripped him of, without any default of his, the privileges and benefits of the inheritance still continue in him. Besides, to punish this tenant for waste, seems to be against the design and intention of the first donation; for by that the donor gave the inheritance and an absolute power over the lasting improvements, which are looked upon as part of the inheritance for their duration, and consequently, it can be no injury to him in reversion, nor beside his intention in the donation, if the donee exercises the power he was entrusted with by the donor; nor can the donor revoke it, because the authority given by the gift must continue as long as the gift to which it was annexed continues.

become tenant in tail after possibility of issue extinct, was holden to be unimpeachable for waste, and moreover to be entitled to the timber she had cut as her own property. *Williams v. Williams*, 12 East, 209. & *supra*.] [But a court of equity will restrain such a tenant from committing malicious and extravagant waste. *Abraham v. Bubb*, 2 Freem. Rep. 53. 2 Eq. Ca. Abr. tit. Waste (A), pl. 1. S. C. 2 Show. 69. S. C. Anon. 2 Freem. 278. S. P.]

He shall not have aid of him in reversion, because he having originally the inheritance by the first gift, has likewise the custody of the writings which are necessary to defend it. Co. Litt. 27. b. 11 Co. 80. b.

For the same reason he may join the mise in a writ of right, because, the deeds belonging to the inheritance lying in his hands, he may make out his title without calling in the reversioner. Co. Litt. 27. b. 11 Co. 8.

The writ of entry *in consimili casu* doth not lie upon his alienation, as it does for him in the reversion, upon the alienation of any other tenant for life, because this case is not *consimilis* to that of tenant in dower, because this tenant had originally the inheritance in him, which the tenant in dower never had. Co. Litt. 27. b. 11 Co. 80. b. F. N. B. 206. Booth. 199.

If upon the death of tenant in tail after possibility, &c. a stranger intrudes, yet no writ of intrusion lies against such intruder, because this writ is given only upon an entry and intrusion after the death of a bare tenant for life, which this tenant is not. Co. Litt. 27. b. 11 Co. 80. b. Booth. 181.

He shall not be called tenant for life in a *præcipe* brought by or against him, because his original infeudation, by which he claims, was of an estate of inheritance, not of an estate for life. Co. Litt. 27. b. 11 Co. 80. b.

ESTATE FOR LIFE AND OCCUPANCY.

(A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.

(B) Who upon the Death of Tenant for Life is to enjoy the Land; and herein of Occupancy: And,

1. *Of what Things a Man may make himself a Title to by Occupation.*
2. *What makes an Occupant.*
3. *The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 Car. 2. c. 3.*

- (C) How far Tenant for Life may dispose of his Estate, either singly by himself, or by joining with him in Reversion: And herein of his Forfeiture, either by Common Law or Statute.

- (A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.

Litt. § 56.

IF a man lets land to one for term of life of the lessee, or any other, in this case the lessee is tenant for term of life; but in common speech, he, who holdeth for term of his own life, is called tenant for term of his own life; and he, who holdeth for term of another's life, is called tenant for term of another man's life, or tenant *pur autre vie*.

Co. Litt. 41. b.
5 Co. 13. a.
Cro. Eliz. 182.

So, if a man lets land to another for term of his own life, and the lives of *A.* and *B.*, the lessee has a freehold determinable upon his own death, and the deaths of *A.* and *B.*, nor can there be any merger of the freehold during the lives of *A.* and *B.* into the estate that the lessee has during his own life; because, though the estate for a man's own life is greater than an estate for another man's life, yet here the lessee has not two distinct estates in him, but only one freehold circumscribed with that limitation as the measure of its continuance.

Ro. Abr. 843.
But, if a lease
be made to a
corporation
aggregate for

If a lease be made to a corporation aggregate for life of the lessor; this is a good estate for life, because the life of the lessor, which is wearing and will determine, is the measure of its continuance.

their own lives; this is no estate for life, but a fee-simple; for the lease being made to them as a body politick, which has a continued succession and never dies, a lease made to them during their lives is equal to a grant made to them while they continue a body politick, which by reason of the perpetual succession of its members is in law looked upon to be for ever; and therefore, this is a good gift in fee, without the word *successors*, because the lessor cannot have the land against his own grant till the corporation is dissolved; for till their dissolution they are in being and have a continuance, which is to be alive within the words of the lease. 21 E. 4. 76. Ro. Abr. 843.

Litt. § 283.
Co. Litt. 42.
183. Ro.
Abr. 846.

If a man leases lands to another, without saying how long the lessee shall enjoy them, he shall have them for his own life, if livery be made, because every man's gift is taken most strongly against himself, and for the benefit of the grantee, to avoid all equivocation. But there is a difference between such a lease made by tenant in fee-simple and tenant in tail; for if tenant in tail makes a lease generally with livery, the lessee shall have the land but during the life of the tenant in tail, for that is the greatest estate he can lawfully make, the power to lease ceasing with his life; and where a man's act will bear different constructions, the

law

law, for no consideration, will make that construction which must be injurious to another.

So, if lessee for term of his own life makes a lease generally with livery; this the law construes an estate for his own life only; for if it were to be taken an estate for the life of the lessee, the lessor, without any explicit act of his own, would not only discontinue the reversion, but also forfeit his own estate, which construction would make the conveyance useless and ineffectual; for it would be in the power of him in the reversion to enter into the land for the forfeiture; and the law will make no construction to do wrong, or in doubtful expressions presume a wrongful intention, it being also most for the benefit of the lessee, that he should have a rightful estate. Co. Litt. 183.

So it is of things which lie in grant, as rents, reversions, commons, &c. for if a man grants these things by deed, without mentioning any particular estate, the grantee hath an estate for term of his own life, because a man's own act is taken most strongly against himself: and where the words of the deed will bear two senses without injury to any one, the purchaser who comes in upon a valuable consideration deserves the most favour; and the construction that most enlarges his interest is to be preferred: besides, being granted to him, it cannot be supposed out of him, as long as the same person continues. Ro. Abr. 845. Co. Litt. 42. a. 8 Co. 85. b.

But, if the king grants land or rent, and limits no particular estate in the gift, the patentee has no freehold, either for his own life or the life of the king. Ro. Abr. 845. For since the king is seldom known to

make market of his titles, his grants proceeding from his own bounty, and not from any valuable consideration of the patentees, ought not to be taken in a larger sense than the words of themselves import; and therefore, where he has not explicitly set forth the extent of his bounty, the law, with reason, construes the grant in favour of the king, who is best judge of the services of his subjects, and how far he intended to reward them, where the words of the grant do not declare it; and therefore such grant, being capable of a double construction, is void for the uncertainty, and shall not pass so much as an estate at will; because most grants proceeding from the instigation and application of the subject, they ought to know what they ask; and if that does not appear, nothing shall pass from the king for the uncertainty. Ro. Abr. 845. Dav. 43. 45. Co. 43. 49.

If an estate be given to a woman *dum sola fuerit*, or *durante viduitate*, or to a man and woman during coverture, or as long as the grantee shall dwell in such a house, or shall pay 10l. yearly to the grantor; in all such cases, where there is no fixed time appointed for the determination of the estate conveyed, the grantees have estates for life, if the ceremony required by law to pass a freehold be observed; as, if livery be made in case of things corporeal, or a deed be perfected in case of things incorporeal. Co. Litt. 42. a.

If I make a lease to another till I go to *Westminster*, the lessee has an estate for life. So, if *A.* leases to *B.* till *A.* makes *J. S.* bailiff of his manor, *B.* has the freehold in him; for since there is no particular time specified, but it is left indefinitely, when I shall go to *Westminster*, or *J. S.* be made bailiff of the manor, and these contingencies may or may not happen during the life Ro. Abr. 844.

of the lessee, and the livery transfers the freehold to him ; so he must, consequently, by the words of the gift, enjoy it during his life, if none of these contingencies happen in that time, upon which his estate is to determine.

Co. Litt. 42. a.
Ro. Abr. 844.
Cases in Parl.
161-2-3.
4 Mod. 173.

If an office be granted to a man, to have and enjoy so long as he shall behave himself well in it, the grantee hath an estate of freehold in the office ; for, since nothing but his misbehaviour can determine his interest, no man can prefix a shorter time than his life, since it must be his own act, (which the law does not presume to foresee,) which only can make his estate of shorter continuance than his life. So, if the office had been granted to a man *quamdiu se bene gesserit tantum*, his estate had not been less for the word *tantum* ; for a grant to a man for so long time as he shall behave himself well, and for so long time only as he shall behave himself well, are of equal extent, and his misbehaviour in each case determines his interest.

Co. Litt. 42. a.
Ro. Abr. 845.
6 Co. 35. b.

If a man grants a manor worth 10*l.* per annum to *J. S.* till he has received 100*l.*, this is an estate for life, if livery be made ; for though at the time of the grant the manor be worth 10*l.*, and by that computation the 100*l.* must be paid in ten years ; yet since the profits are uncertain, and may rise or fall, there can be no definite time fixed for the limitation of the lessee's estate ; and therefore, since livery is made, he must have a freehold in the manor determinable upon the levying of the 100*l.* But in this case, if no livery had been made, the lessee had been only tenant at will ; for it cannot be a lease for years, because the determination of it is uncertain, and there can be no freehold without livery.

Ro. Abr. 845.
Co. Litt. 42. a.

But, if I grant a rent of 10*l.* to *J. S.* till he has received 100*l.* this is an estate for years in the grantee, for the determinate sum, which is payable yearly, must necessarily in ten years amount to the 100*l.* and, consequently, it is evident at the commencement of the grant, when the interest of the grantee is to determine.

Ro. Abr. 845.

If I grant to another common of turbary in my land, to dig and carry away at his will, there being no particular estate limited in the grant, it must be construed in favour of the grantee, to continue during the life of the grantee ; for the words *at his will*, cannot refer to the estate in the common, but to the privilege given to the grantee to dig and carry away, which by the grant he may use at his will and pleasure.

Ro. Abr. 845.

If a man seised of land in right of his wife for life, bargains and sells it by indenture enrolled, the purchaser has an estate for his life determinable upon the coverture ; for the conveyance being by bargain and sale transfers no more than the husband may lawfully pass, which is an estate during the coverture ; for so long he has an estate in the freehold of his wife, and may lawfully dispose of it ; and since it cannot be foreseen when the coverture will be dissolved, the lessee must, consequently, have the freehold determinable with the coverture, since the bargain and sale upon the statute is equivalent to livery at law, to transfer the freehold.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office; this is no absolute estate for life, because the rent being granted on account of the office, and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined, because it was first granted for the exercise of the office which he is no farther concerned in. Co. Litt. 42. a.

And here it may be proper to observe, that though, by the common law, the investiture of livery was the only solemnity required to convey the freehold, yet now, by the statute of *frauds and perjuries*, it is enacted, *That all leases, estates, interests of freehold, &c. in any lands, tenements, or hereditaments, made or created by livery and seisin only, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect.* 29 Car. 2. c. 3.

(B) *Who upon the Death of Tenant for Life is to enjoy the Land: And herein of Occupancy.*

IF a man leases to *J. S.*, and *J. S.* dies, the land returns to the lessor, because, the life being spent for which the land was granted, it must necessarily come back to the old proprietor. Co. Litt. 41. b.
Cro. Eliz. 182.
 But, if the lease had been made to *J. S.* during the life of *A.* and the lessee had died living *cestui que vie*; or, if in the former case *J. S.* had granted over his estate to *B.*, and *B.* had died; in these cases, he that first took possession of the land was lawfully the tenant; for the reversioner could not claim in either case, because he had parted with it during the life of *A.* in one case, and of *J. S.* in the other; and *J. S.* cannot have any right, for that were to act contrary to his own grant, and to claim an interest which he had transferred to another; and the tenant *pur autre vie* being dead, his descendants could not claim it, because they were not comprehended in the words of the feudal donation; and therefore the first occupant must be the rightful tenant, since this, like all other things which are derelict and without an owner, belongs to the first occupier or possessor. But, the better to understand this matter, we shall consider,

1. *What Things a Man may make himself a Title to by Occupation.*
2. *What makes an Occupant.*
3. *The Way to prevent the General Occupant; and herein of the Special Occupant, and the Alteration made in the Common Law, by the Statute 29 Car. 2. c. 3.*

1. *Of what Things a Man may make himself a Title to by Occupation.*

Vaugh. 199. There can be no occupant (a) of things which lie in grant, and which cannot pass without deed, as rents, advowsons, commons, reversions, &c. because these things having no natural existence, but consisting purely in the agreement, and depending on the institution of the society for their being, no man can enter to possess them. Besides, as these things are framed and have their existence by the municipal laws of the nation, so those laws have established the solemnity of a deed to transfer them; from whence it follows, that, since no man can make himself a title to these things without deed, whoever claims them must shew he is a party to the deed before he can derive himself a title to the things contained in the deed.

200. Co. Litt. 41. b. 2 Ro. Abr. 150. Cro. Eliz. 721. 901. (a) [That is, no general occupant; for Lord Coke writes in Co. Litt. 388. a. that if heirs are named in the grant of a rent *pur autre vie*, they shall take, though this was formerly doubted. Dy. 186. ed. in marg. 1 Bulstr. 155. Mo. 625. 664. Godb. 172.]

Vaugh. 199. Therefore, if a rent be granted to *A.* during the life of *B.*, and *A.* die, living *B.*, the rent is determined; because the grant being originally made to *A.* only, when he dies, nobody can claim it as occupant, because there can be no entry into it to possess: nor by the deed, because no one was party to it but *A.*; it must follow, therefore, that when nobody can take by the grant, it must cease as a void grant, or as if it had never been made; and, consequently, the reversion must necessarily commence.

Vaugh. 200. Mo. 664. If a rent be granted to *A.* during the life of *B.*, remainder to *C.*, if *A.* dies living *cestui que vie*, the remainder which was limited to *C.* commences immediately; for the particular estate in the rent must determine, when nobody can enjoy it; and, consequently, the remainder must take place, which was to commence upon the determination of the particular estate.

Crawley's case, Cro. Eliz. 721. Dy. 186. a. in marg. S. C. But, if a rent be granted to *A.* and *B.* during the life of *C.* to the use of *C.*, if *A.* and *B.* die, *C.* shall enjoy the rent during his own life; for the rent granted to *A.* and *B.* to the use of *C.* is by the statute of uses executed in *C.* as an estate for his own life; so that the lives of *A.* and *B.* are no ways material; for the estate being executed by the statute to the use which was limited to *C.* during his own life, he must, by the grant, notwithstanding the death of *A.* and *B.*, enjoy the rent during his own life.

2 Ro. Abr. 86. 403. Cro. Ja. 696. Eustace and Scawen. Sir Wm. Jones, 55. S. C. If there be two jointenants for life, and one be a feme covert, and the baron and feme levy a fine to the other jointenant, and thereby grant *totum & quicquid* in the land, for the life of the wife; upon the death of the other jointenant, there shall be no occupant during the life of the feme, but the feoffor may enter; for the fine enured by way of release, and then the other jointenant must have claimed the whole from the first feoffment, so could have had the whole but for his own life.

But,

But, though there be no occupancy of things which lie in grant, yet they may be occupied as appendant to things which pass by livery, and which may be occupied; as, if a manor consisting part in demesne, and part in services, be leased to *A.* for the life of *B.*, upon the death of *A.* whoever first enters and occupies the demesnes has also the services: so, the occupancy of a manor is the occupation also of the advowson appendant to the manor; for though neither the services nor the advowson are separately in their own nature capable of an occupancy, yet, as they belong and are appendant to land which is subject to occupation, the occupant of the demesnes has a right to the whole manor, because the occupancy making no severance or alteration in the manor, he, that has a right to the whole manor by occupation, must necessarily have a right to all its rights.

So, the occupant of a house shall have the estovers, or way leading to the house; for since these things pertain to the house, and the occupation of the house makes no severance of them, they must necessarily remain as they were before the occupant entered, and then the possessor of the house enjoyed the estovers or way also. Vaugh. 196.

If a lease be made of lands to *J. S.* for life, *habendum* to him, and *A.* and *B.* successively, *A.* and *B.* cannot take the lands in possession, because not named in the premises; nor by way of remainder, because the intent of the deed appears to give it them in possession by the copulative words, and by joining them with *J. S.*, who is to take in possession: nor can there be any occupancy upon the death of *J. S.*, because *A.* and *B.* are mentioned in the deed as persons to take an estate, and not to make a limitation of the lands to *J. S.* during their lives; so that the lease in effect is no more than to *J. S.* during his own life, and, consequently, upon his death it must return to the lessor, since the life is spent for which he granted it. Cro. Eliz. 57.
Hob. 313.
Windsmore
and Hubbard.

If tenant in dower, or by the curtesy, of lands, grant over their estate, and the grantee dies during their lives, whoever first enters shall be occupant; for though their estates are created by law, yet since they are to enjoy them during their own lives, the reversioner has no right to enter till their deaths; nor can they enter upon the death of the grantee, because this were to act contrary to their own grant, which conveyed their estates during their own lives; consequently, since the possession is vacant and derelict by the death of the grantee, he that first enters to possess is the occupant, and shall enjoy the land during the life of tenant in dower, or by the curtesy, though they cannot be said to be tenants in dower, or by the curtesy. Co. Litt. 41.
2 Ro. Abr. 150.
Palm 32. *Vide*
Cro. Eliz. 58.

If a lease be made to *A.* and *B.* for their lives, and the life of the longest liver of them, and they make partition, and then *A.* dies, the lessor shall enter into his part; and there can be no occupancy; for *B.* has no title to it, because the right of survivorship was lost by the partition which destroyed the jointenancy; nor will the words *to the longest liver* be of any use to *B.*, because they 2 Ro. Abr. 150.

they were void at first, being no more than the law employed in the joint estate: besides, after the partition, each of the lessees has but an estate for his own life in the several moieties, and, consequently, the reversion, which is to commence when the particular estate determines, must necessarily take place, for there can be no occupant where another has right, as the reversioner has in this case upon the death of *A.* and *B.*

Co. Litt. 41.

2 Ro. Abr. 150.

There can be no occupant of any of the king's possessions; for if the king grants lands to *A.* during the life of *B.*, and *A.* dies, living *B.*, the law allows no man to gain the possession which is now vacant by the death of *A.*, but preserves it for the king; for, he being employed in the care and business of the whole nation, ought not to suffer in his private estate and concerns: besides, no man can make himself a title to any of the king's possessions without matter of record.

Smartle v.

Penhallow,

1 Salk. 188.

2 Ld. Raym.

1000. S. C.

6 Mod. 63.

S. C. Gilb. Ten.

327.

|| There can be no general occupant of a copyhold estate, because the freehold is never out of the lord; but there may be a special occupant of it, as, where the grant is to *A.* and his heirs for the life of *B.*, upon the death of *A.* during the life of *B.* *A.*'s heir must be admitted and pay a fine.||

2. What makes an Occupant.

Vaugh. 188.

Occupancy in land being nothing else than the taking possession or appropriating of that part which every man had a right to as much as another, it follows, that a claim without an actual entry makes no occupation, because, notwithstanding the claim, the possession is still vacant, and such claim leaves no marks of an appropriation; besides that, since the occupancy in civil societies follows the natural, and a mere claim makes no natural occupancy, because a man's natural right extends no farther than possession and use, and not to what he may only wish for, by consequence, if a claim doth not remove it out of the state of nature, the occupancy in civil societies, according to the nature of things, must be an actual possession, and not a bare claim.

Co. Litt. 41. b.

Riding over the ground to hunt or hawk makes no occupancy; for though this be an actual entry, yet (being only transitory and to a particular purpose, which leaves no marks of an appropriation, or of an intention to possess for the separate use of the rider) can gain no occupancy; the intention of the person being to denominate his action according to the rule *quod affectio tua imponit nomen operi tuo*.

Vaugh. 189.

191. Cro. Ja.

554. Co. Litt. 4.

If *A.* tenant *pur autre vie* leases to *B.* at will, and *B.* enters and is possessed, and then *A.* dies, and *J. S.* enters as occupant, yet he is no occupant, because the possession was taken up by *B.* before, and *B.* being found in possession, (which prevents any other occupant,) the law casts the freehold on him, not only to prevent any abeyance, but that there may be a tenant to do the services, and to answer to the *præcipe* of strangers.

2 Ro. Abr. 151.

2 Bulstr. 12,

13. Vaugh. 194.

If tenant *pur autre vie* makes a lease for years, and dies, the lessee for years being in possession shall be occupant without any act

act of his declaring his intention to be so; for being already in possession, the law does not put a man to claim or enter into that of which he has already possession, and in whomsoever the law finds the possession, there it casts the freehold for the former reasons: nor is the lessee for years injured by it, for he purchased his estate subject to this contingency of being merged by occupancy.

Comp. Incum.
348. 7 Ves. 142.

But, if tenant in fee-simple makes a lease for years to *J. S.* and after ousts him, and makes a lease to *A.* for the life of *B.*, *J. S.* re-enters, and *A.* dies, the lessee for years is no occupant; for though he is found in possession, yet it is by a title superior to the lease for life, and since he did not purchase the term at first under the contingency of a merger by occupancy, the law will not permit the lessor by any act of his to destroy the title he himself made; nor will the law merge the term, for that were to destroy the prior title of *J. S.* contrary to the rule of law, that *actus legis nemini facit injuriam*.

Co. Litt. 41. b.
2 Ro. Abr. 151.

If *A.* tenant *pur autre vie* leases to *B.* for years, and *B.* makes a lease at will to *C.*, if *A.* dies, living *cestui que vie*, *C.* shall be the occupant, because being in possession, the law gives him the freehold: and though *B.* should enter upon him and claim as occupant, yet that would make no alteration in the case, because *C.* becomes occupant immediately on the death of *A.*, and what one man is already possessed of, another cannot gain by occupation; for occupancy only gives a right where no man had it before; but the term of *B.* is still in being, because *C.* is to have the freehold as *A.* enjoyed it, which was subject to the lease for years.

2 Ro. Abr. 151.
Co. Litt. 41. b.
2 Bulst. 11.
Dyer, 328.
in margine.
Com. Incum.
348. Cro. Ja.
554. 2 Ro.
Rep. 123.
Vide 1 Vern.
234.

If tenant *pur autre vie* makes a lease for twenty years to *B.* reserving 5*l.* rent, and *B.* leases to *C.* for ten years, reserving 3*l.* rent, if the tenant for life dies, *C.* shall be occupant, because he is in possession; but yet he shall have the freehold only as a reversion on the lease of twenty years; and therefore, since the term of ten years is not merged, *C.* must pay the 3*l.* to *B.*, and *B.* must pay the rent of 5*l.* to *C.*, because *C.* as occupant comes in the place of tenant for life in all respects, and must answer the services over, is subject to the conditions, and to all charges of tenant for life, and, consequently, ought to enjoy all the benefit and profit of it.

Hargr. Co.
Litt. 41. b.
Note (1).

So, if tenant *pur autre vie* makes a lease for years to *A.*, remainder to *B.* for years, and the lessee for life dies, *A.* shall be occupant and have the freehold, because the law finds him in possession: but his term is not merged, by reason of the intermediate interest of *B.* which he must preserve; because coming in the place of the tenant *pur autre vie*, he is obliged to take the freehold under the charges he laid on it, and in the same manner he enjoyed it, which was subject to the lease for years; and therefore, though the freehold be cast on him, yet he holds it by way of reversion upon the remainder for years.

2 Bulst. 12, 13.

If tenant *pur autre vie* dies, and *J. S.* first enters, and claims in right of *J. D.*, yet *J. S.* himself shall be occupant, because the freehold,

2 Ro. Abr. 151.
Vaugh. 192.
2 Bulst. 11.

freehold, being cast on him who first takes possession, cannot be divested out of him without a solemn act of notoriety.

Lev. 202.

Sid. 346.

2 Keb. 148.

If tenant *pur autre vie* makes a lease for years to *A.* in trust for himself for life, and after his death in trust for his wife for her life; *A.* enters, but suffers the lessee for life to enjoy the land; the lessee for life dies, and the wife finding the possession vacant enters, she is the occupant, for though upon the death of tenant for life (whom he suffered to enter and take the profits,) he had so far a possession in law before any actual entry, that he might have an action of trespass; yet that made him no occupant, because nothing but an actual possession makes an occupant, which the wife first took in this case.

3. *The Way to prevent the General Occupant, and herein of the Special Occupant, and the Alteration made in the Common Law by the Statute 29 Car. 2. c. 3.*

Litt. § 739.

Co. Litt. 41. b.

388. a.

|| (a) Lord C. J.

De Grey objects to the term "special occupant" in these cases,

If lands be given to the lessee and his heirs, during the life of another, the heir comes in as special occupant (*a*) upon the death of the tenant for life, because he is included in the words of the donation, which gave him a right to the land upon the death of the lessee, and, consequently, prevents an occupancy, which is admitted in other cases, because no man has a title to the vacant possession.

as a very forced and improper phrase; and thinks there is very great weight in what is said by *Vaughan*, 201. that the heir takes it as a *descendible freehold*. *Doe v. Martin*, 2 Bl. Rep. 1150. And that it is a *descendible freehold* in a sense, Lord *Eldon* says, it is excessively difficult to deny upon a review of *Vaughan's* very learned and able argument. *Ripley v. Waterworth*, 7 Ves. 457-8. The impropriety of the phrase "special occupant" cannot but strike us: there would seem to be a contradiction in it: a special exclusive right of entering upon that which, as being the subject of occupancy, belongs to nobody, and is open to the first person who can possess himself of it, is certainly not very easy to be understood. At the same time the term "*descendible freehold*" has been objected to: for though the estate be in a sense a freehold estate, yet the word "descendible" has been thought to be inaptly applied to it, inasmuch as the heir takes it, it has been said, not as heir by descent, but as heir *nominatim*, and as by way of limitation only, by force and virtue of the grant. 7 Ves. 457-8. *Bowles v. Poore*, 1 Bulstr. 137. And *Gilbert* speaking of the fine payable by the special occupant of a copyhold upon admission, says, "it seems it must be only a purchase fine, and not such a one as is paid on descent; for he doth not take by descent, but by special occupancy." *Gilb. Ten.* 327. And Lord *Kenyon* says, Estates *pur autre vie* have been sometimes called, though improperly, descendible freeholds. Strictly speaking, "they are not descendible freeholds, because the heir at law does not take by descent. If an action at common law had been brought against the heir on the bond of his ancestor, he might have pleaded *riens per descent*; for these estates were not liable to the debts of the ancestor before the statute of frauds." *Doe v. Luxton*, 6 T. R. 291. ||

2 Ro. Abr. 151.

So, if lessee for 1 is own life leases to *B.* and the heirs of his body, during the life of the first lessee; if *B.* dies during the life of his lessor, the heirs of his body shall be occupant.

2 Ro. Abr. 150.

18 E. 3. 44. b.

So, if the lessee had made such a lease to his lessor, and the lessor had died during the life of the lessee, the heir of his body shall be occupant; for this is no surrender, because the first lessee has a possibility of reverter upon his lessor's dying without heirs of his body.

Tenant

Tenant *pur autre vie* may limit the term to a man and his heirs, or to the heirs of his body, and such estate shall descend, and is not within the statute *de donis*. Finch v. Tucker, 2 Vern. 184. Low v. Burron, 3 P. Wms. 262. If tenant *pur autre vie* settles the term to the use of himself in tail, remainder to *J. S.* equity will not support such remainder for the benefit of *J. S.* Baker v. Bailey, 2 Vern. 225. In Low v. Burron, 3 P. Wms. 262. Lord Talbot held the remainder to be good, it being no more than a description who should take as special occupant during the lives of the *cestui que vies*; grounding himself on the case of Wasteney v. Chappell, 1 Br. P. C. 457. where this was determined. And if such a limitation be admitted, it seems that any alienation by the (*quasi*) tenant in tail will be sufficient to bar the remainder-man; although, if no such act be done, he will take as special occupant. Duke of Grafton v. Hammer, 3 P. Wms. 266. note (E). Norton v. Fricker, 1 Atk. 524. Forster v. Forster, 2 Atk. 259. Saltern v. Saltern, *Id.* 376. Williams v. Jekyll, 2 Ves. 681. Blake v. Blake, 3 P. Wms. 10. note 1. Doe v. Luxton, 6 T. R. 289. S. C. Blake v. Luxton, Coop. Rep. 178. S. C. Grey v. Mannoek, 6 T. R. 292.

If lands in Borough-English be given to *A.* and his heirs for the life of *B.*, and *A.* die in the life of *B.*, leaving two sons, the youngest shall be the special occupant, because the heir, that is representative of the father as to land of that nature, must be the occupant, since the heir must take by descent, and not by purchase. Baxter v. Dowdswell, 2 Lev. 138. 3 Keb. 475. 486. 498. S. C. Vaugh. 201. Clements v. Scudamore, 1 Salk. 244. 2 Ld. Raym. 1028. S. C.

If a lease be made of *land* to *J. S.* his executors and assigns, during the life of *B.*, the executors of *J. S.* shall be the special occupants, if he dies in the life of *B.*; for though it be a freehold, which in course of law would not go to executors, yet they may be designed by the particular words in the grant to take as occupants; and such designation will exclude the occupation of any other person, because the parties themselves, who originally had the possession, have filled it up by this appointment. Dyer, 328. 2 Ro. Abr. 151., and it was assets in their hands before the stat. 29 Car. 2. c. 3. 2 Vern. 720. || That an executor may take an estate of freehold as a special occupant has been considered by Lord Hardwicke as clear; Duke of Marlborough v. Lord Godolphin, 2 Ves. 61. Williams v. Jekyll, *Id.* 681. Westfaling v. Westfaling, 3 Atk. 460. 7 Ves. 446. S. C. cited from Lord Hardwicke's notes. And of that opinion Lord Eldon has expressed himself to be. Ripley v. Waterworth, 7 Ves. 425. But Lord Redesdale has said that the old authorities seemed the other way, and that if the case were before him, he should feel great difficulty in determining according to the apparent opinion of Lord Hardwicke. Campbell v. Sandys, 1 Sch. and Lefr. 281. But *qu.* whether the distinction taken in this and the paragraph next following between the case of a corporeal and an incorporeal hereditament has been duly attended to; and see Mr. Sugden's note (I) in his Treatise on Powers, p. 187. See also Savery v. Dyer, Ambl. 140.||

But, if a *rent* be granted to *J. S.* and his executors, during the life of *B.*, by the death of *J. S.* the rent is determined, because the executors cannot take as special occupants, since the nature of the thing lying in agreement is not capable of occupation; nor can they take by the grant, because then they must take as representatives, which they cannot be of a freehold; and the law will not permit people at their pleasure to vary the course of descents. 2 Ro. Abr. 151.

So, if a *rent* be granted to *A.* his executors and assigns, during the life of *B.*, and *A.* die intestate, the administrator cannot claim the rent: not as occupant, because no man can make Vaugh. 199. 200. Cro. Eliz. 901. Mo. 664. Yelv. 9. Salter and Butler.

make himself a title to rent by way of occupancy: not by the deed, because he is not assignee within the words of the grant by the letters of administration; therefore the rent is determined, since none can claim it as occupant.

Vaugh. 201.
2 Ro. Abr. 151.
Bulst. 135.
Cro. Ja. 282.
Bowles and
Poole. Yelv. 9.

Yet, if the rent be granted to a man and his heirs during the life of another, and the grantee die, his heirs shall take as special occupants; for though in point of property the rent is not capable of occupation, yet since the heirs are included in the grant, and they are capable of taking the freehold as representatives of the grantee, which the executors are not in the former case, it is but reason the rent should not determine while any person comprised in the grant is capable of taking.

Bulst. 135.
Co. Litt. 388. a.
2 Ro. Abr. 151.

So, if an annuity be granted to A. and his heirs during the life of B., if A. die before B., his heirs shall have the annuity, because the heirs of A. being the proper representatives to take the freehold descending from him, since they are comprised in the grant, the grant cannot cease or be void while they are in being, and the life not spent for which the grant was made.

By 29 Car. 2. c. 3. § 12. it is enacted, "That any estate *pur autre vie* shall be devisable by will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor, by three or more witnesses; and if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee-simple; and in case there be no special occupant thereof, it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands."

(a) In the case of Oldham v. Pickering, 2 Salk. 464. Carth. 376. Comb. 388. there was an estate *pur autre vie* to a man and his assigns, but of which no assignment had

29 Car. 2.; reciting also that "doubts had arisen (a), where no devise has been made of such estates, to whom the surplus of such estates, after the debts of such deceased owners thereof are fully satisfied, shall belong; it is enacted, That such estates *pur autre vie* in case there be no special occupant thereof, of which no devise shall have been made according to the said act for prevention of frauds and perjuries, or so much thereof as shall not have been so devised, shall go, be applied, and distributed in the same manner as the personal estate of the testator or intestate."

been made, and the Court of King's Bench determined, that it was assets in the hands of the administrator only for the payment of debts, and that it was neither distributable, nor so much as assets for the payment of legacies, except such as were particularly devised thereout; and that the administrator was therefore entitled to hold it as occupant. This decision was not well received at the time it was pronounced. *Comberbatch* says, that it was contrary to the opinion of Mr. *Cheshire*, the counsel for the defendant, who wondered the court should give judgment for his client so suddenly. It is this case to which the statute alludes, and recognizes as not well decided, and as only raising a doubt.

Atkinson v. Baker, 4 T. R. 230.

If an estate *pur autre vie* be limited to a man, his heirs, executors, administrators, and assigns, the heir shall take as special occupant in preference to the executor. And where the heir takes

takes as special occupant, under the statute of frauds, the estate is liable to the debts to which an estate in fee-simple is liable, but to those only.

If an estate *pur autre vie* be limited to a man, his *executors, administrators*, and assigns, it becomes personal estate in the hands of the executors or administrators; it is subject to the same debts and clothed with the same trusts with personalty of any other description; title may be made to it under a will sufficient to pass personal estate; and, where there is no will, it is distributable. For though the executors or administrators take as special occupants under this limitation, yet they take also as executors and administrators; and that character still remaining in them, the equity, which attaches upon it, must remain also. Hence, though an estate so limited, being an estate of freehold, be devisable as to the legal interest only by an instrument attested by three witnesses; yet, where it is not so devised, devolving upon the executor, it devolves upon him in trust for those who are entitled to the personal estate.

Whether an estate *pur autre vie*, not devised, be real or personal assets does not depend upon there being or not being a special occupant (a); for the assets may be personal, though there be a special occupant, as, where the occupancy is in the executor or administrator; to make them real the special occupancy must be in the heir.

Again, an estate *pur autre vie*, where there is no special occupant named, is not, if devised, therefore real assets; but is, by the statute of frauds, assets in the hands of the executor to pay debts generally; for that statute has in effect made the executor a special occupant in all such grants, as is inserted therein.

Duke of Devon v. Kinton, 2 Vern. 719. 2 P. Wms 38c. S. C. by the name of Duke of Devon v. Atkins.

A devise of an estate *pur autre vie* is, as against creditors, fraudulent and void within the statute 3 & 4 W. & M. c. 14.||

Id. ibid.
Ripley v.
Waterworth,
7 Ves. 425.
Williams v.
Jekyll, 2 Ves.
683.

(a) Fonbl. Eq.
Tr. 396.

Id. ibid.
Ripley v.
Waterworth,
ubi supra.
Westfaling v.
Westfaling,
3 Atk. 466.

Westfaling v.
Westfaling,
ubi supra.

(C) *How far Tenant for Life may dispose of his Estate, either singly by himself or by joining with him in Reversion: And herein of his Forfeiture, either by Common Law or Statute.*

BY the ancient feudal law no man could alien without licence from the lord of the fee; but any alienation or disposition was then a forfeiture; but in *England*, where the allodial property prevailed in the *Saxon* times, they were allowed to alien in (b) some cases, which privilege was not only confirmed, but also enlarged and made general by *magna charta*; so that by that act the feudatory might alien to whom he pleased, provided he left sufficient to answer the lord's services, which seems to have been a privilege mightily contended for.

Digest. Feud.
lib. 2. tit. 26.
fol. 523. Vigeli-
lius, lib. 5.
Cause, 32.
f. 287. Staunf.
Præf. 28. a.
(b) 1st, *In re-
munerationem
servitii*, that is,
for services
done

done to the feid, as for services done in the wars by the feudal tenant, or in peace, by ploughing the feid at home; both these being either for the profit or honour of the feudal lord, they formerly valuing themselves upon the number and honour of their tenants. 2dly, In frank marriage with the daughter of the feudatory, or some other of his blood, because this multiplied tenants to the lord. 3dly, In frankalmoigne or free alms, the superstitution of the times allowing it for the good of the soul. Glanvil, lib. 7. cap. 1. 44. Staunf. Præf. 27, 28.

2 Inst. 65.

Ro. Abr. 854.

Co. Litt. 251.

Yet notwithstanding this law, if tenant for life aliens in fee this is still a forfeiture, for that statute only permits a lawful disposition, but does not allow any alienation to the prejudice of him in reversion, and therefore where tenant for life takes upon him to transfer the fee-simple, it is a renunciation of the feud, and contrary to his oath of fidelity. So, if tenant for life aliens to another for the life of the alienee, this is a forfeiture, for it can be no lawful alienation within *magna charta*, because it is palpably to the prejudice of him in the reversion.

Ro. Abr. 854.

If *A.*, lessee for life, leases to *B.* for the life of *B.*, if *A.* lives so long; this is a forfeiture of *A.*'s estate, because *B.* has an estate for his own life, though under a contingency, which must necessarily divest the reversion.

Cro. Ja. 100.

Castle v. Dod.

Ro. Abr. 854.

But, if *A.*, lessee for life, levies a fine to *B.* for the life of *A.* to the use of *B.* for his own life, this is no forfeiture; for the estate granted by the fine was only for the life of *A.*, and the limitation of a greater use can be no forfeiture, for the estate out of which the use arises is only during the life of *A.*

Cro. Eliz. 131.

Piers and

Hew. So, if

baron and

heir be ten-

ants for life,

and they both

join in a feoff-

ment, or the

husband alone;

these are for-

feitures, but

they affect the

wife only during

the coverture;

for she can be

bound by no act

of hers without

examination in

the court of record.

Ro. Abr. 851.

8 Co. 44.

Husband seised of lands in right of his wife for life, and they both by deed of feoffment convey the land to *J. S.* and his heirs, *habend.* to him and his heirs, to the use of him and his heirs, for the life of the wife; this is a forfeiture of her estate; for there being a fee-simple conveyed to *J. S.* by the deed and livery, the words of restraint for the life of the wife refer only to the limitation of the use, so that the fee-simple remains still in the feoffee; but this it seems is a forfeiture only during the coverture.

8 Co. 45. Co.

Litt. 233. b.

If tenant for life makes a lease for years, this was never looked upon to be a forfeiture, because the lessee for years was originally but a bailiff to the freeholder, and the tenant for life only had the feehold, and was to answer the services, and he in reversion was nowise affected by it, because there was no investiture or other act of notoriety done to dispossess him of his reversion. But upon the death of tenant for life the termor's interest ceased, because the person from whom he derived his authority as bailiff being dead, the authority must necessarily cease with the person that granted it. And in this case, if tenant for life enters upon his lessee, and makes a feoffment to another, this is a forfeiture of his whole estate, but the term for years continues, because the wrongful act of tenant for life shall not prejudice a stranger's interest; and if he in reversion enters, he must take it subject to the charges he had power by law to lay

lay

lay on it; yet in this case, if tenant for life had entered and committed waste, this had been a forfeiture of his estate, and the term had been lost too; but this is by the express words of the statute of Gloucester, which gives the place wasted as a penalty to him in reversion, and cannot be done if the term continues notwithstanding the waste. But for this vide tit. Waste.

Of things which may be transferred without the notoriety of livery and seisin, such as rents, advowsons, &c. which lie in grant, a man cannot by any disposition or act *in pais* forfeit them; and therefore, if a man seised of a rent, advowson, or common for life, grants them by *deed* to another in fee, this is no forfeiture, for this can be no way prejudicial to him in reversion, because, should the grantee claim an estate in fee, he can make no title without the original grant made to his grantor; by which it must appear what interest he had, and, consequently, what estate he could convey; and so the grantee, notwithstanding the grant in fee, can claim no larger estate than his grantor had power to make, and so he in reversion can receive no prejudice. Co. Litt. 251.
Ro. Abr. 854.

So, if tenant for life of lands, by indenture enrolled, bargains and sells them to J. S. and his heirs, this is no forfeiture, but the bargainor passes only what he may lawfully pass; for though by the statute 27 H. 8. c. 10. deeds enrolled grew a common conveyance for the transferring of lands, which could not pass at common law without the investiture of livery; yet being a manner of conveyance known before at common law, it was construed to have no new effect given it by the statute, but what the statute expressed. 6 Co. 14. b.

But, if a man be seised of a manor for life, to which an advowson is appendant, and he alien one acre, or the whole manor, with the advowson in fee, this is a forfeiture of the advowson; for as it is a forfeiture of the acre or manor to which it is appendant, so it must be also of the advowson, since the alienation makes no severance of them. Ro. Abr. 854.

If lessee for life of lands aliens in fee upon condition, and enters for the condition broken, yet the lessor may enter for the forfeiture. Ro. Abr. 856.
Co. Litt. 252.
Palm. 202.

So, if tenant for life aliens upon condition, that if he himself pays 10*l.* that he shall re-enter, and that if he fails in payment, that then the alienee shall have the fee-simple; though he pays the money, yet the reversioner may enter for the forfeiture, because the fee was transferred immediately upon the alienation, which was a renunciation of the feud, and consequently a forfeiture. Ro. Abr. 856.

If tenant for life levies a fine, by which the reversion is divested, this is a forfeiture; because it is a more solemn renunciation of the feud than any alienation *in pais* can be. Co. Litt. 251. b.

So it is of a rent, advowson, or any thing else that lies in grant: for if tenant for life of them levies a fine, it is a forfeiture: for though the fine being of a rent, &c. passes no more than it may lawfully pass, yet, being a publick and solemn renunciation of the estate for life in a court of record, this amounts to a forfeiture, and so differs from a grant *in pais*. Ro. Abr. 852.
Co. Litt. 251.

Vigellius,
Cause, 32.
f. 287, 288.

Another way of forfeiture in a court of record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such denial was a forfeiture. Now this denial may be when the vassal claims the reversion himself, or accepts a gift of it from a stranger, or acknowledges the reversion to be in a stranger; for in all these cases he denies that he holds the feud from the lord: but, as by the feudal law the vassal was to be convicted of this denial, so in our law these acts, which plainly amount to a denial, must be done in a court of record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by great lords for trepanning their tenants, and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause: but the denial of the tenure upon record could never be counterfeit, or be abused to any injustice; and therefore this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law.

7 Co. 55. Co.
Litt. 251. b.
So, if in a *quid*
juris clamat
brought
against him,
he claims the
fee-simple;
this is a for-
feiture. Ro.
Abr. 853. 2 Co. 68. b.

And therefore, if tenant for life be disseised, and bring a writ of right, this is a forfeiture of his estate; because by suing a writ of right he admits the reversion in fee to be in himself, and, by consequence, denies that he holds over. So it is, if, in a writ of right brought against him, he should join the mise on the mere right; for by taking upon him the privileges of tenant in fee, he admits the inheritance in him, which is a denial of the tenure.

Dyer, 148.
Co. Litt. 252.
Ro. Abr. 852.
9 Co. 106.

If tenant for life accepts a fine *come ceo*, &c. of a stranger, this is a forfeiture of his estate; for this is a denial of the tenure on two accounts: 1st, In admitting the reversion to have been in the stranger to convey. 2dly, In accepting it himself to the prejudice of him in reversion.

Smith v. Abell.
2 Lev. 202.
Levinz says,
that this was
so determined
without argu-
ment: but Sir

If *A.* be tenant for life, remainder to *B.* for life, and *A.* levy a fine to *B.* and his heirs *sur conusans de droit come ceo*, this is a forfeiture of both their estates; for by their own act on record, they have denied the reversion to be in the lord, the first by giving, and the last by accepting such an estate.

T. Jones in his report of this case, p. 65. says, it seemed to the court, that the acceptance of the fine is a forfeiture of the remainder; but adds, *quære*, whether any judgment was given. See *Lane v. Lady Vane*, Sir *T. Jon.* 98. where this case is referred to.

2 Co. 55.
Moore, 423.
Buckler's case.
Co. Litt. 252. a.

If tenant for life be disseised, and the disseisor make a lease at will, and tenant for life levy a fine *come ceo*, &c. to the lessee this is a forfeiture, and he in the reversion, though he had but a right, may take advantage of it.

Co. Litt. 252.
Ro. Abr. 852.

If a stranger bring an action of waste against tenant for life, and

and the lessee plead *nil waste fait*, in bar to the action; this is a forfeiture, because by his plea he admits the stranger to be the proper person to punish the waste, if there had been any committed.

If the demandant in a real action recovers against the tenant for life by default or *nient dedire*, or by pleading covenantously to the disherison of him in the reversion; these are forfeitures of his estate; for tenant for life is entrusted with the freehold, and is to answer to strangers *precipes*, and defend his own as well as the reversioner's interest; but when he gives way to the demandant's action, he admits the right of reversion to be in him, and, by consequence, denies any tenure of his reversioner, which is a forfeiture.

Co.Litt. 252. a.
Ro. Abr. 853.

If tenant for life prays in aid of him in reversion, and has it granted him, and *J. S.* comes into court without process, and says, he is the person of whom aid is prayed, and that he is ready to join in aid; but tenant for life denies him to be the person, and is adjudged to answer sole; if this be the person that has the reversion, tenant for life has forfeited his estate by his denial of him, because the prayer in aid being always of him in reversion, and the tenant denying him to be the person of whom he prayed in aid, he has denied the reversion to be in him, and, consequently, has denied to hold of him. So it is, if he had at first prayed in aid of a stranger; this had been a forfeiture for the same reason.

Ro. Abr. 853.
Co. Litt. 252.

If a stranger grants the reversion by fine, and the conusee brings a *quid juris clamat* against the lessee, who attorns to the grant; this is a forfeiture, because he thereby admits the reversion to be in a stranger; but, if he be erroneously adjudged by the court to attorn, and he does it in obedience to the court, this is no forfeiture, because he was bound by the judgment to attorn, and did nothing wilfully to the prejudice of him in reversion.

Co.Litt. 252. a.
Ro. Abr. 853.

Where he in reversion is party to the conveyance, there, tenant for life may by solemn investiture convey a greater estate than he had by the first feudal contract: as, if *A.* tenant for life makes a lease to *B.* who is in reversion, for the life of *B.*, this is neither a surrender nor forfeiture: not the first, because *A.* has not wholly parted with his own estate, but hath left a reversion in himself after the death of *B.*, who may possibly die first; and therefore if *B.* takes a wife, she shall not be endowed of such estate, because *B.* is but tenant for life by the conveyance: a forfeiture it cannot be, because he in reversion is party, who cannot take advantage of it as a forfeiture, contrary to his own concurrence and approbation, for that were to render his own act void and ineffectual.

Co. Litt. 42. a.

If *A.* tenant for life enfeoff *B.* in remainder for life; this is a surrender; for a forfeiture it cannot be, because *B.* in remainder was party, and *A.* can have no reversion, because he conveyed the whole estate.

Co. 76. b.
Co. Litt. 42. a.
S. P.

But, if *A.* be tenant for life, remainder to *B.* in tail, remainder

41 Ass. pl. 2.
to Co. 76. b.

Co. Litt. 42. a. to *C.* in fee, and *A.* make a feoffment to *B.* and his wife, and
 Ro. Abr. 855. their heirs, and then *B.* die without issue, *C.* may enter for the
 forfeiture: for this could be no surrender, because the feme, who
 had no interest in the land, was party to the feoffment, and she
 must claim under the feoffment, which, being made to a stranger,
 must necessarily divest the remainder, which is a forfeiture of
A.'s estate, and, consequently, *C.* may enter, since the estates of
A. and *B.*, which hindered him, are spent and determined.

Ro. Abr. 857.
 3 Co. 140. Therefore, if tenant for life, remainder in tail, remainder in
 fee, and the tenant for life enfeoffs him in the last remainder,
 the mean remainder-man may enter, because this divested his
 remainder, and, by consequence, was a forfeiture.

Ro. Abr. 855. If tenant for life makes a feoffment in fee to baron and feme,
 seised of the reversion in right of the feme; this can be no sur-
 render; for whatever vests in the husband by the feoffment, must
 necessarily be divested out of the wife, and when she enters into
 the land she is remitted to her former right.

Ro. Abr. 855.
 Co. Litt. 42. a. If baron and feme, seised in right of the feme for life, lease for
 life by indenture to him in reversion, being within age, for the
 life of the husband; this is a forfeiture; for though he in re-
 version be party to the lease, yet being an infant he is not bound
 by the contract to his own prejudice; but, if he in reversion had
 been of full age, the lease had been good, because he had dis-
 pensed with the advantage of the forfeiture by his acceptance of
 the lease.

Co. 76. 6 Co.
 15. a. Plow.
 140. The next thing to be considered is, where tenant for life and
 he in reversion join in the conveyance: and this has a different
 operation, as the feoffment is with or without deed; for if it be
 without deed, then this is construed to be a surrender of the
 estate for life, and the feoffment of him in reversion, for no other
 interpretation can make the feoffment effectual; for if the estate
 passes from the tenant for life to the feoffee, it will be a forfeiture
 of his estate, whereof he in reversion may take advantage, not-
 withstanding his joining; for he having only the reversion had
 nothing to do with the freehold, and, by consequence, could
 make no feoffment or livery: and it cannot be a grant or con-
 firmation of him in reversion for want of a deed: therefore, to
 make it effectual, it is construed the surrender of the tenant for
 life, and the feoffment of him in reversion.

Co. 76. Plow.
 140. But, if tenant for life and he in reversion join in a feoffment
 by deed, then each passes only his own estate; the tenant for life
 the freehold in possession, and he in reversion his reversion: and
 this cannot be a forfeiture, because he in reversion joined in a
 proper conveyance to transfer his reversion; and having passed
 it to another, has no interest left to entitle him to take advantage
 of the forfeiture, if it was one.

Co. 76. b.
 77. a. So, if tenant for life, remainder in tail, join in a feoffment
 by deed; this is no discontinuance, but each gives only his own;
 and upon the death of tenant for life and him in remainder in
 tail, the issue, or those in reversion may lawfully enter, because
 then the estate that passed is determined; but, if such feoffment
 had

had been by parol, then it had been the surrender of the tenant for life, and the feoffment of him in remainder, which would have made a discontinuance.

A. tenant for life, remainder in tail to *B.*, remainder in tail to *C.*, *A.* and *B.* join in a fine *come ceo*, &c. to a stranger; this is neither a discontinuance nor forfeiture, for each gives what he may lawfully dispose of; the tenant for life his estate, and *B.* a fee determinable on his estate-tail: and to prevent any discontinuance or forfeiture, it shall be first construed to be the grant of *B.* in remainder, and then of *A.* the tenant for life.

But, if *A.* tenant for life, and *B.* in remainder for life, join in a feoffment, this is a forfeiture of both their estates, and he in remainder or reversion may enter presently; because this feoffment passed a greater estate than both of them could lawfully make, and, consequently, must divest the reversion or remainder in fee, and so amount to a forfeiture. So it would be, if a remainder had been to *C.* in tail, remainder to the right heirs of *B.*, for the feoffment conveying a fee in possession, which *B.* had not in him, must necessarily divest the remainder to *C.*, and, consequently, be a forfeiture, whereof he may take advantage.

So, if *B.* in remainder for life, with such last remainder to his right heirs, levy a fine *come ceo*, &c. to a stranger; this is a forfeiture of his remainder for life, because the fine conveys a fee-simple in possession by estoppel, against which he can make no averment; or by making fractions of the estate, say, he only past an estate for life *in presenti*, with a fee-simple expectant on the death of *C.* without issue; because the fine supposes a precedent gift in fee-simple, which he could not lawfully make whilst the estate for life of *A.* and the intermediate remainder of *C.* in tail were subsisting; and therefore such fine is a forfeiture, though during the life of *A.* *C.* can take no advantage of it.

Tenant for life, the reversion in fee being an infant, they both join in a fine, which is afterwards reversed by the infant for his nonage; yet the conusee shall hold during the life of tenant for life, because distinct interests passed from each of them, and the defect in one shall give no advantage to the other.

If tenant for life and he in reversion join in a gift in tail, reserving rent; this can be no forfeiture; because he in the reversion joined, and the tenant for life shall have the rent during his life, because the rent comes in lieu of the land, and therefore shall go according to the estates they had respectively in the land.

Tenant for life and he in reversion join in a lease for life; the lessee commits waste; they both shall join in an action of waste, and the tenant for life shall recover the place wasted, because he in reversion by joining hath admitted a reversion to be in the tenant for life, and, consequently, the forfeiture to belong immediately to him: but he in the reversion shall have the treble damages, because they are given for the waste and destruction

Co. 76.
Bredon's case.
Cro. Eliz. 827.
Mo. 634.
Vent. 160.

Dyer, 339.
Ro. Abr. 855.
1 Co. 76.

[Between
Garret v.
Blizard, Ro.
Abr. 855. Sty.
192. S. C. the
court divided;
and the re-
porter says,
Qu. What
judgment was
given? S. C.
cited in Sir
Wm. Jon. 65.
70. 3 Keb. 733.

Co. 76. b.
Vent. 160.

6 Co. 15. a.

Co. Litt. 42. a.

done to the inheritance wherewith the tenant for life has nothing to do.

Co. Litt. 42. a. If *A.* and *B.* jointenants, and to the heirs of *B.* join in a lease for life, *A.* has a reversion, and shall join in an action of waste; but the writ must be *ad exhereditationem* of *B.*, because he only hath the inheritance.

6 Co. 14. b. If *A.* tenant for life, and *B.* in remainder in fee join in a lease
Treport's case. for years by deed; this, upon the delivery of the deed, is the
Mo. 72. Co. lease of *A.* during his life, and the confirmation of *B.*, for *A.* be-
Litt. 45. a. ing tenant in possession, the possession could only pass from
him; and the lease being made by deed carries the approbation
of the reversioner, and therefore is construed his confirmation;
and therefore, where the lessee declared of a joint demise by *A.*
and *B.*, it was adjudged he had failed of his title, because during
the life of *A.* it was only his demise, and *B.* having only an inter-
est in reversion could give the lessee no interest in possession.

Dyer, 234. But in this case, upon the death of *A.*, it becomes the sole demise
b. 235. Mo. of *B.*, for it can be no longer the demise of *A.*, who is not
72. Newd- in being, and whose interest in the land determined with his
gate's case. life; but the lease does not determine on the death of *A.*, be-
6 Co. 15. a. cause, though *A.* could transfer the land only during his own
Co. Litt. 45. a. life, yet the term having the approbation of *B.* who has the ab-
solute property, such joining and approbation has made the
lessee's interest absolute and indefeasible during the term; and
therefore upon the death of *A.* it becomes the demise of *B.*, for
B. has the sole and absolute interest in the land, and the lessee
can hold of none else; and therefore it seems, that if *B.* brings
an action of waste against the lessee, he may declare of a demise
by himself, without taking notice of *A.*, because upon the death
of *A.* it becomes the sole lease of *B.*

Lady Whet-
stone v.
Saintsbury,
2 P. Wms. 147.
Pr. Ch. 591.
S. C.

[By marriage settlement lands were conveyed to trustees and their heirs to the use of husband for life, remainder to the use of trustees to preserve contingent remainders, remainder to the use of the wife for life, remainder to the first, &c. son of the marriage in tail male. The husband and wife levied a fine, (they having then a son an infant,) and mortgaged the land to *J. S.* The husband died; *J. S.* brought a bill against the wife and son then of age. The son pleaded the settlement, and insisted that his mother's estate was forfeited, and equity ought not to relieve. The Lord Chancellor upon argument allowed the plea. But the cause coming on to be heard by the Master of the Rolls, he observed, that the use and the legal estate were vested in the trustees: and the limitations to the husband, wife, and sons, were but trusts; and a trust for life is not forfeited by a fine (*a*), and so the plea false, not being warranted by the settlement. He therefore decreed the plaintiff to hold and enjoy during the life of the wife.]

(*a*) So, Le-
theuillier v.
Tracey,
3 Atk. 728.

EVIDENCE.

(A) Who may be a Witness : And herein,

1. *Whether a Husband or Wife may be Witness for or against each other.*
2. *Whether a Judge or a Juror may be a Witness.*
3. *Whether a Counsel, Attorney or Solicitor, may be a Witness against his Client.*
4. *Whether Plaintiffs or Defendants in the Cause may be Witnesses.*
5. *Whether an Accomplice in a Crime may be a Witness for or against his Companion.*
6. *How far a Person is disabled from being a Witness in respect of his having been attainted or convicted of a Crime.*

(B) How far a Person is disabled from being a Witness in respect of his being interested in the Success of the Cause.

(C) Of the Number of Witnesses required in our Laws.

(D) Of compelling a Witness to appear and give Evidence.

(E) Of the Manner of giving Evidence : And herein,

1. *Where the Examination is in open Court, and herein of such Questions as may be asked a Witness.*
2. *Of Examinations and Proofs in Chancery.*

(F) Of written Evidence : And herein of admitting Exemplifications or Copies of Records, &c. in Evidence.

(G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

(H) Of Presumptive Proof.

(I) Where the Law requires the highest Proof the Nature of the Thing is capable of.

(K) Of Hearsay Evidence.

(L) Of the Party's Confession.

(M) Of

(M) Of Similitude of Hands.

(N) Whether the Depositions of Witnesses in another Cause may be given in Evidence.

What evidence will maintain the plaintiff's action, *vide* under the titles of the several actions; and what the defendant must plead, and cannot give in evidence, *vide* also under the titles of the several actions and head of PLEADINGS.

(A) Who may be a Witness.

Co. Litt. 6.

(a) An infant of the age of nine years has been allowed to give evidence.

H. P. C. 263.

ALL persons may be witnesses who appear to have sufficient (a) discretion, and who from their (b) principles must be presumed to have a right sense of the sanctity of an oath (c), and of the obligations it lays them under to depose the whole truth, and nothing but the truth; therefore infants, aliens, villeins, bondmen, &c. may be witnesses.

[An infant under the age of seven years may be a witness in a criminal prosecution, provided such infant appears upon examination to possess a sufficient knowledge of the nature and consequences of an oath: there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court. But, if they are found incompetent to take an oath, their testimony cannot be received. *Rex v. Brasier*, *Leach's Cases*, 180. *Powell's case*, *Id.* 104. — *Mr. J. Rooke*, in a criminal prosecution that was coming on to be tried before him at *Gloucester*, finding that the principal witness was an infant, who was wholly incompetent to take an oath, postponed the trial till the following assizes, and ordered the child to be instructed in the mean time by a clergyman in the principles of her duty, and the nature and obligation of an oath. At the next assizes the prisoner was put upon his trial, and the child was produced as a witness, and being found by the court, upon examination, to have a proper sense of the nature of an oath, was sworn, and upon her testimony, the prisoner was convicted, and afterwards executed. *Mr. J. Rooke* mentioned this at the *Old Bailey* in 1795, in the case of *Patrick Murphy*, who was indicted for a rape on a child of seven years old; and the learned judge added, that upon a conference with the other judges upon his return from the circuit, they had unanimously approved of what he had done.] (b) But an infidel cannot be a witness, *i. e.* such a one as neither believes the Old or New Testament to be the word of God, on one of which our laws require the oath should be administered. 2 *Keb.* 314. 2 *Hawk. P. C.* c. 46. § 26. [All that the law of *England* requires is, that the witness should profess a belief in a Supreme Being, and his moral providence, and appeal to his omniscience for the truth of his attestation. The form of the oath is not of the essence of it. 2 *Sid.* 6. It is immaterial what may be its external form, provided it affect the conscience of the party. An infidel therefore, that is, one not believing in revealed religion, is, in general, an admissible witness, if sworn according to the ceremonies of his religion. *Omychund v. Barker*, 1 *Atk.* 21. 1 *Wils.* 84. But men wholly without religion shall not be permitted to bear testimony in any case whatsoever. 1 *Atk.* 45. Neither shall a person excommunicated be a witness, because being excluded out of the church, he is supposed not to be under the influence of any religion. *Bull. N. P.* 292. 3 *Bl. Comm.* 102. || But see *st.* 53 *G. 3.* c. 127. § 3. which enacts, that no person pronounced or declared excommunicate shall incur any civil penalty or incapacity whatever.] — A man deaf and dumb, with whom communication could be held by means of signs, &c. was admitted to give material evidence against a prisoner at the *Old Bailey*, January Sessions 1786, by *Mr. J. Heath*, after an argument against his competency. (c) The solemnity of an oath is required from all persons. Lords of parliament, when they give their testimony, must be sworn. Their privilege to protest upon honour only is confined to their answers in courts as defendants. *Sir W. Jon.* 153, 154, 155. *Cro. Car.* 64.

2 Mod. 99. 2 Salk. 513. 1 P. Wms. 146. In the case of the king, his testimony has in one instance been admitted without oath. This was in the reign of *James the First*, whose certificate under his sign manual, was received as evidence in a Chancery suit without exception. *Abignye v. Clifton*, Hob. 213. But the legality of admitting this evidence, was justly questioned by a great contemporary authority. 2 Ro. Abr. 686. In one case the law dispenseth with the formal manner of being sworn in favour of certain sects of our own people, and allows their affirmation to have the force and effect of an oath. But this indulgence it confines to civil actions. Stat. 7 & 8 W. 3. c. 34. 22 G. 2. c. 30. Perhaps the affirmation of one of these sectaries may be read in defence of a criminal charge against the sectary himself, but not where his evidence is collateral, and in exculpation of a third person, the sectary himself not being charged at all. 2 Barr. 1117.]

[In the second year of *Charles the First*, the House of Lords 7 Parl. Hist. 43. referred it to the judges generally, whether, in case of treason 3 Wooddes. and felony, the king's testimony is to be admitted: but the king 276. Com. prohibited them from giving their opinion. As to appearing Dig. tit. Test. personally, and being sworn in court, that seems wholly incon- moigne, (A. 1.) sistent with the royal dignity.]

Lunatics may be witnesses *in lucidis intervallis.*]

But, as our law has disabled several persons from being witnesses, who may be supposed so far biassed as to be induced to go beyond the truth, I shall consider this matter,

1. *In relation to Husband and Wife, and whether they may be Witnesses for or against each other.*

Husband and wife are considered as one and the same person in law, and to have the same affections and interest; from whence it has been established as (a) a general rule, that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband, by reason of the implacable dissension which might be caused by it, and the great danger of perjury from taking the oaths of persons under so great a bias, and the extreme hardship of the case.

4 T. R. 678. The husband cannot be a witness for the wife even on a question touching her separate estate. 1 Burr. 424.] (a) And holds as well in the courts of equity as in the common law courts. 2 Ch. Ca. 39. 2 Vern. 79. — But where, from the nature and difficulty of the case, the wife's evidence, being corroborated by other circumstances, was admitted to be read against the husband, *vide* Abr. Eq. 226, 227.

Hence it hath been adjudged, that the husband cannot be a witness against the wife, nor the wife against the husband, to prove the first marriage, on an indictment on the statute of 1 Ja. 1. c. 11. for a second marriage; but the second husband or wife may be allowed to give evidence, such second marriage being void, and therefore they were never husband and wife.

in Sir John Savil's case, who was convicted of marrying a second wife. Harper, 2 Ld. Raym. 752. S. P. 2 T. R. 263. S. P.]

|| So, in an action brought by a woman as feme sole, the defendant cannot call the plaintiff's husband to prove her married, thereby to nonsuit her.

So, where an action is brought by or against the husband, or by

Co. Litt. 6. b.
2 Ro. Abr. 686.
pl. 4. H.P.C.
263. Brownl.
47. Hutton,
116. Raym. 1.
2 Keb. 403.
2 Hawk.
P. C. c. 46.
§ 16. [2 T.R.
265. 262.

Raym. 1.
State Trials,
vol. 4. fol. 754.
S. P. admitted
in Fielding's
trial, and
3 Keb. 490.
S. P. admitted
[Broughton v.

Bentley v.
Cook, cited in
2 T. R. 265.

Winsmore v.
Greenbank,

Willes, 577. Alban v. Pritchett, 6 T. R. 680. by the husband and wife jointly in right of the wife, the declarations of the wife are not evidence against him.

Hall v. Hill, 2 Str. 1094. In an action of trespass against a husband and wife, the wife's confession of a trespass, committed by her, cannot be given in evidence to affect the husband. *Per Cur.* in Denn v. White, 7 T. R. 112.

Bull. N. P. 28. Willes, 577. In an action for criminal conversation with the wife, the wife's letters to the defendant are not evidence for the defendant against the husband, nor is her confession evidence for the husband against the defendant: but conversations between her and the defendant are evidence against him.

Davis v. Dinwoody, 4 T. R. 678. In an action by a trustee in a marriage settlement against a sheriff to recover the value of certain goods sold by him under an execution against a third person, that person was not admitted to prove on the part of the plaintiff, that the goods had been conveyed to the use of his (the witness's) wife.

Tiley v. Cowling, 1 Ld. Raym. 744. Bull. N. P. 243. In trover by a carrier for a box, which had been delivered to the defendant by mistake, the plaintiff called the owner's wife to prove what the box contained. But *Holt C. J.* refused to hear her testimony, on the ground, that the verdict in that action, with oath of what the carrier's witness swore, might be given in evidence to prove the value of the goods in a subsequent action brought by the husband against the carrier.

R. v. Lecker, 5 Esp. 107. R. v. Frederick, 2 Str. 1094. S. P. On a prosecution against several persons for a conspiracy, Lord *Ellenborough* refused to admit the wife of one of the defendants to be a witness for the others; a joint offence being charged, and an acquittal of all the other defendants being a ground of discharge for the husband.

Mary Grigg's case, Sir T. Raym. 1. Broughton v. Harper, 2 Ld. Raym. 752. R. v. Cliviger, 2 T. R. 263. (a) R. v. Cliviger, *ubi supra*. The husband and wife are not allowed to give any evidence that may directly criminate, or even tend to criminate, each other. Thus, if an actual marriage has been proved between two persons, a woman cannot be suffered to prove an antecedent marriage between herself and one of the parties, the consequence of which might be a prosecution for bigamy. And it has been laid down by *Ashhurst J.* (a) that if a witness has been examined to a material fact in a cause, which from its nature must have been known to him, (as, for example, to his own marriage,) his wife cannot be called by the same party to contradict him, as such evidence might lead to a charge of perjury, and cause the husband to be apprehended.

Monroe v. Twisleton, cited in Aveson v. Lord Kinnaird, 6 East, 192. Even after a dissolution of the marriage for adultery, the wife is not admitted to give any evidence which would have been excluded, if the marriage had continued. ||

(b) *Vide* Sid. 431. (c) Cro. Car. 488. Fulwood's case. Vent. 243-4. 4 Mod. 8. Stra. 633. But some exceptions have been allowed to this general rule, especially in cases of (b) evident necessity; and therefore it hath been (c) adjudged, and is the constant practice at this day, that on an indictment for a forcible marriage grounded on the 3 H. 7. c. 2. the wife may be a witness against the husband. So, where

where (a) husband or wife has cause to demand sureties of the peace against the other. (a) 2 Hawk. P.C. c. 46. § 16.

Also, in Lord *Audley's* case, who held his wife's hands and legs, while his servant, by his command, ravished her, the wife was admitted an evidence. Hutt. 116.
2 Hawk.
P. C. 132.
But in *Raym. 1.*

this case is denied to be law; and in *Vent. 244.* it is doubted of by my Lord Ch. Just. *Hale*, because here is a wife *de jure*, and so not like the case, where a woman is admitted to prove a forcible marriage.

Also, in (b) *Raym. 1.*, it is said, that a husband and wife may be witnesses against each other in treason: but the contrary is adjudged in (c) 1 *Brownl.*

2 Hawk. P. C. c. 46. § 16. note, seems to agree.

[And by stat. 21 J. 1. c. 19. § 6. the wife of a bankrupt may be examined by the commissioners for the discovery of his estate: the contrary whereof was holden to be law before the passing of that act of parliament.] 1 *Brownl.* 47.

¶ Upon an appeal against an order of bastardy in the case of a married woman, she was admitted to be a competent witness to prove her criminal connection with the appellant, though her husband was interested both in the question and in the event of the cause, because a fact so secret in its nature can scarcely ever be proved by other evidence. But this is only (d) from the necessity of the thing: she is not competent to prove any other fact, as, non-access, which other witnesses may be supposed capable of proving. R. v. Reading, Ca. temp. Hardw. 82.
R. v. Bedell, Andr. 8.
R. v. Luffe, 8 East, 193.
(d) *Id.* R. v. Rooke, 1 Wils. 340. R. v. Kea, 11 East, 132.

Upon an appeal against the removal of a woman as the widow of *A. B.* deceased, *prima facie* evidence of the marriage having been produced on the part of the respondents, the woman was holden to be a competent witness on the part of the appellants, to disprove the marriage. R. v. Bramley, 6 T. R. 330.

On a motion to set aside an award one of the grounds of the application was, that the arbitrator had rejected the evidence of a woman called on the part of the plaintiff, who had cohabited with him for several years, and passed as his wife, but who would have stated, that she had never been married to him. The point was much argued at the bar. The Court, considering it as a doubtful question, declined giving any opinion, as it was unnecessary for the determination of the case; and they refused the motion on the ground that the opinion of the arbitrator was final and conclusive, all matters both of law and fact having been left to his discretion. *Richards B.* cited a case before Lord *Kenyon* on the *Chester* Circuit in the year 1782, where on a trial for forgery the prisoner called a woman as his witness, whom he had himself in court represented to be his wife, but, afterwards, on hearing an objection taken to her competency, denied that she was married to him, and Lord *Kenyon* refused to admit her evidence. Campbell v. Twenlow, 1 Price, 82.

A wife has been allowed to be a witness in an action between third persons not immediately affecting the husband's interest, Williams v. Johnson, 1 Str. 504.
though

Bull. N. P.
287. S. C.

though her evidence might expose him to a legal demand; as, in an action between third persons for goods sold and delivered, to prove the goods sold not on the credit of the defendant, but on that of her husband.||

Salk. 289.
Str. 925.

[But no other relation is excluded, because no other relation is absolutely the same in interest: therefore in *Pendrel* and *Pendrel*, before Lord *Raymond*, which was an issue out of Chancery to try whether the plaintiff were heir to *T. O.*, the marriage and birth being admitted by order, the mother was admitted to prove the father had access to her. So, in *Lomax* and *Lomax*, before Lord *Hardwicke*, the mother was admitted to prove the marriage; and in an ejectment against *Sarah Brodie* at *Hereford* 1744, Mr. *J. Wright* admitted the father to prove the daughter legitimate; her title being as heir to her mother.

Str. 940.

April 22d,
1771.

In Lord *Valentia's* case in the House of Lords, where the question was, whether the Earl of *Anglesea* was married to the Countess Dowager of *Anglesea*, on 15th September 1741, prior to the birth of Lord *Valentia* their son, who was born in 1744, the countess dowager, having no interest, was admitted to prove the fact of the marriage. So, where the question was, whether the lessor of the plaintiff was the legitimate son of *Francis* and *Mary Stephens*, or was born of *Mary* before their marriage; the court determined, that general declarations by the parents, and the answer of the mother in Chancery, were good evidence, after the death of such parents, to prove that the lessor of the plaintiff was born before marriage. But they shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious, more especially the mother, who is the offending party. But the wife, as we have seen above, may be permitted to prove the fact of adultery with her, though not to prove the baron had no access.

Goodright v.
Moss, Cowp.
591.

Rex v. Rook,
1 Wils. 340.
Rex v. Reed-
ing, 8 G. 2.
per Ld. *Hardwicke*.

1 Wils. 332.

A father who was a freeman of a borough by servitude, was admitted to prove the custom whereby his son was entitled to his freedom as eldest son of a freeman. — If a legacy be given to a son, a father may be a witness to prove the will. *Per cur. ibid.*

2. Whether a Judge or a Juror may be a Witness.

(a) 2 Hawk.
P. C. c. 46.
§ 17. (b) A
commissioner,
by virtue of a
commission
out of Chan-
cery, may him-
self be examined as a witness at the commission, but then he must be examined first by the
other commissioners, after which he may proceed in the execution of the commission.
2 Ch. Ca. 79.

It seems (a) agreed, that it is no exception against a person's giving evidence, either for or against a prisoner, that he is one of the (b) judges who is to try him; and therefore in the case of (c) *Hacker*, two of the persons in the commission for the trial came off from the bench, and were sworn and gave evidence, and did not go up to the bench again during his trial.

(c) *Kelynge*, 12. Sid. 133. Style, 233.

Nor is it any exception to a witness, that he is one of the jurors; but then he is, if called upon, to give his evidence on

oath openly in court, and not to be examined privately by his companions.

3. *Whether a Counsel, Attorney, or Solicitor, may be a Witness against his Client.*

It seems agreed, that (a) counsellours, attornies, or solicitors are not obliged (b) to give evidence, or to discover such matters as come to their knowledge in the way of their profession; for by the duty of their offices they are obliged to conceal their clients' secrets; and every thing that they are entrusted with, is (c) *sub sigillo confessoris*: for were it otherwise, no person could ever with safety employ a counsel, &c.

Style, 449. Keb. 505. Vent. 197. (a) That the same rule extends to a scrivener who has acted as counsel or attorney. Skin. 404. [And to a person who acts as interpreter between the attorney and client. Madam du Barre's case, 4 T. R. 756. (b) In 1 Ves. 63. Lord Chancellor Hardwicke is made to say, "that though an attorney or counsel concerned for one of the parties, may, if he pleases, demur to his being examined as a witness; yet if he consents, the court will not refuse the reading of his depositions: that the objection had been often made; and though some particular judges had doubted, it was always over-ruled." It should seem from hence as if the right to object were the privilege of the attorney, not of the client; whereas nothing is clearer than that the obligation to silence is for the sake of the latter, not of the former. Bull. N. P. 284. So far from the right to object being in the attorney, the court takes upon itself to stop the witness, whenever it discovers an anxiety in him to reveal the confidential communications of his client. 4 T. R. 759. 2 Ves. jun. 189. Nor is it true, that a court of equity will not refuse the reading of the depositions in such case; it will not indeed at once and without examination merely upon this ground, suppress the whole of the deposition; but it will direct a reference to the Master, and will expunge such part as he shall find to be matter of that sort, which from the confidence between attorney and client ought not to be disclosed. Sandford v. Remington, 2 Ves. jun. 189.] (c) From the trust and confidence reposed in counsellours, &c., it has been established as a rule in the courts of equity, that if an attorney or solicitor, at the time that he is treating for his client about a purchase or mortgage, has notice of a prior title, such notice shall not affect his client, though notice before, or in another transaction shall. 2 Vern. 474. [But it seems now to be settled, that such notice to a man's scrivener, attorney, agent, or counsel, is sufficient notice to the party himself. Merry v. Abney, 1 Ch. Ca. 38. Brotherton v. Hatt, 2 Vern. 574. Jennings v. Moore, Id. 609. 1 Br. P. C. 244. S. C. Le Neve v. Le Neve, 3 Atk. 646. Sheldon v. Cox, Ambl. 624. The notice, however, must be in the same transaction. The examination of a title by a counsel or solicitor, on a former occasion, shall not be such a constructive notice, as to affect a client in a subsequent transaction. Fitzgerald v. Falconberg, Fitzg. 207. Warrick v. Warrick, 3 Atk. 291. Ashley v. Baillie, 2 Ves. 368. Steed v. Whitaker, Barnard. Ch. Rep. 220.]

But, as the inconveniency would be very great, if a counsel, &c. were not at all to be made use of as a witness; (for by this means every such person's evidence may be taken off by giving him a fee;) so the courts have come to this mean, *viz.* upon every question, to ask him if he knew it of his own knowledge, or from his client, &c. for though the oath is general, to swear the whole truth; yet the intention thereof, and of the law, is only, that he should declare what he knew of his own knowledge, and not reveal what he was entrusted with by his client. [Collateral facts, and acts done by his client in the course of the business in which he has been employed, he is bound to give evidence of: nay, an attorney has been obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury. (d)]

Vent. 197. Skin. 404. pl. 40. Doe v. Andrews, Cowp. 845. Sandford v. Remington, 2 Ves. jun. 189. Lord Say and Seal's case, Bull. N. P. 284. (d) Rex v. Watkinson, 2 Str. 1122. *contr.*

Spenceley v. Schulenburg, 7 East, 357. || So, the attorney of one of the parties may be examined as to the contents of a written notice, which has been received by him in the course of the cause calling upon him to produce papers.

Duffin v. Smith, Peake's N. P. C. 108. In debt upon bond the plaintiff's attorney has been admitted to prove that the bond had been given upon an usurious consideration.||

Cobden v. Kendrick, 4 T. R. 431. [It hath been adjudged too, that an attorney was at liberty to give evidence of a conversation between him and his client touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to be made by way of instruction for conducting the cause.

In this case the communication was made after the suit was at an end, and it was that which the judgment of the court turned upon. Had he acquired his information, pending the suit, during the time he acted as attorney, he would not have been permitted to disclose it; for in that case, the obligation to secrecy continues after the determination of the suit, and indeed ceaseth at no period of time. 4 T. R. 759.

Wilson v. Rastall, 4 T. R. 753. So, where it appeared that the attorney proposed to be examined, *though confidentially and professionally* consulted with by one of the parties, in parts of the business which constituted the subject-matter of the suit, was yet not actually employed as his attorney in that particular cause, it was adjudged, that he ought to be examined, for that the privilege of a client only extends to the case of the acting attorney for him.

Duchess of Kingston's case, 11 St. Tr. 243. 4 T. R. 758, 759. This privilege is confined to the cases of counsel, solicitor, and attorney, and does not extend to any other professions.]

4. *Whether Plaintiffs or Defendants in the Cause may be Witnesses.*

Norden v. Williamson, 1 Taunt. 378. || Where one of several co-plaintiffs comes voluntarily forward to disprove the defendant's liability to the demand made upon him, he may be admitted, with the consent of the adverse party, though at the same time he defeats the claim of those who jointly sue with him. For if such plaintiff were to make a declaration against his interest out of court, evidence of that declaration would be admissible (a), and the proof is not the less credible, if, with the defendant's consent, he declares the same thing upon oath at the time of the trial.||

(a) R. v. Hardwick, 11 East, 579. R. v. Whitley, Lower, 1 M. & S. 636. In an action of trespass against several persons, one of them, whom the plaintiff designed to make use of as a witness, was by mistake made a defendant; and on motion the court gave him leave to omit him, and have his name struck out of the record, though after issue joined, in order to have the benefit of his testimony.

Sid. 441. but for this *vide* Style, 401. 404. Savil, 34. 2 Ro. Abr. 685. Sid. 237. [And therefore, where in an information for a misdemeanour, the attorney general (*Trevor*) offered to examine a defendant for the king, which the court would not permit, he entered a *noli prosequi*, and then examined him.

Bull. Ni. Pri. 285. So,

So, where two were indicted for an assault, and one submitted, and was fined one shilling, the Chief Justice admitted him as a witness for the other.] Rex v. Fletcher, 1 Str. 633.

¶ But on a joint indictment against several for a misdemeanour, a defendant, who suffers judgment to go by default, cannot be a witness either for the others or against them. So on a joint contract, *Secus* in trover, as he is not liable to the costs of the issue tried against the other, and is not himself released, whatever may be the event of the suit. ¶ (a) R. v. Lafone, 5 Esp. N.P.C. 155. Bull. N. P. 285. Chapman v. Graves, 2 Campb. N.P.C. 333. n.

Brown v. Fox, Exeter Summ. Ass. 1789, *coram* Lord Kenyon, Phil. Ev. 62. *Brown v. Brown*, 4 Taunt. 752. (a) *Ward v. Haydon*, 2 Esp. N. P. C. 553. See 2 Campb. N. P. C. 334.

[If any person be arbitrarily made a defendant to prevent his testimony, it is said, that if nothing be proved against him, he shall be sworn, for he does not swear in his own justification, but in justification of another. But *quære*, whether a verdict should not be first taken for him? Bull. Ni. Pri. 285. ¶ If no evidence has been given against him, a co-defendant, it is true, is

entitled to his discharge as soon as the plaintiff has closed his case, and may then be a witness for the others. But, if there is any, the slightest, evidence against him, he cannot be discharged before the rest, and the case must go altogether to the jury. Gilb. Ev. 117.

Raven v. Dunning, 3 Esp. N. P. C. 25.¶

¶ Trespass against *A.* and *B.* for two horses: evidence against *A.* as to one; and the question is, whether he may be a witness against *B.* in relation to the other: and it seems, that if it were the same fact, and the trespass committed at the same time and place, he may not be a witness, because he swears to discharge himself. But, if it were not the same fact, but two distinct trespasses at different times and places, arbitrarily joined in the same declaration, then they may be witnesses one for the other, because the oath of one of them has no influence on the fact laid to his charge, but merely goes in discharge of the other.¶ Gilb. Ev. 112.

If a material witness for the defendant in ejectment be also made a defendant, the right way is for him to let judgment go by default: but, if he plead, and by that mean admit himself to be tenant in possession, the court will not afterward, upon motion, strike out his name. But in such case, if he consent to let a verdict be given against him for as much as he is proved to be in possession of, there seems to be no reason why he should not be a witness for another defendant. Dormer and Fortescue, M. 9 G. 2. *ibid.*

In trespass, the defendant pleaded in bar of the action that *R. M.* named in the *simul cum* paid the plaintiff a guinea in satisfaction, and issue was joined thereon: the defendant produced *R. M.* and *per Eyre C. J.* he may be examined, for what he is now to prove cannot be given in evidence in another action, and in effect he makes himself liable by swearing he was concerned in the trespass. Poplet v. James, Tr. 5 G. 2. *ibid.*

But, if the plaintiff can prove the persons named in the *simul cum* in trespass guilty, and parties to the suit, which must be by producing the original or process against them, and proving an ineffectual Reason v. Ewbank, H. 1. G. 1. *per omnes just.*

ibid. Hill. v. ineffectual endeavour to serve them, or that the process was lost, Fleming, Ca. the defendant shall not have the benefit of their testimony.]
temp. Hardw.
264. Lloyd v. Williams, *Id.* 123.

2 Chan. Ca.
214. Vern.
230.

According to the law and practice in the courts of equity, defendants in a cause may be witnesses, for they are forced into the cause; and if their being made parties should absolutely invalidate their testimony, it would be in the power of any one who had a mind to oppress another, to deprive him of his defence, by making the most material witnesses defendants in the suit; and therefore any of the defendants to a suit may be examined as witnesses, saving just exceptions to their credit.

Vern. 230.
Abr. Eq. 225.

But plaintiffs cannot examine each other as witnesses in the cause; because, if the cause miscarries, the plaintiffs will be liable to costs, and therefore their swearing is to exempt themselves.

And the practice is, that if a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition for that purpose. This order is of course, and must be served on the adverse party's clerk in court. The defendant too may obtain the like order to examine a co-defendant as a witness for him. But all these orders are upon a suggestion, that the defendant is not concerned in point of interest in the matters in question, and they are never granted but with a clause of *saving just exceptions to the other side*; and these must be made at the hearing of the cause. The order for examining a defendant must be produced at the commission-office, or in the examiner's, when the defendant attends to be examined, for without it he cannot be examined, as it is by virtue of that order, and the authority given them by the court, that they are empowered to examine him, and they cannot do it otherwise.

Walker v.
Wingfield,
15 Ves. 178.

|| An order may be made on the motion of the defendant to examine a plaintiff, saving just exceptions; the plaintiff consenting to be examined. ||

5. *Whether an Accomplice in a Crime may be a Witness for or against his Companion.*

(a) 2 Hawk.
P. C. c. 46.
§ 18.

As to this, the following particulars are laid down as law by Mr. Serjeant (a) *Hawkins*: 1st, That it hath been long settled, that it is no exception against a witness, that he hath confessed himself guilty of the same crime, if he hath not been indicted for it; for if no accomplices were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders.

[It was at one time doubted, whether the

evidence of an accomplice, unconfirmed by any other evidence that could materially affect the case, were sufficient to warrant a conviction? But it is now settled, that an accomplice is a competent

competent witness; and that a conviction, supported by his testimony alone, is perfectly legal. *Atwood's case*, *Leach's Cases*, 365.]

Also it hath been adjudged, that such of the defendants in an information, against whom no evidence is given, may be witnesses for the others.

It hath also been adjudged, that where *A.*, *B.*, and *C.* are sued in three several actions on the statute, for a supposed perjury in their evidence concerning the same thing, they may be good witnesses in such actions for one another.

[It hath been adjudged, that a *particeps criminis* is a good witness for the plaintiff in trespass; though he is left out on purpose to make him a witness, and a recovery against the defendants in the action is a good bar as to him. *Bull. Ni. Pri.* 286. *Say. Rep.* 290.]

In an information for bribery at an election on the stat. 2 G. 2. the person bribed, and who had taken the bribery-oath, was called as a witness. He was objected to as a *particeps criminis*, and on the ground that the tendency of his evidence was to discharge himself, as the statute exempts from the penalty any person discovering another guilty of the offence. But it was holden, that a *particeps criminis* was in many cases a good witness even to obtain a reward or pardon for himself: that unless a *particeps criminis* was admitted as a witness, the statute would be of no avail, as such transactions are generally matters of secrecy; and *Dennison J.* cited a case, wherein *C. J. Eyre* admitted such a witness. *Bush v. Rawling*, *Say. Rep.* 209., cited also by Lord *Mansfield*, *Cowp.* 199. *Snead v. Robinson*, *Willet.* 423.]

So, where a clerk had embezzled money and notes, the property of his master, which he had laid out with the defendant in illegal insurances in the lottery; on an action brought by the master to recover the money and notes, the clerk was allowed, on receiving a release, to be a good witness to prove that they had been so disposed of by him.] *Clerk v. Shee*, *Cowp.* 197.]

|| A person, who has set his name as a subscribing witness to a deed or will, may be a witness to prove the instrument a forgery. || *7 T. R.* 604. *611.* *6 East*, 195. *3 Burr.* 1255.]

6. *How far a Person is disabled from being a Witness in respect of his having been attainted or convicted of a Crime.*

It seems now agreed, that a conviction, and therefore a *fortiori* an attainder or judgment of treason, felony, piracy, *præmunire*, or perjury, or of forgery on 5 Eliz. c. 14. and also a judgment in attaint for giving a false verdict, or in conspiracy at the suit of the king (*a*), and also judgment for any crime whatsoever to stand in the pillory, or to be whipped or branded, (*b*) being in a court which had a jurisdiction, are good causes of exception against a witness, while they continue in force. *2 Hawk. P. C.* c. 46. § 19. and several authorities there cited. (*a*) [A conviction of any crime which amounts to the *crimen falsi*

incapacitates a man from being a witness, therefore conspiracy, barratry, &c. *Priddle's case*, *Leach's Cases*, 349. (*b*) It is now settled, that it is the infamy of the crime which destroys the competency of a witness, and not the nature or mode of the punishment. *Pendock v. Mackender*, 2 *Wils.* 18.]

2 Hawk. P. C. c. 46. §. 20. (a) [And it is not sufficient to produce the conviction alone; it must be followed up by the judgment to consummate the incapacity. Cowp. 3.] But no such conviction or judgment can be made use of to this purpose, unless the record be actually produced in court (a). Also, it is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime, and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes whereof he never was convicted.

2 Hawk. P. C. c. 46. §. 21. (b) [In the case of the Earl of Warwick, one French, who had been convicted of manslaughter and allowed his clergy, but not burnt in the hand, was holden by the judges not to be a competent witness; for that though the statute operates as a pardon; yet the words are, that the offender, after the allowance of his clergy and burning in the hand, shall be enlarged out of prison; and therefore both conditions are precedent, and until they are complied with, the party remains convict of felony, and, consequently, his testimony cannot be received. 3 P. Wms. 456. The stat. 19 Geo. 3. c. 74. §. 3. substitutes a discretionary power of fining, or ordering to be whipped, felons convicted, and liable to be burnt in the hand, in lieu of the latter punishment; and ordains, that such fine or whipping shall have the same effect in restoring them to their credit. But felons convicted of petty larceny were never subject to burning in the hand, as they were never in need of praying their clergy. There was therefore this inconsistency: convicts of grand larceny, who had undergone the sentence of the law, were competent witnesses; convicts of petty larceny, who had also undergone the sentence of the law, were incompetent. This is rectified by stat. 31 Geo. 3. c. 35. which provides, that no person shall be an incompetent witness by reason of a conviction for petty larceny. 3 Wooddes. 286. note.] It is also agreed, that outlawry in a personal action is not a good exception against a witness, as it is against a juror; and that a person convicted of felony, who is admitted to his clergy and burnt in the hand (b), is thereby re-enabled to be a witness.

2 Hawk. P. C. c. 46. §. 22. [If the pardon is conditional, the performance of the condition ought to be shewn; for on that depends all its efficacy.] Also, it seems agreed, that the king's pardon of treason or felony, after a conviction or attainder, restores the party to his credit. And it was holden by Chief Justice *Holt*, that the king's pardon will remove a man's disability to be a witness in all cases whatsoever, wherein it is only the consequence of the conviction or judgment against him, and not an express part of the judgment, as it is in conspiracy at the suit of the king, and in perjury on the statute.

2 Hawk. P. C. c. 37. §. 45. Burridge's case, 3 P. Wms. 485. The pardon itself under the great seal must be produced. A warrant under the privy seal, or sign manual, is not sufficient, as it is not of itself a complete irrevocable pardon. Gully's case, Leach's Cr. Ca. 116. ||

2 Hawk. P. C. c. 46. §. 23. It hath been ruled that a conviction of perjury doth not disable a man from making an affidavit in relation to the irregularity of a judgment.

(B) How far a Person is disabled from being a Witness in respect of his being interested in the Success of the Cause.

Co. Litt. 6. Sid. 237. (c) And this rule has been so strictly adhered to, that it is said, that [IT has been always (c) held a sacred and inviolable rule of evidence in all cases (d) whatsoever, not to admit the testimony of a witness, who is either to be a gainer or loser by the event of the cause, whether such advantage be direct and immediate, or consequential only.

though

though a witness is examined an hour together; yet, if in any part of his evidence it appears that he was a party interested, the court will direct the jury, that he is no witness, nor his evidence to be regarded. 2 Vern. 463. [The incompetency of a witness by reason of his being interested, may be ascertained, either by examining the witness himself on a *voir dire*, or bringing other proof, whether he is interested in the event of the suit; but a party, it is said, cannot have recourse to both these methods. 10 Mod. 151. Ambl. 593. Ca. temp. Hardw. 358. It was formerly the rule to disallow objections to the competency of a witness, as too late, after he was sworn in chief; and though this rule is in some measure relaxed; still the objections must be taken at the trial. 1 T. R. 719, 720. 4 Burr. 2256. (d) Hence, he who is bail for another cannot be a witness for him, for he is directly and immediately interested; for if a verdict be given against the principal, he becomes immediately liable. 2 Hawk. P. C. c. 46. § 24. 1 T. R. 164. So, a *prochein ami*, by whom an infant sues, cannot be a witness, because liable to the costs. Hopkins v. Neal, 2 Str. 1026. Clutterbuck v. Lord Huntingtower, 1 Str. 506.]

From this general rule several doubts and difficulties have arisen with regard to those cases where the party may be said to have an interest, and from the extreme difficulty attending certain particular cases, this matter seems in several instances to be very unsettled, and any information upon it can only be collected from the nature and circumstances of the cases themselves.

It has been held, that an heir apparent may be a witness concerning the title of the land, for the heirship of the heir is a mere contingency; but, if there be a tenant in tail, remainder in tail, he in remainder cannot be a witness concerning the title of those lands; for he hath an estate, such as it is.

Salk. 283.
Ld. Raym.
724. Ruled
by Treby, C. J.
[For the bare
possibility of
an interest in

the witness will not exclude his testimony. Hence, a liability to be rated to the poor is no objection to a witness in questions touching an existing rate, or the settlement of a pauper. Rex v. Prosser, 4 T. R. 17. Rex v. South Lynn, 5 T. R. 664. So, a co-obligor in a bond to the ordinary, under 22 & 23 Car. 2. c. 10. may be admitted to prove a tender by the administratrix. Carter v. Pearce, 1 T. R. 163. So, a creditor of the administratrix is admissible for the same purpose. *Ibid.*]

It seems to be agreed, that one commoner (a) cannot be a witness to prove the right of common in an action brought by another; for the right being entire, his swearing tends to entitle himself.

Skin. 174.
(a) [If the issue
be on a right
of common,
which depends
on a custom

pervading the whole manor, the evidence of a commoner is not admissible, because, as it depends on a custom, the record in that action would be evidence in a subsequent action brought by that very witness to try the same right. But the same reason does not hold where common is claimed by prescription in right of a particular estate; for it does not follow, that if A. has a prescriptive right of common belonging to his estate, that B. who has another estate in the same manor must have the same right; neither would the judgment for A. be evidence for B. *Per Buller J.* 1 T. R. 302, 303. So, by Lord Holt, in 1 Ld. Raym. 731. If A., B., C., D., and E., claim common exclusively of all others, and A.'s right be disputed, B. may be a witness for him, for it tends to narrow his own right. But, if there be a custom that all the inhabitants of *Blackacre* ought to have common there, one of the inhabitants in that case cannot be a witness.] || So in an action on the case by a commoner against the defendant for not repairing his fences contiguous to a common, where one of the points in issue was, whether the defendant was liable to repair by reason of his occupation, it was determined, that other persons, who claimed a right of pasture over the same common, were not competent witnesses for the plaintiff, because the record would be evidence for another commoner, that the occupier of the adjacent land was bound to repair this fence; and though the plaintiff in that case claimed a right of common by prescription, in right of a particular messuage, still the other commoners, in whatever right they might claim, would have a common interest in casting the burthen of the repair of this individual fence upon the occupier of the adjacent land. *Anscomb v. Shore*, 1 Taunt. 261. ||

Duke of
Somerset v.
France, 1 Str.
658.

[So, where the question respected the rights of lords of customary manors, the lords of other manors were deemed incompetent witnesses, because the question concerned a general right.]

Lord Clan-
ricard v. Lady
Denton,
1 Gwill. 360.
Gilb. Ev. 113.

|| So, where the question is, whether in a particular parish or vill certain things are generally exempted from tithes, or subject only to a modus, no persons, who would be subject to tithes, if the parson's claim were to be allowed, can give evidence in support of the modus or exemption.||

Doe v. Wil-
liams, Cowp.
621.
(a) Bourne v.
Turner, 1 Str.
632.

[A tenant in possession is not an admissible witness to prove the estate of his landlord, for this would be to uphold his own possession. So (a), where a motion was made to admit the landlord a defendant in ejectment, instead of the tenant, upon an affidavit that the tenant was a material witness, the court refused it; because the tenant was liable to answer for the mesne profits, and therefore could not be a competent witness.]

Doe v. Wilde,
5 Taunt. 183.

|| But, where the plaintiff in ejectment had made out a *prima facie* case against the defendant as tenant in possession, it was holden, that a witness called on the part of the defendant was not competent to prove himself the real tenant, and the defendant only his bailiff; for the verdict would have the effect of turning him out immediately; which, being an immediate interest, outweighed the more remote effect of his subjecting himself by his testimony to an action for mesne profits.||

Bell v. Har-
wood, 3 T. R.
308. Rex v.
Woodlands,
1 T. R. 262.

[If two persons are contending for the possession, who are to pay rent in different rights, the landlord cannot, in that case, be admitted as a witness to prove the demise in the ejectment. But, where the question is merely touching the settlement of the tenant, the landlord may be received to explain the terms of his demise. So, where in an action of covenant for rent upon a lease by *A.* to *B.*, the point in issue was, whether *C.* (whose title both admitted) demised first to *A.* or to another person, *C.* was allowed to be a competent witness to prove that point; for the verdict could not be given in evidence in any future action by or against him being a record, between other parties; and it appeared to be indifferent to him whether he had the one or the other for his tenant.]

Ridley v. Tay-
lor, 13 East,
175.

|| On this principle, where one partner drew a bill in the partnership firm, and gave it in payment to a separate creditor in discharge of his own debt, it was holden, that in an action by such creditor against the acceptor, either of the partners might be called on the part of the defendant to prove, that the partner, who drew the bill, had no authority to draw it in the name of the firm; and that the bankruptcy of the partners would not vary the question as to the competency of the witness.

Iderton v. At-
kinson, 7 T. R.
480. Birt v.
Kirkshaw,
2 East, 458.
ruled accord-
ingly. But see
Jones v.

Where the question in assumpsit was, whether *A. B.* who had received money due from the defendant to the plaintiff, received it in the character of agent for the plaintiff, it was holden that *A. B.* might be called for the defendant to prove his agency, as he was liable either to pay the money received or to refund it to the defendant; and though it was objected, that he

had a stronger interest to give evidence in favour of the defendant than of the plaintiff, (since, if he had received the money under a misrepresentation of his own character, the defendant might recover from him the costs of the action then depending, as well as the money,) yet it was holden, that the possibility of such a remote interest did not make the witness incompetent.

A witness, who might have a remedy by action whether the plaintiff or defendant had a verdict, was considered as interested, because under the particular circumstances he would have a greater difficulty in the one case than in the other to enforce the remedy. But *Qu.*||

[It hath been usual in actions on policies of insurance, not to admit underwriters on the same policy to be witnesses for each other. But this is now treated rather as an objection to the credit, than the competency of the witness.]

So, where the master of a ship brought an action against the custom-house officers for refusing to clear his ship and re-deliver his cockets; it was held, that the owners of the goods on board could not be admitted as witnesses to prove him master, &c. for that they were all concerned in (a) one bottom, and in one adventure.

prove wages due to another, for there the contracts are several. *Skin. 174.* seems to be admitted. And this is certainly law, and every day's practice.

In an action against the master of a ship for so negligently managing the ship, that it ran over the plaintiff's barge; it was held, that the pilot could not be a witness, because he was answerable, if faulty in steering, to the master. (b)

been released by the master and owner, and made a good witness. — On an action brought against a master for a carman's driving his cart negligently, *per quod, &c.* the carman was admitted witness for his master on shewing a release from him. *Jarvis v. Hayes, Str. 1083.* [But without a release, the testimony of the servant in such case is not admissible. *Green v. The New River Company, 4 T. R. 559.*]

The master of a ship took a prize, and disposed of 100 chests of lemons to A., for which he brought his action, and a mariner was allowed to be sworn as a witness, though it appeared, that by the Admiralty law he was to have a share of the prize; for the master is accountable to the mariners for their share, which they shall recover from him, whether he recovers in this action or not.

necessitate. In actions by informers for selling coals without measuring by the bushel, the servants are witnesses for their master, notwithstanding 3 Geo. 2. inflicts a penalty upon them for not doing it; though *Eyre C. J.* did on that account, in two or three instances, refuse to receive them. *Per Lee C. J. in E. I. Company v. Gosling, Bull. N. P. 289.* So, where the question was, whether the master had deserted the ship without sufficient necessity, a sailor, who had given a bond to the master (as a trustee for the company) not to desert the ship during the voyage, was admitted evidence for the master, it appearing all the sailors entered into such bonds. *Ibid.* So, if a man pays money by his servant, the servant may be a witness from the necessity of the thing. *Tybbald v. Tregott, 4 Mod. 26.* So, where a son, having a general authority to receive money for his father, received a sum, and gave it to the defendant; the son was admitted as a good witness (his testimony being corroborated by other circumstances) for his father in an action of trover for the money. 1 *Salk. 289.* So, in trover

Brooke, 4 Taunt. 464. & infra, 219.

Buckland v. Tankard, 5 T. R. 579.

Ridout v. Johnson, Bull. N. Pri. 283. Bent v. Baker, 3 T. R. 27.

Skin. 174. Sands v. the Custom-house Officers.

(a) But one mariner may be admitted as a witness to

Salk. 287. ruled by Holt C. J. Ld. Raym. 1007. (b) But he might have

Skin. 403. pl. 38. [But there are many cases where servants and sailors, though parties interested, will be admitted ex

necessitate. In actions by informers for selling coals without measuring by the bushel, the servants are witnesses for their master, notwithstanding 3 Geo. 2. inflicts a penalty upon them for not doing it; though *Eyre C. J.* did on that account, in two or three instances, refuse to receive them. *Per Lee C. J. in E. I. Company v. Gosling, Bull. N. P. 289.* So, where the question was, whether the master had deserted the ship without sufficient necessity, a sailor, who had given a bond to the master (as a trustee for the company) not to desert the ship during the voyage, was admitted evidence for the master, it appearing all the sailors entered into such bonds. *Ibid.* So, if a man pays money by his servant, the servant may be a witness from the necessity of the thing. *Tybbald v. Tregott, 4 Mod. 26.* So, where a son, having a general authority to receive money for his father, received a sum, and gave it to the defendant; the son was admitted as a good witness (his testimony being corroborated by other circumstances) for his father in an action of trover for the money. 1 *Salk. 289.* So, in trover against

against a pawn-broker, the servant, embezzling his master's goods and pawning them, will be admitted to prove the fact. Mich. 1752. C. B. at *Westminster*, Bull. N. P. 290. So, in an action to recover money from a lottery-office keeper, which the plaintiff's clerk had embezzled and paid to the defendant upon the chances of the coming up of tickets in the state-lottery, contrary to the lottery act, the clerk was admitted as a witness to that fact. *Clark v. Shee*, Cowp. 197. In this case indeed the clerk had a release from the plaintiff and his sureties: but *qu.* if he would not have been admissible without a release? So, in actions by masters for assaulting a servant, *per quod servitium*, &c., it is every day's practice to admit the servant as a witness for the master. *Duel v. Harding*, 1 Str. 595. *Lewis v. Fog*, 2 Str. 944. *Cock v. Wartham*, *Id.* 1054. *Tullidge v. Wade*, 3 Wils. 18. See *Dunsley v. Westbrowne*, 1 Str. 414. *contr.* — So, for the sake of trade and the common usage of business, an interested servant will be admitted. As, a porter is evidence to prove a delivery of goods; a banker's apprentice to prove the receipt of money. Bull. N. P. 289. So, a factor, who made the agreement between the parties, was allowed to be a witness to prove the contract, though he was to have a shilling in the pound; for, as factor he was concerned both for vendor and vendee, was a mere *go-between*, and might be a witness for either. *Dixon v. Cooper*, 3 Wils. 407.]

Hard. 331.

2 Salk. 691.

pl. 5. (a) But he may be a

It seems agreed clearly, that a legatee in a will cannot be a witness to (a) prove the (b) will, because he is (c) presumed to be partial in swearing for his own (d) interest.

witness against the will, for when he swears against the will, he swears against his own interest, and is therefore the strongest witness. 2 Salk. 691. — So, freemen of a corporation were allowed witnesses against the corporation. 2 Show. 146. (b) Yet he may be examined as a witness to prove a deed or other thing which has no relation to the will. *Style*, 370. — So, if the parson sues one of his parishioners for tithes, who pleads a *modus*, the other parishioners, though they cannot be witnesses as to the custom, yet they may be witnesses as to the value of the tithes. (c) But, if the legacy be so inconsiderable, as that he cannot be presumed to be biassed by it; as, if it be *ss.* to a private person, or *sl.* to a nobleman, it is said that he may be a witness for the will. *Vern.* 254. But it is settled, that the minuteness of the interest is no answer to the objection, and that therefore where the party is concerned in interest, though never so small, he cannot be a witness, 2 *Vern.* 317. 4 *Burn's E. L.* 95. *Vent.* 351. (d) Where a witness hath a legacy by the will, by a release of the legacy, though at the trial, he becomes disinterested, and so is a good witness. *Sid.* 315. [See tit. "*Wills and Testaments*" (D), and 25 *Geo.* 2. c. 6.] — So, a bankrupt, who has assigned and released all his estate and right to the assignees, may be examined as a witness for them. 2 *Vern.* 637. — [But in a *qui tam* action on the statute of usury, against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or re-paid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from this debt in particular, and all claim to allowance and surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission. *Masters v. Drayton*, 2 T. R. 496.] *Vide infra*, 219. *Smith v. Prager*.

Carth. 514.

Hilliard and Jennings, *vide* tit. *Wills*.

Ld. Raym. 507.

So, if J. S. devises lands to A. and the will is signed, sealed, and published in the presence of the said A. and B. and C. who attested the same; yet this is no good will to pass those lands; for the statute of frauds requires three or more competent witnesses, which A. cannot be, being concerned in interest as devisee of the lands.

Mod. 107.

[An executor in trust is a good witness for the will.

It is said by *Hale* C. J. that he knew it to have been adjudged, that an executor in a cause (e) concerning the testator's estate, if he hath not the surplusage given to him by the will, may be a witness for the will.

And though in the case of a trustee, it hath been usual to have a release, yet that is not necessary, for such person has in fact no interest to release. Nor is it any objection to an executor's testimony, that he may be liable to actions as executor *de son tort*. *Lowe v. Jolliffe*, 1 Bl. Rep. 365. *Holt v. Tyrrell*, 1 *Barnardist.* 12. *Goodtitle v. Welford*, Dougl. 139. *Baillie v. Wilson*, 4 *Burr.* 2254. In *Goss v. Tracy*, *Canc. M.* 1715. Lord *Cowper* determined, that a grantee, where he appears to be a bare trustee, is a good evidence to prove the execution of the deed to himself. 1 P. Wms. 287.] (e) That the children of an intestate cannot, by

reason

reason of their interest, under the statute of distributions, be witnesses in any thing relating to the intestate's estate. *Skin. 223.*

[An informer under a penal statute, who is entitled to part of the penalty, cannot be admitted a witness against the offender.] *2 Ld. Raym. 1545. Rex v. Piercy, Andr. 18. Rex v. Blaney, Id. 240. Rex v. Tilly, 1 Str. 316.* — But some modern statutes declare the informer to be a competent witness; as the act of 32 G. 3. c. 56. § 7. for preventing the counterfeiting of certificates of the characters of servants; and the act of 33 G. 3. c. 75. § 17. which regulates hackney coaches. Where a statute can receive no execution, unless a party interested be a witness, there he must be allowed; for the statute must not be rendered ineffectual by the impossibility of proof. *Gilb. Ev. 114.* Thus by 2 G. 2. c. 24. § 8. against bribery at elections, the legislature in giving an indemnity and discharge to any person offending against the act, who shall discover any other offender so that he may be convicted, must also have intended that he should be competent to give evidence at the trial; and therefore in an action for the penalties he has been admitted. *Bush v. Ralling, Say. 289. Mead v. Robinson, Willes, 425. Heward v. Shipley, 4 East, 182.* So, in a prosecution on 21 G. 3. c. 37. against exporting machinery, the informer is competent. *R. v. Teasdale, 3 Esp. N. P. C. 68.* So, on a prosecution for penalties under 9 Ann. c. 14. § 5. the loser of money won at cards may prove the loss. *R. v. Luckup, Willes, 425.* So, on a prosecution under 23 G. 2. c. 13. § 1. for enticing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty. *R. v. Johnson, Id. ibid.*]

|| The informer under the statutes of 17 G. 2. c. 40. and 9 & 10 W. 3. c. 41. against any person for having naval stores in his possession is a competent witness to prove the fact; for his interest is precarious, the court, on conviction, having a power to inflict at their discretion a corporal punishment, or to impose a fine. ||

R. v. Cole, Espin. N. P. C. 169.

[The plaintiff had been appointed husband of a ship by a deed executed by all the joint owners; by which deed he was empowered generally to lend or advance money, &c. He insured for all the owners; and brought separate actions of covenant against two of them: they were each of them charged for the amount of the whole sum paid. It was agreed that a direction to insure given by one part-owner did not bind the rest, without an express or implied authority for that purpose from the rest. The plaintiff did not pretend that any express general direction to insure had been given by all the owners; but insisted that they were all informed of it, and acquiesced in it, and called a witness to prove it. This the defendant denied, and offered to disprove it by calling the defendant in the other cause, insisting, that he was a competent witness, because he was not interested in the event of this suit, for that each of the two causes was to stand on its own evidence. But Lord Mansfield, at the trial, and afterwards the Court of K. B. rejected this witness as incompetent; for unless there was a general direction to insure, the plaintiff could not recover in this action; and a verdict against one of these joint-owners would affect the other of them; because that other would be obliged to contribute. (a)]

French v. Backhouse, 5 Burr. 2727.

(a) According to this state-

ment, the court considered the witness as interested in the event of the cause; though *Buller J.* in the case of *Walton v. Shelley, 1 T. R. 303.* treats the decision as having proceeded upon the ground merely of an interest in the question. His words are, "In that case, the second defendant was certainly not interested to support the defence in the first cause; for if the

" plaintiff

"plaintiff had recovered in that, the second defendant, who was offered as the witness, could not have been charged with any part of the damages recovered in the first action."

Trelawney v.
Thomas,
1 H. Bl. 303.

A. gave a general bond to *B.* for the payment of a sum of money. It appeared upon examining *A.* on a *voir dire*, that it was understood between them that this money was to be applied towards indemnifying *B.* from the expences of an election in which *B.* was a candidate. In an action brought by *C.* against *D.*, an active member of a committee for carrying on *B.*'s election, for money advanced and services performed in supporting the interest of *B.* at the request of *D.*, it was holden that *A.* was not a competent witness; for he was interested in the event of the cause, inasmuch as by procuring the plaintiff to be nonsuited, or a verdict against him, he would save himself from the consequences of this action, since, if he succeeded, as the defendant would call upon *B.* to be reimbursed the damages and costs, *A.* would be liable by his engagements to *B.*; and if the plaintiff, having failed in this action, should bring another against *B.*, *A.* might tender to *B.* the amount of the plaintiff's demand, and thereby escape the costs; for if *B.* should proceed against him on the security, he would be restrained in equity from having execution for more than the damages recovered by the plaintiff in the former action, which would have been tendered.]

Ball v. Bostock, 1 Str.
575.

||In trover for three South Sea bonds, the case was this: *Ball* had delivered to *Lechmere*, a broker, these bonds to sell, and they were picked out of his pocket. Notice being given at the South Sea house, they were stopt by *Henry*, one of the clerks, upon *Bostock's* bringing them to receive the interest. Upon this *Bostock* brought trover against *Henry*, who at the trial offered to prove the property being in *Ball*, and called *Lechmere* for that purpose. But it appearing that *Lechmere* had given bond to indemnify the company in stopping the bonds, *King C. J.* refused to let him be examined, saying, that though there are many instances where a party shall be a witness, though he is concerned in the event of the cause; yet there never was a case of allowing one who had made himself liable to pay costs on the action.

1 T. R. 164.

The defendant's bail are not competent to give evidence for their principal, because they are immediately answerable in case of a verdict against him.

Powell v.
Hord, 2 Ld.
Raym. 1411.
1 Str. 650. S.C.

So, in an action against the sheriff for a false return, the sheriff's officer, who has given security for the due execution of process, is not a competent witness to prove that he endeavoured to make the arrest.

Knightley v.
Birop,
3 Campb. 521.

So, in an action against the sheriff for an improper return to a writ of *fieri facias*, which stated (*inter al.*) that he had paid a sum of money to the landlord of the premises for arrears of rent, the landlord is not a competent witness to prove the rent due; because, if this action should succeed, he would be liable to an action

action at the suit of the sheriff, in which this judgment would be evidence of special damage.

So, in an action by an infant plaintiff, neither his *prochein amy* nor guardian is a competent witness for him, because each is liable for costs.

James v. Hatfield, 1 Str. 548. Hopkins v. Neal, 2 Str. 1026. Gilb. Ev. 107.

So, in an action against a master for the negligence of his servant, the servant is not a competent witness to disprove his own negligence; for the verdict may be given in evidence in a subsequent action against him, as to the *quantum* of the damages, though not as to the fact of the injury.

Raym. 1007. Miller v. Falconer, 1 Campb. 251.

So, in an action by an indorsee against the acceptor of a bill of exchange, which has been accepted for the accommodation of the drawer, the drawer is not a competent witness for the defendant to prove that the holder took the bill for a usurious consideration; for if the holder should succeed against the acceptor, the acceptor would not only have a right of action against the drawer for the principal sum, but also for all damages which, as acceptor, he might sustain in being sued upon the bill; the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of his acceptance.||

Green v. The New River Company, 4 T. R. 589. Martin v. Henrickson, 2 Ld. 1 Campb. 251.

He who borrows money upon an usurious contract, cannot be a witness upon an information for the usury (unless he hath paid the money) (*a*), whether such information be brought by himself or any other; for if in such case a man might be a witness, he would in effect swear for himself, by proving a matter which may avoid his own contract.

Jones v. Brooke, 4 Taunt. 464. Maundrel v. Kennet, 1 Campb. 408. Co. Litt. 6. b. 2 Ro. Abr. 685. Raym. 191. 2 Hawk. P. C. c. 46. § 24. [Shank q. t. v. Payne, 1 Str. 633. S. P.

(*a*) In which case he is a competent witness, though the fact of payment should be proved by no other person but himself. Abrahams v. Bunn, 4 Burr. 2251.] || Whether he has or has not repaid the money lent does not appear to make any essential difference, at least as far as his *competency* is affected, for in neither case does he gain any thing immediately by the event of the suit, nor can he give the judgment in evidence in an action against him for the money lent. Smith v. Prager, 7 T. R. 60. Jordaine v. Ladbroke, *Id.* 601.||

Hence also it hath been held, that he, who by a slight has been imposed upon to set his hand to a note for more money than he intended, is no good witness on an information for the cheat; because a conviction may be a means to avoid the note, by being made use of by the party when sued upon it, as a motive to influence the jury, which cannot well be prevented, though in law it be no evidence.

Rex v. Whiting, Salk. 283. Ld. Raym. 396. Rex v. Nunez, 2 Str. 1043. S. P. Rex v. Ellis, *Id.* 1104. S. P. Rex v. Parris, Sid.

431. Vent. 49. 2 Keb. 572. [Rex v. Broughton, 2 Str. 1229. *contr.* In the case of the King v. Bray, Ca. temp. Hardw. 359. || Lord Hardwicke reviewed his own opinion in the case of the King v. Nunez, and that of Lord Holt in the principal case, and decided, that the objection went only to the credit, not the competency of the witness; and with respect to the probability that the jury might hear of the verdict, he said, that, sitting as a judge, he could only hear of it judicially. Thus *A.* having brought an action against *B.* the latter filed a bill in equity against him for a discovery and injunction, and for an account, to which *A.* having put in his answer, denying the allegations of *B.* which involved the merits of the suit at law, the injunction was dissolved. On this answer *B.* indicted *A.* for perjury, and the indictment and action coming on to be tried at the same assizes, the indictment standing first,

first, it was holden, that *B.* was a competent witness to prove the perjury, as he could not avail himself of the conviction of *A.* in any civil proceeding between them, either at law or in equity. *R. v. Boston*, 4 East, 572. ||

Salk. 283. Also, it seems generally agreed, that he, whose property may be prejudiced by a (*a*) forgery, is no evidence to prove it on an indictment or information.

v. Payne, 1 Str. 633. *S. P. Rex v. Rhodes*, 2 Str. 728. *S. P. Rex v. Boston*, 4 East, 582. Though a person, as it is said, whose hand is forged, is not admissible to prove the forgery, yet, under many circumstances, he may be admitted, where he is not directly interested in the question; as in *Wells'* case, who was indicted for forging a receipt from a mercer at *Oxford*, the mercer having before recovered the money in an action against *Wells*, was admitted by *Willes C. J.* to prove the forgery. *Bull. Ni. Pri.* 289. So, where *Newland* forged a bank note in the name of *William Lander*, one of the cashiers; *Lander* was admitted, without a release, to prove that it was not his signature; because the interest and liability to pay must be immediate and apparent either upon the face of the instrument forged, or on a *voir dire*; and *Lander*, the cashier, was only *mediately* liable over to the bank upon his security. *O. B.* 1784. — A bond was forged by *Dr. Dodd* in the name of *Lord Chesterfield*, and the obligees executed a release; upon which his lordship was admitted to prove, that the signature was not his hand-writing. *Leach's Hawk.* 2 vol. c. 46. § 24. note. But on an indictment for forging a seaman's will, a person named executor in a will of a subsequent date, was holden an incompetent witness to prove that the name of the testator to the first will was a forgery; for that went to establish the second will in which he was named executor. *Rhodes'* case, *Leach's Cr. Cas.* 25.] (*a*) And if it be a forgery within 5 Eliz. c. 14. a farther reason is given in 2 Hawk. P. C. c. 46. § 24. why such person cannot be an evidence, because he may have an action on the statute.

2 Ro. Abr. 685. So, upon this reason it hath been adjudged, that he, against whom a verdict is given, cannot be a witness to prove perjury in the evidence.

Sid. 237. *Keb.* 836. *Rex v. Whiting*, Salk. 283. *S. P.* [*Rex v. Nunez*, 2 Str. 1043. *S. P.* But see *Rex v. Broughton*, 2 Str. 1229. *contr.* However, in the case of *Rex v. Eden*, *Lord Kenyon* held, that the defendant in the original action, against whom the verdict went, was an incompetent witness, he not having paid the debt and costs. *Hil.* 34. G. 3. *Espinasse's Ca.* at *Ni. Pr.* 97.] But see *R. v. Boston*, *supra*.

Sid. 211. 237. Yet notwithstanding these cases, and the force of these reasons, there are several instances, where, in cases of (*b*) necessity, a person, whose (*c*) damage an indictment or information concluded to, has been allowed and admitted an evidence, and his credit left to the jury.

2 *Keb.* 384. Salk. 286. 2 *Ld. Raym.* 1179. 6 *Mod.* 301. 311. 7 *Mod.* 119. (*b*) On the statute of robberies, a man swears himself, because there can be no other witness. 3 *Mod.* 114. *per cur.* (*c*) As in an indictment for a battery, &c. 2 *Hawk. P. C.* c. 46. § 24. — Where a person rescued was admitted a witness for the person against whom an action was brought for the rescue, and his credit left with the jury. 6 *Mod.* 211.

2 Salk. 690. If the warden of the *Fleet* suffers a voluntary escape, and an inquisition, by virtue of a special commission issuing out of Chancery, is taken thereof, which he traverses; the person escaping, though he gave a bond to be a true prisoner, is a good witness to prove the escape; for this does not make the bond void, as a conviction on the statute of usury does. Besides, this is a matter privately transacted between the party and officer, of which there can be no other evidence.

(*d*) || If a corporation would examine Upon this rule, that an interested person cannot be a competent witness, it has been often doubted, how far (*d*) freemen of a corporation,

corporation, the inhabitants of a hundred or parish, (a) should be admitted as witnesses in matters which concern those places. And here it is said, that no general rule can be laid down, but that every case must stand upon its own particular circumstances, viz. Whether the interest be of that nature, or so considerable as by presumption to produce partiality in the witnesses. it is by an information in the nature of a *quo warranto* against him, when upon his confessing the information, judgment passes to disfranchise him. *Colchester Corporation v. —*, 1 P. Wms. 595. (n.) But this judgment must be such as cannot be avoided: for if it appears that the witness can avoid the judgment for irregularity, as, if he had not been summoned, and knew nothing of his disfranchisement, he is not competent. *Brown v. Corporation of London*, 11 Mod. 225. (a) Parishioners are not admissible to prove a charity given to a parish. *Attorney General v. Wyburgh, Id.* 599. But a mere lodger, who does not pay to the poor, is admissible. By 54 G. 3. c. 170. § 9. "no inhabitant or person rated or liable to be rated to any rates or cesses of any district, parish, township, or hamlet, or wholly or in part maintained or supported thereby, or executing or holding any office thereof or therein, shall before any court or person or persons whatsoever, be deemed and taken to be by reason thereof an incompetent witness for or against such district, parish, township, or hamlet, in any matter relating to such rates or cesses, or to the boundary between such district, parish, township, or hamlet, and any adjoining district, parish, township, or hamlet, or to any order of removal to or from such district, parish, township, or hamlet, or the settlement of any pauper in such district, parish, township, or hamlet, or touching any bastards chargeable or likely to become chargeable to such district, parish, township, or hamlet; or the recovery of any sum or sums for the charges or maintenance of such bastards; or the election or appointment of any officer or officers, or the allowance of the accounts of any officer or officers of any such district, parish, township, or hamlet; any law, &c." By 27 G. 3. c. 29. parishioners are made competent witnesses in prosecutions where the penalty is given to the parish, unless it exceed twenty pounds.||

ine one of their own members as a witness, they must disfranchise him; and the method of doing

Hence in an information in nature of a *quo warranto*, for taking *1d. per chaldron* for all sea-coals brought to *London*, where the defendants prescribed for the duty, upon which issue was taken and tried at the bar, it was held, that the freemen of *London* were good witnesses to prove the prescription, though the mayor, &c. have the whole profit of this toll, which is for the benefit of the corporation, of which all the citizens and freemen are members; for it cannot be presumed, that for an advantage so small and so remote, they would be partial and perjure themselves. (a)

2 Lev. 281. The King v. the Mayor of London. (a) [The quantum of interest will not affect the case at all: if the party have any interest, he is disabled from being a

witness. Hence, where a corporation, being lord of a manor, had approved part of a common, and leased it, reserving rent to the corporation, a freeman was not admitted to prove, that there was a sufficiency of common left for the commoners. *Burton v. Hinde*, 5 T. R. 174.]

So, in the case of the city of *London*, concerning the duty of water-bailage, where the mayor and commonalty brought an *indebitatus assumpsit* against *A. B.* for 5*l.* for so much due to them for divers tons of wine brought from beyond the seas to the port of *London*, at 4*d. per ton*; and some freemen being produced as witnesses, it was objected, that the commonalty of *London* comprehending all the freemen, this made them interested in the success of the cause; but it was held by three judges against one, that so small and remote an interest did not disable them from being competent witnesses. However, they were laid aside by consent.

Vent. 351. In 1 Vern. 254. it is held generally, that freemen of a corporation cannot be witnesses, and this case is there cited, as a case in which such evidence was

rejected, and so said to be resolved, 2 Vern. 317. [4 Burn's E. L. 95.]

[A person,

The Company
of Carpenters,
&c. v. Hay-
ward, Dougl.
374.

7 Mod. 63.
Lord Wharton
and Sir John
Robinson.

2 Sid. 109.
Townsend
and Row.
(a) But in
2 Vern. 317.
where the
question re-

lated to the loss and misapplication of a sum of money given for the benefit of the parishioners, it was held, that an inhabitant of the parish could not be a witness; and that the cases where the party was concerned in interest, though never so small, have always prevailed.

Vent. 351.
admitted.

(b) Mod. 73.

S. P. though he be poor, and pays no taxes, or parish duties; for when the money recovered of the hundred comes to be levied, he may then be worth something; but servants, and those who receive alms, may be witnesses. 2 Keb. 73. S. P. [But now by stat 8. Geo. 2. c. 16. § 15. inhabitants of hundreds are made competent witnesses at trials on the statutes of hue and cry.]

Vent. 351.

(c) If there be
a dispute be-
tween two

parishes, which of them shall repair a certain highway, the inhabitants of neither of the parishes can be witnesses. 4 Mod. 48.

[A person, who has acted in breach of an alleged custom, is not a competent witness to disprove the existence of the custom; for if the custom should not be established, he would be discharged from any actions he may be liable to for the breach of it.]

At a trial at bar concerning boundaries of lands; the parson of the one parish, the land lying in two parishes, was rejected, because he might enlarge his own parish, and by consequence the tithes; but one, who about seven years before had taken the profits, under the title of one of the parties, was received as a witness, because now he might plead the statute of limitations.

It is said in 2 Sid. to have been ruled on evidence at a trial at bar, that if a remainder after an estate for life be limited to the minister and churchwardens of a certain parish, for the use and benefit of the poor of the parish, (a) that any of the parishioners may be witnesses to prove this devise.

In an action against the hundred, upon the statute of Winton, an hundredor (b) cannot be a witness.

On an indictment against the county for not repairing (c) a bridge, it has been doubted whether an inhabitant of the county could be a witness.

But now by the 1 Ann. st. 1. c. 18. reciting, That whereas many private persons, or bodies politick or corporate, are of right obliged to repair decayed bridges, and the highways thereunto adjoining; but because the inhabitants of the county, riding, or division, in which such decayed bridge or highways lie, have not been allowed, upon informations or indictments brought against such person or persons, bodies politick or corporate, for not repairing such decayed bridges and the highways thereunto adjoining, by the judges before whom such information or indictment is to be tried, to be legal witnesses; it is enacted, "That in all informations or indictments to be brought and tried in any of Her Majesty's courts of record at *Westminster*, or at the assizes or quarter sessions of the peace, the evidence of the inhabitants, being credible persons, or any of them of the town, corporation, county, riding or division, in which such decayed bridges or highway lie, shall be taken and admitted in all such cases in the courts aforesaid."

And by the 3 & 4 W. 3. c. 11. "In all actions to be brought
" in

"in the courts of *Westminster*, or at the assizes, for money mis-
 "spent by church-wardens, the evidence of the parishioners,
 "other than such as receive alms, shall be taken and admitted."

On this rule, that an interested person cannot be a witness, the time and manner of a witness's becoming interested seems also material; and therefore it has been held, that it is no good exception against a witness, that he hath a promise of a reward, on condition of giving his evidence, especially, if such reward be not promised by the person for whose benefit he is to swear, and by way of contract for giving such and such particular evidence.

|| Also it was ruled by Lord *Holt*, that if a man be a witness to a wager, and afterwards bet himself, this shall be no objection against his being sworn to prove the wager. ||

Barlow v.
 Vowell,
 Skin. 586.

Hence it hath been held, that on a *scire facias* against the king's patentee, a person who has a promise of being made a deputy, may be a witness.

Owen Han-
 nings's case.
 Mod. 21.
 2 Keb. 576.

S. C. So ruled at a trial at bar by three judges against *Twisden*, who held, that it was like a man's promising another, that, if he recovered the lands, he should have a lease of them, which, he said, disabled him from being a witness. Gilb. Ev. 108.

But it has been held, that if several persons lay wagers at a horse-race, &c. and an action is brought against one of them for the money lost, that a better on the same side cannot be a witness for him who lost; but, if such person acknowledges that he lost the wager, and pays the money, he may be a witness.

3 Lev. 151.
 Rescous and
 Williams, ad-
 judged, and
 Jones Ch. Just.
 held, that
 laying a wager,

or being a better, did not destroy the testimony of the witness, but went only to his credit. — [See *Baron v. Bury*, Vin. Abr. tit. Evidence (I.), pl. 33. S. P. and same distinctions as in the text. In *Str. 652. Rex v. Fox*, on an indictment for an assault, it was proved, that the prosecutor had laid a wager that he should convict the defendant. And Lord *C. J. Raymond* held him to be a good witness for the king, though it might go to his credit. And the better opinion seems to be, that it is no objection to the competency of a witness, that he has laid a wager on the subject of the suit, though it may affect his credit. Cowp. 736. 3 T. R. 37. And it was laid down as a settled principle, deducible from the above case of *Barlow v. Vowell*, that where a person makes himself a party in interest after a plaintiff or defendant has acquired an interest in his testimony, he shall not by this deprive the plaintiff or defendant of the benefit of his testimony; and that, therefore, a broker who underwrites a policy after getting it underwritten by others, is a competent witness for the defendant in an action against any of those who underwrote before him. *Bent v. Baker*, 3 T. R. 27.] || But this proposition would seem to be expressed in too broad and general terms. In the case of *Forester v. Pigou*, 1 M. & S. 9. 3 Campb. 380. where the defendant in an action on a policy of insurance called another underwriter to prove the policy void on account of a misrepresentation of the nature of the risk, and upon the *voire dire* the witness stated, that "he had paid the loss to the plaintiff upon an understanding that he was to be repaid in the event of this action failing, and that he had since received a letter from the plaintiff promising to return the money in that event," an objection being taken to his competency, the point was argued on the other side upon the authority of *Barlow v. Vowell*; but the witness was considered as incompetent and rejected. A motion was afterwards made for a new trial on account of the rejection of this witness, as well as of another also, who was similarly situated; and a new trial was granted for the purpose of ascertaining more particularly the precise time when the undertaking was made to the witness. But the court added, that with respect to the case of *Barlow v. Vowell*, it appeared that the witness was the original witness to the wager; and that it was therefore a *fraud* to deprive the party of his testimony. So, in *Bent v. Baker*, the broker was the common agent and witness of both parties, and therefore his testimony was not to be taken from them. But, if a person, who is under no obligation to become a witness for either of the parties in a suit, choose to pay his debt beforehand, upon a condition

which

which is to be determined by the event of that suit, he becomes as much interested in the event, as if he were a party to a consolidation rule.]]

2 Vern. 699. It has been held in Chancery, that if a person is examined as
[1 P. Wms. a witness, who is no ways concerned in interest, and afterwards
287. S. C.] he becomes heir at law, and thereby interested in the matter,
Abr. Eq. 224. that notwithstanding, his depositions, when thus disinterested
[2 Atk. 615. that notwithstanding, his depositions, when thus disinterested
2 Ves. 42. may be read, even (a) at a trial at law; and that it was like the
Tully's case, case, where the only surviving witness to a deed becomes the
2 Ld. Raym. party interested (b), or where a witness to a deed becomes blind,
1008. 1 Salk. in which cases his hand may be proved at law.
286. Holcroft v. Smith, 1 Eq.

Ca. Abr. 224. Baker v. Lord-Fairfax, 1 Str. 1001. *contr.* But depositions have been allowed
to be read at law, where the witness was beyond the reach of judicial process. Lord Altham
v. Lord Anglesea, Gilb. Ca. in Eq. 16. 11 Mod. 210. S. C. So, where he could not be
found, or was disabled from attending by sickness. Fry v. Wood, 1 Atk. 449. Bull. Ni. Pri.
239.] (a) But at a trial at bar in C. B. on an issue directed out of Chancery, the judges re-
fused to have such depositions read, because the witness was still living. Abr. Eq. 224. But
in 2 Vern. 699. such depositions were read in Chancery, and there said, that the reason of
rejecting such evidence at law was, because it was against the rule, viz. that where the witness is
living, and might be produced at the trial, the deposition of such witness cannot be read
(b) [As, where he becomes executor or administrator to the obligee of a bond. Godfrey v. Nor-
ris, 1 Str. 34. Goss v. Tracy, 1 P. Wms. 289. So, where he becomes infamous. Jones v. Mas-
son, 2 Str. 833. But, if the subscribing witness be interested both at the attestation and at the
trial, he can neither be examined as a witness to prove the execution, nor can his hand-
writing be proved. Swire v. Bell, 5 T. R. 371.]

2 Vern. 472. A witness was examined whilst she was interested, before the
Callow and hearing; and the cause being heard and decreed to an account,
Mine. she was re-examined after the hearing, before the master, on the
account, having first released her interest; it was objected,
that she ought not to be heard, for having been examined whilst
interested, and her depositions published, she was thereby en-
gaged, and almost under a necessity of standing to what she had
before sworn, and could not be free to retract or contradict it;
but the lord-keeper over-ruled the objection.

2 Hawk. P. C. It is no good exception against a witness, that he has a main-
c. 46. § 25. tenance from the king or other person, for every one may main-
(c) [But Sir tain his own witnesses; nor is it any exception against a witness,
Matthew Hale that he has received a reward for having made a discovery of the
is of a different crime to be proved against the prisoner, nor that he hath the
opinion. promise of a pardon on condition of giving his evidence. (c)
2 Hal. H. P. C. 280.]

Fotheringham [A person cannot be a witness who apprehends himself to be
v. Greenwood, interested, though in fact he be not so; or, who admits himself
1 Str. 129. to be under honorary engagements, though not under any legal
But *qu.* whe- obligation, to contribute to the expences of the action.
ther the being under mere honorary engagements ought not to go rather to the credit, than the competency
of a witness, since it is impossible to render the witness competent, a notional honorary in-
terest not being the subject of a release.

Case of the || In a late case before the High Court of Admiralty, an ob-
Amitié, jection was made to the evidence of a witness, who had acknow-
Villeneuve, ledged in his answer, "that he could not say that he was not
5 Robins. "interested, inasmuch as he conceived that he should be en-
Adm. Ca. "titled

"titled to share, if his vessel should be pronounced a joint captor, though he had signed a release;" to which it was answered, that as he was clearly not interested, the effect of his impression was no more an objection in this case, than in those in which the expectation depended only on the bounty of the parties. But Sir *William Scott* rejected the witness, observing, that he had always understood the distinction to be, that if the witness says only he expects to share from the bounty of the captors, he is not disqualified or rendered incompetent, whatever may be the deduction of credit to which he is exposed. But, if he thinks himself entitled in law, he acts under an impression of interest, which renders him incompetent, however erroneous that opinion may be.||

[A person shall not be permitted to give evidence to invalidate a negotiable instrument which he has signed. *Walton v. Shelly*, 1 T. R. 300. But this

rule is confined to negotiable instruments; for in the case of Mr. *Jolliffe's* will, all the subscribing witnesses were allowed to give evidence of the insanity of the testator at the time of making it. *Lowe v. Jolliffe*, 1 Bl. Rep. 365.

If a person who is tendered as a witness does every thing in his power to get rid of the objection to his testimony, it shall not be competent to the other party by an obstinate refusal to prevent him from being examined.] *Goodtitle v. Welford*, Dougl. 139.

(C) Of the Number of Witnesses required in our Laws.

[T is holden by my Lord Chief Justice *Holt*, that at common law it was not necessary in any case, that a proof of matter of fact should be made by more than one witness, and that the single testimony of one credible witness was sufficient to prove any fact, and that the authorities cited by my Lord (a) *Coke* do not warrant the opinion founded on them.

Carth. 144.
(a) Co. Litt. 6. b. where my Lord *Coke* says, that when a trial is by witnesses, as of the challenge of a juror, or summons of a tenant, the affirmative ought to be proved by two or more witnesses; but, when the trial is by verdict, there, the judgment is not given upon witnesses, or other kind of evidence, but upon the verdict; and upon such evidence as is given to the jury they give their verdict.

But the civil law requires two witnesses to prove a fact; and therefore it has been holden, that if the spiritual court, which proceeds according to the civil and canon law, refuse, where a temporal matter is pleaded in bar of an ecclesiastical demand, to admit the evidence of one witness, they shall be prohibited; as, where an executor proves payment of a legacy by one witness, &c.

Hence it hath been established as a fundamental rule in the courts of equity, that on a bill for relief a decree cannot be made on the testimony of one single witness against the positive denial of a fact by the defendant's answer; (b) because the oath of the party is ever looked upon to be as good as the oath of a single person.

(b) If an executrix to a first husband marries a second, and a bill is exhibited against them to discover a trust, and they, in their answers, disagree in the matter, the wife confessing what the husband denies, and what the plaintiff can prove only by one witness, the plaintiff can have no relief; for one witness is not sufficient against the husband's answer; and the wife's confession will not avail, for she can be no witness against her husband. 2 Chan. Ca. 39
3 P. Wms. 238.

[[E.I. Company v. Donald, 9 Ves. 283. Lord Chancellor Eldon in delivering judgment in this case admirably explains the rules of evidence peculiar to a court of equity, and the principles on which they are founded. See also Only v. Walker, 3 Atk. 407. Le Neve v. Le Neve, Id. 650. Walton v. Hobbs, 2 Atk. 19. Janson v. Rany, Id. 140. Pember v. Mather, 1 Br. Ch. Rep. 52. Evans v. Bicknell, 6 Ves. 184. Biddulph v. St. John, 2 Sch. and Lefr. 521.]]

But for this *vide* head of *Wills*.

Also, by several acts of parliament, a certain number of witnesses is required, as by the 29 Car. 2. c. 3. "That all devises of lands shall be attested and subscribed in the presence of the testator, by three or four credible witnesses, or else shall be void."

By the 7 W. 3. it is enacted, "That no person shall be indicted, tried or attainted for high treason, but upon the oath of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the (a) same treason."

(a) There must be one witness to one, and another witness to another overt act of the same species of treason, or at least one witness to an overt act, and another to a material circumstance to prove it. 2 Hawk. P. C. c. 46. § 2. But for this *vide* tit. *Treason*.

(D) Of compelling a Witness to appear and give Evidence.

21 H. 6. 6. a. IT is held to be maintenance for a person officiously to give evidence in a cause, without being called (b) upon to do it. 11 H. 6. 4. b. Also, if a man, who is not subpoenaed, happens to be in court during a trial, he shall not be forced to be sworn against his will; but, if he consents, the want of a subpoena is not material, and in certain cases, the court will, in discretion, wait till a subpoena can be procured. Bro. Maintenance, 5. 51. 2 Ro. Abr. 118. (b) [This is now not law. See 4 T. R. 340.]

(c) And therefore witnesses are privileged *eundo & redeundo*, for which *vide* tit. *Privilege*. (d) A feme covert is within the statute, and if she be served with a subpoena, and refuse to appear, the action lies against the Hence it follows, that the parties have (c) a right to process to bring in their witnesses, and to this purpose it is enacted by 5 Eliz. c. 9. § 12. "That if any (d) person or persons, upon whom any process out of any of the courts of record within this realm, or *Wales*, shall be (e) served, to testify or depose concerning any cause or matter depending in any of the same courts, and having (f) tendered unto him or them, according to his or their countenance or calling, such (g) reasonable sum of money for his or their costs and charges, as, having regard to the distance of the place, is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary; that then the party making default to

"los

“lose and forfeit for every such offence ten pounds, and to yield such further recompence to the party (*h*) grieved, as by the discretion of the judge of the court out of which the said process issues shall be awarded, according to the loss and hindrance that the party which procured the said process shall sustain, by reason of the non-appearance of the said witness or witnesses; the said several sums to be recovered by the party so grieved against the offender or offenders, by action of debt, bill, plaint, or information, in any of the queen’s majesty’s courts of record, in which no wager of law, essoin or protection to be allowed.”

husband and wife. Cro. Eliz. 122. Havithlome and Harvey, adjudged. Jon. 430. S. C. and S. P. adjudged. (*e*) A delivery of a ticket containing the substance of the writ, is a sufficient service within the act; 5 Mod. 355. Cro. Car. 540. S. P. for there being two, three, or four names of witnesses in one writ, he cannot leave the writ with every one of them; and to have several writs for every witness would be very chargeable to the subject. [Four witnesses only can be put in one writ of subpoena; Cowp. 846.; and a ticket should be made out for each witness, and personally delivered to him, a reasonable time before the day of trial, 2 Str. 1054.; for witnesses ought to have a convenient time to put their own affairs in such order that their attendance on the court may be of as little prejudice to themselves as possible. 1 Str. 510.]

—(*f*) If a feme covert be the person to appear as a witness, the tender must be to her, and not to her husband. Cro. Eliz. 122. W. Jon. 430. S. P. (*g*) If the party gives the witness a shilling, which he accepts, and promises, that on his appearance he will pay him all further reasonable charges; this is sufficient. Cro. Car. 522. 540. March, 18. || Regularly, no witness is bound to appear in civil cases, unless his reasonable expences for going to and returning from the trial be tendered to him at the time of serving the subpoena; nor, if he appears, is he bound to give evidence, till such charges are actually paid or tendered; Chapman v. Pointon, 2 Str. 1150. 13 East, 16. n. a. S. C. more fully reported. Bowles v. Johnson, 1 Bl. Rep. 36. Fuller v. Prentice, 1 H. Bl. 49. except he reside, and be summoned to give evidence, within the bills of mortality. 3 Bl. Comm. 369. Tidd’s Pr. 805. If a witness is brought over from a foreign country after the commencement of the action, it should seem that the expences of his passage over, subsistence here, and of his return, are to be allowed on the taxation of costs. Sturdy v. Andrews, 4 Taunt. 699. See Cotton v. Witt, *Id.* 55. *Secus*, if the witness were here before the commencement of the suit, Schimmel v. Lousada, *Id.* 695., or, if, being in this country, he was detained here for the purposes of the trial; for in these cases the expences of his subsistence here during the action only will be allowed. Sturdy v. Andrews, *ubi supra*.] (*h*) In Cro. Eliz. 130. and the S. C. Leon. 122. it is adjudged, that the plaintiff need not set forth any special damage which he sustained by the negligence of the defendant in not appearing to give evidence, where the action is brought for *res. only*, and not for any more damages; but the contrary has since been resolved in Cro. Car. 522. 540. Goodwin and West, Jon. 430. and Maddison and Shore, 5 Mod. 355. which was affirmed on a writ of error; for there must be a party grieved, otherwise there is no cause of forfeiture, and a particular damage must be set forth, &c. [But the action for the further recompence will not lie, unless such recompence hath been previously assessed by the court out of which the process issued; neither the jury, nor the judge at *nisi prius* being competent to do it. Pearson v. Iles, Dougl. 556. Upon such assessment debt may be brought. However, the more usual way is to proceed by attachment against the witness neglecting to attend. But in order to ground this summary mode of proceeding, it is necessary to prove that the witness was personally served; Smalt v. Whitmill, 2 Str. 1054. Wakefield’s case, Ca. temp. Hardw. 313. and that his reasonable expences were paid or tendered to him. Chapman v. Pointon, 2 Str. 1150. Stephenson v. Brookes, Barnes, 33. Bowles v. Johnson, 1 Bl. Rep. 36.]

If a person, who can give evidence against one who is accused of felony, refuses to be bound to do so at the general gaol-delivery, &c. the justice of peace may either commit to prison such person so refusing, or may bind him to his good behaviour, and to appear at the next gaol-delivery, or quarter-sessions. Dalt. Just. 111.

Lord Preston was committed by the court of quarter-sessions for refusing to be sworn to give evidence to the grand jury on an indictment Salk. 278.

indictment of high treason; he was brought by *habeas corpus* in *B. R.*; and *Holt* C. J. said, it was a great contempt, and that had he been there he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed.

Tidd's Pr. 528.

(a) Fortesc.

396.

(b) Cowp. 672.

(c) Imp. K. B.

(d) Dougl.

419.

(e) 3 Burr.

1440. 2 Cr.

Pr. 248, 249.

Qu. Whether the officer may not require an indemnity against the prisoner's escape? *Id. ibid.*

Phil. Ev. 10.

[Where a witness is detained in prison, or on board a ship under the command of an officer, who refuses to allow his attendance, a *habeas corpus ad testificandum* is necessary to bring him up; for which an application is made to a judge, upon an affidavit, sworn to by the party applying (a), stating that he is a material witness; and, in case of his being on board a ship, that he is willing to attend (b): Upon this application, the judge, if he think proper, will grant his *fiat* for the writ, which is then sued out, signed, and sealed (c). But a *habeas corpus ad testificandum* will not lie to bring up a prisoner of war (d); and where the application for it appeared to be a mere contrivance to remove a prisoner in execution, the court refused to grant it (e). The writ being sued out, should be left with the sheriff, or other officer in whose custody the witness is detained, who will bring him up, on being paid his reasonable charges.]

¶ It having been doubted, whether persons in custody could be brought up as witnesses by writ of *habeas corpus* to give evidence before any other courts than those at *Westminster*, it is enacted by 43 G. 3. c. 140. that any judge of the courts at *Westminster* may, at his discretion, award such writ for bringing a prisoner, detained in any gaol in *England*, before a court martial, or before commissioners of bankrupts, commissioners for auditing the publick accounts, or other commissioners acting by virtue of any royal commission or warrant.

Where a cause of action has arisen in *India*, or any offence has been committed there, which is to be tried in this country, the evidence of witnesses resident in *India* may be obtained in the manner prescribed by 13 G. 3. c. 63. § 40. & 44. ||

2 Hawk. P. C.

c. 46. § 30.

It seems that by the common law the defendant, in capital cases, had no right to any process against his witnesses, without a special order of the court; but now by the 7 W. 3. c. 3. it is enacted, that all persons accused and indicted for any high treason, whereby any corruption of blood may ensue, shall have the like process of the court, where they shall be tried, to compel their witnesses to appear for them at any trial or trials, as is usually granted to compel witnesses to appear against them. And now since the statute of 1 Anne, c. 9., which ordains, that the witnesses for the prisoner shall be sworn, process may be taken out against them of course in any cause whatsoever.

On a commission issuing out of Chancery for the examination of witnesses, there must be a *subpoena ad testificandum* taken out directed to the witnesses, and a summons from two of the commissioners, of the time and place where they are to be examined; and, if the witness so summoned and served do not appear, the court will grant an attachment against him, unless he come up at his own expence to be examined before the examiner; or if he be summoned by the commissioners without a *subpoena ad testificandum*.

ficandum

testificandum, and do not appear, the court will order such witness to attend at his own expence, and to be examined; and if he disobey such order, then an attachment shall go against him.

¶ If a witness has in his possession any deeds or writings, which are thought necessary at the trial, a special clause must be inserted in the subpoena called a *duces tecum*, commanding him to bring them with him. If the writings are in the possession of the adverse party or his attorney, notice should be given to produce them, and if, after proof of a reasonable notice, they are refused, secondary evidence of the contents will be admitted. It is not necessary to give notice to the defendant himself: notice to his attorney will be sufficient, even in penal actions.

Phil. Ev. 11.

Attorney
General v. Le
Merchant,
2 T. R. 203.

Cates v. Winter, 3 T. R. 706.

The writ of *subpcena duces tecum*, as well as the other writ of *subpcena ad testificandum*, is compulsory on the witness. And though it will be a question for the consideration of the judge at the trial, whether in any particular case the actual production of writings should be enforced, yet the witness ought always to have them ready to be produced, if required by the court.¶

Amey v. Long,
9 East, 485.

(E) Of the Manner of giving Evidence: And herein,

1. Where the Examination is in open Court; and therein of such Questions as may be asked a Witness.

THE examination of witnesses *viva voce*, in open court, is justly esteemed one of the greatest excellences of our law, not only from the awe and reverence which the solemnity of the manner is supposed to produce in the witness, and the regard which from thence he must have for truth, but also from the benefit of cross-examining: and further, the air and manner of giving evidence often carry such convictions with them, as will induce the court and jury to believe or reject what the witness has sworn.

Hob. 325.
Hale's Hist.
C. L. 253 &
259. Pref. to
Fortesc. Rep.
ii. to iv.
Vaugh. Rep.
143.

Hence it hath always been held as a settled rule, that in cases of life, no evidence is to be given against a prisoner, but in his presence.

2 Hawk. P. C.
c. 46. § 1.

Also in a civil cause, where the jury withdrew to confer about their verdict, one of the witnesses, that was before sworn on the part of the defendant, was called by the jurors, and he recited again his evidence to them, and they gave their verdict for the defendant; and complaint being made to the judge of assise of this misdemeanour, he examined the jury, who confessed all the matter, and that the evidence was the same in effect that was given before, & *non alia nec diversa*; and this matter being returned upon the *postea*, the opinion of the court was, that the verdict was not good, and a *venire facias de novo* was awarded.

Cro. Eliz. 189.
Metcalf and
Dean.

Style's Pract.
Reg. 671, 672.
(a) In Comb.
63. it is said,
that witnesses
may be ex-
amined before

But it is said, that a witness, who by reason of sickness, extreme age, or (a) other cause, cannot come to a trial, may, by order of court (b), be examined in the country before any judge of the court where the cause depends; and the testimony so taken shall be allowed to be given in evidence at the trial.

a judge, by leave of the court, as well in criminal causes as in civil, where a sufficient reason appears to the court, as going to sea, &c. and then the other side may cross-examine them; but for this *vide* Keb. 36. 249. 787. 2 Keb. 13. (b) [The order for this purpose cannot be obtained without consent; the depositions of witnesses, upon interrogatories, not being the best evidence the nature of the case admits of. Tidd's Pr. 529. The court, however, will do every thing in their power to make the parties consent, when necessary; as by putting off the trial, at the instance of the defendant, if the plaintiff will not consent, Cowp. 174. Dougl. 419.; and if the defendant refuses, the court will not give him judgment as in case of a nonsuit. Tidd's Pr. 529.] ¶ Where a party, after obtaining leave by consent, examines witnesses abroad on depositions, he will not be entitled to any allowance in the taxation of costs for the expence of taking the depositions, although he may succeed in the action. Stephens v. Crichton, 2 East, 259. Taylor v. Royal Exchange Assurance Company, 8 East, 393. The same rule prevails in the court of Chancery: if a party applies to that court for a commission to examine witnesses, he must pay the expences. Phil. Ev. 11.]

2 Salk. 691.

But, if a witness going to sea be by rule of court examined upon interrogatories before a judge, and the trial come on before he is gone, his deposition shall not be read, but he must appear; for the rule was made on supposal of his absence.

(c) Cro Car.
292. 2 Bulst.
147. (d) But
my Lord Coke
says, that he
never read in
any statute,
ancient au-

Every person produced as a witness must, before he gives his evidence, be sworn to depose the truth, the whole truth, and nothing but the truth: this the law required in all cases, (c) except on indictments for capital offences, where by (d) immemorial practice, the witnesses against the king were not suffered to be sworn.

author, book, case or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore that there is not so much as *scintilla juris* against it. 3 Inst. 79. And in H. P. C. 264. it is said, that there is no known law against it. — But in 2 Hawk. P. C. c. 46. § 29. it being the constant practice not to suffer witnesses to be sworn against the king upon indictments of capital crimes, the judges presumed it founded originally on some statute, or other good foundation, and were therefore tender of departing from the settled practice.

But now by 1 Anne, st. 2. c. 9. § 3. it is enacted, "That every person who shall be produced, or appear as a witness on the behalf of the prisoner, upon any trial for treason or felony, before he or she be admitted to depose, or give any manner of evidence, shall first take an oath to depose the truth, the whole truth, and nothing but the truth, in such manner as the witnesses for the queen are by law obliged to do; and, if convicted of any wilful perjury in such evidence, shall suffer all the punishments, penalties, forfeitures, and disabilities, which by any of the laws and statutes of this realm are and may be inflicted upon persons convicted of wilful perjury."

(e) ¶ If he has
been once
sworn, the
other party
may cross-
examine him,
though he

By the practice of the courts, if one be produced and sworn for the plaintiff or defendant, being once (e) sworn, the other may examine him to any thing whatsoever, though he be the solicitor of the party who produces him (f): also either party may, on application to the court, have the witness examined apart, and out of the hearing of the others. (g)

gave

gave no evidence for the party calling him. *Philips v. Eamer*, 1 Esp. N. P. C. 357. And it is reported to have been ruled at *nisi prius*, that, if a witness has been once examined by a party, the privilege of cross-examination continues in every stage of the cause: so that the other party may call the same witness to prove his case, and in examining him may ask leading questions. *Dickinson v. Shee*, 4 Esp. N. P. C. 67. But it has been well observed, that in the case referred to, the witness might possibly have shewn a strong bias in favour of the party who first called him; and on that account perhaps a greater scope was granted to the adverse party than is usually allowed: that it may happen on the other hand, that the plaintiff calls a witness, unwillingly and from mere necessity, knowing him to be favourable to the other side: that in such a case to allow the defendant, on calling him up afterwards as his own witness, to put leading questions, would be giving him an unreasonable advantage; on the contrary, the court might perhaps be induced to invest the plaintiff's counsel with some of the powers of cross-examination, at the same time that it would probably oblige the defendant's counsel to treat such a witness strictly as his own, and confine him within the limits of an examination in chief. *Phil. Ev.* 211. A witness cannot be cross-examined as to any fact, which, if admitted, would be collateral, and wholly irrelevant to the matter in issue, for the purpose of contradicting him by other evidence, in case he should deny the fact, and in this manner to discredit his testimony; *Spenceley v. De Willot*, 7 East, 108. and if the witness answers such an irrelevant question before it is withdrawn or disallowed, evidence cannot afterwards be admitted to contradict his testimony on the collateral matter. *Harris v. Tippet*, 2 Campb. 638. || (f) [But a solicitor cannot be compelled, and ought not to disclose matters confidentially communicated to him by his client. (g) The like indulgence will be given to a prisoner; but he cannot demand it as of right. 4 St. Tr. 9.]

It is a general rule, that a witness shall not be asked any question, the answering to which might oblige him to accuse himself of a crime (a); and that his credit is to be impeached only by general accounts of his character and reputation, and not by proofs of particular crimes against which he cannot be presumed prepared to defend himself.

2 Hawk. P. C. c. 46. § 20.
7 Mod. 119.
Doug. 593.
Cooke's case,
4 St. Tr. 748.
(a) || A witness shall not be

compelled to answer not merely questions which have a direct tendency to subject him to penalties, but those also which have such a connexion with them, as to form a step towards it. Formerly the judge frequently informed the witness, that he was not bound to answer; so frequently, as to prove that it was the duty of the court to do so. Now it appears to be understood, that the witness may waive the objection, and proceed, if he thinks proper: and in general it is left to his own discretion. *Paxton v. Douglas*, 16 Ves. 239. ||

|| It having been doubted, whether a witness could be compelled to give any evidence, which might subject him to a civil action, or charge him with a debt; it is enacted by 46 G. 3. c. 37. that "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture, of any nature whatsoever, by reason only, or on the sole ground, that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty, or of any other person or persons."

The right, which the parties to a suit have to refuse answering any question, is not in any degree affected by this statute: and therefore on a question of settlement, a rated parishioner is not compellable by the adverse parish to give evidence, as he is directly interested as party to the appeal, and does not come within the words or meaning of the act. ||

R. v. Woburn
10 East, 395.

If a witness, when under examination, through surprise and inadvertency, gives a wrong answer to a question that is asked him, he is always allowed to recollect himself, and that, which

5 Mod. 350.
13 Ves. 284.
and tit *Perjury*

he affirms on due deliberation, is to be taken for the truth. So, if he mistakes the true state of the question, in such a manner as shews, that it is rather owing to his weakness, than perverseness, he cannot be punished for it as guilty of perjury.

Cro. Ja. 120. If a person is produced as a witness for the king, upon a
Price's case. trial in an information, and he is guilty of perjury, he cannot be punished for it on the 5 Eliz. by way of indictment, which is the suit of the king; and such a one hath been discharged

* *Qu. de hoc?* accordingly. *

Ro. Rep. 61. If a witness in giving evidence reflects on the character of another, or makes use of such words as are actionable; yet this being in a judicial way, he cannot be punished for it, nor will an action lie for such words.

Doev. Perkins, [A witness shall not be allowed to read his evidence, but he
3 T. R. 749. may refresh his memory by any book or paper, if he can after-
Tannerv. Tay- wards swear to the fact from recollection: but, if he cannot
lor, 1d. 754. swear to the fact from recollection any further than as finding it
3 East, 282. entered in a book or paper, the *original* book or paper must be
289. 1 East, produced.]
460.

Phil. Ev. 209. || When a witness has recourse to a written memorandum for
Burrough v. the purpose of assisting his recollection, there seems to be no
Martin, good reason for confining him to such writings only as were
2 Campb. 112. drawn up at the precise time when the facts occurred; for one person may have as clear and strong a recollection from looking at a paper half a year after the fact, as another who wrote down the fact on the very day it happened. However, the entry ought to have been made by the witness himself, or, if made by another, examined by him while the fact was fresh in his memory ||.

2. Of Examinations and Proofs in Chancery.

Gilb. For. By the civil and canon law it was absolutely necessary, that
Rom. 115, 116. there should be a citation taken out against the defendant previous to the examination of witnesses. And the reason is, that the defendant, if cited, might either examine or object to their credibility, or put such cross-interrogatories to them, as might bring out circumstances in his favour, which he would not have an opportunity to do, if he were not cited. But it was not necessary for the defendant to appear, because the citation is in his favour, and he might renounce a privilege introduced in his favour.

Hence it is, that in Chancery, after the plaintiff has replied to the defendant's answer, before he proceeds to examine any witnesses, he must take out a subpoena against the defendant to rejoin. But, if the plaintiff serves the defendant with a subpoena to rejoin before he has filed a replication, the defendant appearing upon such subpoena shall have his costs taxed, because the plaintiff had not closed the contest of the answer before he served the subpoena to rejoin.

The defendant being served with a subpoena to rejoin, the
plaintiff,

plaintiff, of course, upon producing an affidavit thereof, is to have an order for the defendant to rejoin and join in commission in four days, giving the defendant's solicitor notice thereof; and the plaintiff thereupon may, in eight days afterwards, leaving his commissioners' names at the office, have, at his own costs, a commission *ex parte* directed to two of the plaintiff's commissioners, and two such as the officer shall think fit to nominate.

Also, it is usual to apply by petition or motion, that a subpoena to rejoin *return. immediate* may be awarded against the defendant; and that service thereof on the defendant's clerk may be deemed good service on the defendant; and to this is often added, especially in a country cause, that the defendant may join and strike commissioners' names sometimes in four days, sometimes in a week; or that the plaintiff may have a commission *ex parte*, directed to his own commissioners; and all this is of course.

But the more usual way is for each party to name four commissioners for the examination of witnesses, and two a-piece are struck out on each side; and if a defendant joins in a commission and names commissioners, and yet afterwards refuses to strike, the court, upon petition, will strike out such two of them as they please, and the commission shall go to such of the four as are left standing.

But here it is necessary to observe, that there is an office called the Examiner's Office, which extends itself, and has a right to examine all witnesses in town, or within ten miles of town, which is the circuit of the court; and if any commission be made out, or witnesses examined within that district, the depositions taken by commission will, upon complaint, be suppressed, and the clerk who made out the commission will stand committed for a misbehaviour, and breach of the known duty of his office. (a)

(a) || It is now settled, that

after a decree the examination may be by one of the Masters of the court. It was usual formerly to insert in the decree, (and it is still constantly done in the Court of Exchequer,) that the Master be armed with a commission to examine witnesses, and to direct the same into the country, if he thinks fit. But the course now is, for the Master to examine, where he sees fit; and if he sees cause to direct a commission into the country, he does not direct it himself; but he certifies, that it is necessary; and upon that certificate an order issues for the commission. The same subpoena is used to bring witnesses before the Master as before the Examiner, and it is indeed no other than the common subpoena to answer, its purpose being explained by the label. Upon an examination in the country, the body of the writ expresses that it is to give testimony. *Parkinson v. Ingram*, 3 Ves. 603. *Sandford v. Biddulph*, 9 Ves. 36. It seems, that the Masters had been in the habit of performing this part of their duty by their clerks; a practice which the Master of the Rolls gravely observes, in the first of the above cases, can *never be proper*; though there was a time when the very same practice was not considered as altogether improper at the Rolls or in the Exchequer, and the Judges of those courts are still enjoying the immunity arising from it. See *Gilb. For. Rom.* 124, 125. & *infra*, 235.—Evidence in the cause, though not read at the hearing, may be received by the Master; but he cannot re-examine a witness, who has already been examined in the cause, without leave of the court; *Hough v. Williams*, 3 Br. Ch. Rep. 190. *Vaughan v. Lloyd*, 1 Cox, 312. *Smith v. Althus*, 11 Ves. 564. whether the interrogatories be to the same matter, or essentially different. *Browning v. Barton*, 2 Dick. 508. *Sawyer v. Bowyer*, 1 Br. Ch. Rep. 388. And even before decree, if publication has passed, and the depositions have been seen, he cannot, without the special order of the court, examine witnesses to the same matters. *Willan v. Willan*, *Coop.* 291. It is not indeed in the ordinary course of proceeding to re-examine the

same

same person to the same matter ; though this has been done *in toto* under very special circumstances ; as, where the witness, from mere accident, and without design, was incompetent at the time of his original examination, the release, which he had executed, not being sufficiently comprehensive. *Sandford v. Paul*, 3 Br. Ch. Rep. 370. 1 Ves. Jun. 398. S. C. And to the order to re-examine Lord *Thurlow* in one case declined adding any directions that the witness should not be examined to the same points, but left it to the judgment of the Master ; for if the witness had been examined in the cause on a more general interrogatory, under which he might have deposed to the point in question, but did not ; and a more particular interrogatory were exhibited to get at his testimony, the Master would feel no difficulty in admitting it. *Vaughan v. Lloyd*, *ubi supra*. But *qu.* and see *Purcell v. M'Namara*, 17 Ves. 434.—“ It was settled by Lord *Hardwicke*, that the Master could re-examine a party in the cause without leave, but not a witness, because the decree was that he might examine parties as he should see fit, and he settles the interrogatories for the examination of the parties, but not for the examination of the witnesses.” *Per* Lord *Eldon*, *Willan v. Willan*, *ubi supra*. But in another case, his Lordship, agreeing that the interrogatories were so settled in those respective cases, says, “ though the usual direction is to examine the parties, as the Master shall think fit, the practice has been long settled, that the Master cannot, without an order, examine a party, who has been previously examined ; that it is not of course ; but in the discretion of the court.” His Lordship’s order therefore for the examination of a defendant in that case upon interrogatories, who had been examined and cross-examined, restrained it to such of the points in the cause, to which he had not before been examined, as the Master should think reasonable. *Purcell v. M'Namara*, 17 Ves. 434.—The depositions taken before the Masters are filed in their offices : but depositions taken in the country are filed in the Six-clerks’ Office. *Parkinson v. Ingram*, *ubi supra*.||

When interrogatories are filed in the examiner’s office, the witness is carried to the seat of the examiner, and a note in writing is there taken of his name and place of abode, to the end the other side may cross-examine, if they think fit ; and, to prevent the personating of any witness, he is constantly carried in person, and shewn at the seat of the adverse party’s clerk in Chancery. This being done, he returns back to the examiner’s office, and is there examined.

If interrogatories are filed for his cross-examination, the party who produces him must see that he stays, or returns, and attends to be examined. || But as it is usual, after the witness is sworn, for the examiner to appoint some other day for him to attend to be examined ; to prevent the examination from being taken unknown to the other side, a note in writing may be stuck up in the examiner’s office, that if *such a person* come to be examined in *such a cause*, let him be cross-examined ; or the examiner may be instructed to take care that the witness be cross-examined, which seems the better method.|| But, if no such interrogatories are filed, or he is not demanded to be cross-examined at the same time when he is under examination, and if he goes away about his business, the party who intends to cross-examine him must get him examined as well as he can ; and the adverse party is not in that case bound to produce him over again, to attend to be cross-examined, since it was the party’s fault he had not his interrogatories ready to cross-examine him whilst he was under his former examination.

If the examiner is served with an order whereby publication is to pass on such a day, he cannot afterwards examine any witness, though it often falls out, that three or four witnesses have been before that time sworn to the interrogatories, but have not attended to be examined : in this case the party cannot examine

amine them without leave of the court, which is seldom denied on motion.

If a witness is duly subpoenaed to attend and be examined, and he refuses to attend; then, upon a certificate from the examiner that interrogatories are filed, and the witness hath not attended to be examined, he shall stand committed (a), unless he attends and is examined in four days after notice. And this is sometimes allowed as a good cause for enlarging publication or putting off the cause. But, where publication is actually passed, and depositions are delivered out, if the party moves for enlarging publication, he must offer good reasons, by affidavit, of some material witnesses whom he hath to examine, and the reasons why they could not attend and be examined before publication passed.

(a) || So, if a person having attended as a witness refuse to be sworn, an order will be made, that he attend to be examined, or stand committed. *Hennegal v.*

Evance, 12 Ves. 201. In these cases a motion is necessary before the witness can be committed for a contempt of such an order, upon which it is open to the court to consider, whether, under the circumstances, he ought to be committed. If the witness attending refuses to answer, conceiving the interrogatory put to him to be improper, he must demur. Whether the demurrer must be in writing, or may be *ore tenus*, does not appear. *Bowman v. Rodwell*, 1 Madd. 266.||

And in this case the plaintiff or defendant, as the case falls out, must make oath, and so must his clerk or solicitor, that they have neither seen, heard, read, nor been informed of any of the contents of the depositions taken in that cause; nor will they see, hear, read, or be informed of the same; || nor shall any person or persons by or with their or either of their order, privity, direction, or knowledge, read, see, hear read, or be informed of the same, || till publication is duly passed in the cause; and upon such an affidavit it is usual for the court to enlarge publication, and give the party an opportunity to examine his witnesses. But he is to be limited to a time, and so as not to put off the hearing of the cause; for otherwise it would be hard to put the defendant to hear his cause without proof.

If the party examines some witnesses in town, and others by commission, he is not obliged to exhibit or file his whole set of interrogatories in the examiner's office; he only files such and such alone as he hath occasion to examine to in town; for if this were otherwise, it would put the plaintiff to a double expence of paying for copies of the whole interrogatories twice over.

Here also we must observe, that anciently the examination was before a judge of the court, who was to consider whether the witness answered readily, or whether he brought a story formed to the judge. The examination in Chancery was originally before the Master of the Rolls, who was one of the judges of the court; and therefore it should seem that the examination might be upon the bill without interrogatories drawn and framed, as the examination with the canonists may be upon the *libellus articulatus*. But afterwards the Master of the Rolls having left the examination of the witnesses to his clerks, as the barons of the Exchequer did to theirs, thenceforward not the judge, but

Gilb. For.
Rom. 117. 124,
125.

but the counsel for the party, whose witnesses were to be examined, framed the interrogatories upon which the clerks examined; and so it became the practice to send the commission to the commissioners to examine upon interrogatories, as the examiners did above.

Gilb. For.
Rom. 118.

But, as witnesses often lived remote from the court, it was thought more convenient to appoint commissioners to examine such witnesses, the court sending a notary of their own, who was often in commission with them, and with those commissions a copy of the articles. The commissioners are to examine themselves, and cannot delegate their power, for *delegata potestas non potest delegari*.

Id. ibid.

The commissioners were likewise to be indifferent, for, upon exception to the partiality of any of them, the court would supply their places by putting in others; for though they are named by the parties, yet that is but by way of proposal to the court; for they are the ministers of the court, and therefore must be impartial.

Id. ibid.

(a) But there seems to be no such rule or distinction at this day, and therefore it hath been re-

solved, that a commissioner may maintain an action for the labour and pains he has been at in the execution of the commission. *Stockhold v. Collington*. Carth. 208. || 1 Salk. 330. S. C. Comb. 186. S. C. 1 Show. 343. S. C. The acting commissioners are allowed one guinea *per diem* during the execution of the commission, exclusive of every other expence incident thereto. The clerks are in like manner entitled to half-a-guinea *per diem*. The expences and charges of entertainment, and other matters, are borne by the parties joining in and attending the execution of the commission. If a commissioner refuse to sit, the suitor has no remedy by action against him; and though perhaps his refusal be a contempt of the court, if without excuse, yet doubtless they will not punish him for it, unless his reasonable expences be allowed. 1 Show. 343.||

The interrogatories were anciently annexed to the commission, and so now they are supposed to be; but by consent of parties they are delivered to the commissioners at the opening of the commission; and this is the present practice.

The commissioners can only examine upon the set of interrogatories that are first put in before them, and no new ones can be examined upon before them, without leave of the court, because their commission is to examine upon such interrogatories as are supposed to be annexed to the commission, or such as are delivered in at the opening of the commission.

But before the examiner they may examine upon a new set of interrogatories, because that is presumed to be the examination of the judge; and the judge might examine upon interrogatories *ex re natâ* out of the articles.

Id. 127.

The plaintiff has regularly the carriage of the commission, and so is to appoint time and place; but, if the defendant supposes that the plaintiff will aggrieve him by such appointment,

he

he may move for a duplicate of the commission, and that the officer may appoint time and place.

But, if the officer appoints time and place, yet the commissioners may agree to adjourn, because the appointment of the master is only for the opening of the commission; and, therefore, if the commissioners agree, they have yet power to make proper adjournments.

If the plaintiff, or his commissioners, abuse the carriage of the commission, by making unnecessary adjournments, or an irregular examination of the witnesses, that will entitle the defendant to a commission of his own, and he may have the carriage of it himself, because he shall not be obliged to produce and examine his witnesses where it cannot be done impartially. *Id. ibid.*

The fair examination by commissioners is not to adjourn without necessity, because that would be to harass the defendant by obliging him to travel from place to place to cross-examine; but, if it be necessary, they may adjourn, not only as to time, but place. *Id. ibid.*

And this affair must be performed as far as it is possible *uno actu*, that there be as little opportunity as possible to divulge the depositions, that neither side may better their proof. *Ibid.*

When a witness is produced, he must first be examined upon the interrogatories of the producer, and then forthwith, without suffering him to go abroad, upon the cross interrogatories of the other side; and the depositions are to be read over to him, every sheet whereof he is to sign, that so they may have the sense of the witness *ex re natâ*, without being tampered with. *Id. 128.*

The depositions, thus taken, are to be bound up, and signed and sealed by the commissioners, and sent by a messenger of their own to the court out of which the commission issued, who is to swear that they were not opened or altered since they were delivered to him. *Ibid.*

If there be due notice of executing the commission, and at the day appointed the commissioners meet, and the commission be opened, but no witnesses examined nor adjournment made, the commission is lost; but, if it be not opened, they may give new notice, and proceed, unless in the mean time the court be moved, and order be made to pay the costs of the former day before they proceed. And the reason of this rule seems to be, that the not adjourning is a refusal of the commissioners to act any further upon it; for though the court itself never adjourns, because it is always open, yet the delegated authority must adjourn, because they have no standing and constant power, as the seal has, but their power arises from the words of their commission, which are *quod mandamus quod ad certos dies & locos quos ad hoc provideritis testes præd. coram vobis venire faciatis & advocetis*; so that if they do not provide time and place by an adjournment, they have no authority further to act by that commission, for the delegated authority must pursue the words of the commission, else it will be construed a refusal to act. But, if they do not open the commission, their not acting at that time will
not

not be construed as a refusal to act; but it is an harassing of the defendant, for which he may complain to the court and have his redress; and the not acting before the commission is opened, is not construed to be a refusal, because they do not know what their authority is till the commission is opened.

Id. 130.

Where one of the plaintiff's commissioners and one of the defendant's meet, and the commissioner for the plaintiff refuses to act, the commission is lost; but the plaintiff shall pay the defendant his costs, and the defendant shall have a new commission and the carriage of it. And so it is when any commission is lost through the default of him that has the carriage of it; for he is unworthy to have the carriage of the commission, who appears to make default in the execution of it.

Ibid.

If due notice be given, and the one side proceed and examine his witnesses; the other, if he does not examine, shall not have a new commission, unless affidavit be made of some reasonable cause of his non-attendance, and that neither the party who did not examine, nor any for him, or by his direction or knowledge, has seen, heard, or been informed of the depositions taken, or any part of them, nor willingly will see, &c. till he has examined, or till publication. And the reason hereof is, that the defendant may not have an opportunity to know what has been proved for the plaintiff, and so be able to contest it.

Id. 131.

And where such a new commission is granted, it shall all be at the charge of the defendant, and the plaintiff is permitted to cross-examine without charge.

Ibid.

But, if the plaintiff will, upon such new commission, produce any witnesses, he must be at equal charges of the commission, because he has equal benefit by the examination of his own witnesses.

Ibid.

But he, at whose instance a commission is renewed, must examine all his witnesses upon such commission, or in court, before the return of it, because he cannot be indulged a farther probatory term.

Ibid.

If the commissioners on both sides attend the execution of the commission, and the one side examines, and the other neither examines nor puts in interrogatories, he shall never afterwards examine, unless upon special order of court, upon good cause shewn, because he might form his interrogatories upon the discovery made to his commissioners of what the other side examined to.

Id. 132.

Where the commissioners meet and examine, and afterwards adjourn, and one of the defendant's commissioners takes away the commission, and the other commissioners meet at the day adjourned, and examine witnesses and return the depositions, the court will order such depositions to lie, and the *subpoena duces tecum* to issue against the commissioner who took away the commission, that he may bring in the authority by virtue of which the depositions were taken; for if they had a proper authority, the not having the commission before them does not impeach the depositions.

There

There must be fourteen days' notice given by the commissioners to all the defendants, of the time and place of the execution of the commission, else it is not good notice, and the depositions will stand suppressed for irregularity, in not pursuing the tenor of the commission. This rule seems to be taken from the common law, which requires fourteen days' notice of trial. But, where it is a short vacation, as between *Easter* and *Trinity* term, ten days, or less, is good notice. *Id.*

No commission can be executed in term-time, unless by leave of the court, or consent of the parties; for the commissioners being generally country attornies, it is more than probable they are in town attending the term, on their other clients' affairs, and, consequently, cannot attend upon the execution of the commission. *Ibid.*

If two of the plaintiff's commissioners attend at the time and place appointed for the execution of the commission, they may proceed therein *ex parte*, if the defendant's commissioners do not then attend; but, if the defendant's commissioners attend at the time and place appointed, and the plaintiff's commissioners are not there, they cannot go on, because the plaintiff having the carriage of the commission, he will not produce it, if he is disappointed of his commissioners, and, consequently, there can be no proceedings for want of the commission. This makes a duplicate of the commission more necessary; for in this case, if the defendant's two commissioners meet, they may proceed in the execution of the commission; but, where there is no duplicate, and the defendant's commissioners attend at the time appointed, and none attend for the plaintiff, the party grieved is to be recompensed in costs upon complaint made thereof to the court; and in that case the court will give him leave to sue out another commission, and order him the carriage thereof. *Id.* 136.

There must, at least, one commissioner attend on each side; for if the plaintiff hath but one commissioner that attends on his side, he cannot proceed to execute the commission, unless one of the defendant's commissioners attends and joins with him therein; but, if one commissioner for each party attend, they may proceed in the execution of the commission, and not otherwise. *Ibid.*

It having been found by common experience, that country commissioners were apt to publish and divulge all the evidence taken before them, even before the passing of publication, and in such a manner, as that it could rarely, if ever, be detected, because they usually disclosed it to the attorney or solicitor who employed them, and who was always their friend; and since the very life and vitals of almost every cause, and of every man's property, lie in keeping close and secret his evidence, till after the depositions are published, because after that there is an end of examining, unless it is to prove exhibits, (which may be done after the hearing, or by order *vivâ voce*, and then they must be particularly named in the order, that the other side may have notice what is to be proved; and this indeed can only be to prove

prove the execution of deeds, or signing receipts or acquittances ; but a man cannot have leave to prove a will *vivâ voce* at the hearing, because the due execution may come in question, (a), which cannot be examined to at the hearing *ore tenus*, but ought to be done before publication passes :) (a) [No examination is allowed to

points that would admit of a cross-examination. 2 Ves. 480.] || But see *Turner v. Burleigh*, 17 Ves. 355. where Lord *Eldon* says, " in the case of an exhibit proved at the hearing, the court " would examine *vivâ voce* at the hearing upon the suggestion of any question. In *Aylett's* " case, upon an indictment for perjury, the question was made, whether this court had the " right of examining *vivâ voce* ; and it was settled, that the examination may be in either " way." See *Gascoigne's case*, 14 Ves. 182. *Ogle's case*, 11 Ves. 556.||

To remedy this inconvenience, the following order was made the 9th of *February*, the 8th year of G. 1. in Chancery :

Whereas this court hath been informed, that commissioners and their clerks attending the execution of commissions for examination of witnesses in causes depending in this court, do frequently before publication is passed, and even before the executing of such commissions, disclose to or inform the parties, or their agents, of the contents of the depositions of witnesses taken on such commissions, which leads to introduce perjury, and occasions tedious and unnecessary examinations ; for remedying and preventing thereof for the future, the Right Honourable the Lord High Chancellor of *Great Britain*, by and with the advice and assistance of the Right Honourable the Master of the Rolls, doth order, that from and after the last day of this present *Hilary* term, where any commission issues for examination of witnesses, all and every the commissioners named in such commission shall, before they act in or be present at the swearing or examining any witness or witnesses upon interrogatories in such causes, severally take the oath following : " You " shall, according to the best of your skill and knowledge, " truly, faithfully, and without partiality to any or either of the " parties in this cause, take the examinations and depositions of " all and every witness and witnesses produced and examined " by virtue of the commission hereunto annexed, upon the interrogatories now produced and left with you, and you shall " not publish, disclose, or make known to any person or persons " whatsoever, except to the clerk or clerks by you employed and " sworn to secrecy in the execution of this commission, the contents of all or any of the depositions of the witnesses, or any " of them, to be taken by you and the other commissioners in " the said commission named, or any of them, by virtue of the " said commission, until publication shall pass by rule or order " of the High Court of Chancery." — Which oath is to be annexed in a schedule to the said commission. — And it is further ordered, that all and every the clerk or clerks attending the execution of such commission, and employed in taking, writing, transcribing, or engrossing the deposition or depositions of witnesses examined on such commission, shall, before he or they be permitted to act as clerk or clerks as aforesaid, or be present at the execution of such commission, severally take the oath

oath following: "You shall truly and faithfully, and without partiality to any or either of the parties in this cause, take and write down, transcribe and engross the depositions of all and every witness and witnesses produced before and examined by the commissioners, or any of them named in the commission hereunto annexed, as far forth as you are directed and employed by the said commissioners, or any of them, to take, write down, or engross the said depositions, or any of them, and you shall not publish, disclose, or make known to any person or persons whatsoever, the contents of all or any of the depositions of the witnesses, or any of them, to be taken, wrote down, transcribed, or engrossed by you, or whereto you shall have recourse, or be any ways privy, until publication shall pass by rule or order of the High Court of Chancery."—Which oath is likewise to be annexed in the same schedule to the said commission.—These oaths the said commissioners are by such commissions to be empowered jointly and severally to administer to each other, and also to the persons attending as clerks to the said commissioners.

If any practiser, or other person, goes about to tamper with or suborn any witness, upon complaint made thereof, and upon examination of the matter upon oath, he shall stand committed. *Id.* 143.

¶ If a commissioner be examined as a witness, at the execution of the commission, he must be examined by the other commissioners, as well previously to his acting as a commissioner, as also before any other witness be examined. After his examination he may join and proceed in the execution of the commission with the other commissioners; for if other witnesses be examined previously to the examination of a commissioner, and in the presence of that commissioner, the examination in that case would be irregular, the commissioner having heard the former examination. The deposition of a commissioner, who had so acted, and was afterwards examined in court, was suppressed upon motion. So, if a clerk, who writes for the commissioners, be examined as a witness, his examination must precede the examination of any other witness, except a commissioner under the same commission. *Hinde's Pr.* 356. 2 Ch. Ca. 79. 1 Vern. 369. *Gilb. For.* Rom. 138.

If a plaintiff wants to examine a defendant as a witness, he must obtain an order by motion or petition in the usual way for that purpose. This order must be served on the adverse party's clerk in court, by leaving a true copy of it with him *personally*, or with his agent at his seat in the six-clerks' office, shewing at the time of service the original order passed and entered. A defendant may obtain a like order for the examination of a co-defendant. These orders are of course, (a) but they proceed upon a suggestion, that the defendant is not interested in the matters in question; and they are never granted without a clause of saving just exceptions to the other side, which must be made at the hearing. This order must be produced at the execution of the commission, or in the examiner's office, when the defendant attends to be examined; for without it he cannot be examined, *Hinde's Pr.* 356, 357. *Gilb. For.* Rom. 139.

See *Murray v Shadwell*, 2 Ves. & Beam. 401. and the cases there cited.
(a) They are of course before, but not

after, a decree. *Franklyn v. Colquhoun*, 1 Ves. 218. it being only by virtue of this order, and the authority given to them by the court, that the commissioners or examiners are empowered to examine a defendant.||

When the parties have examined, they give a rule, as they do in the civil and canon law, for publication; and if no cause be shewn to the contrary within four days, the rule is made absolute.

Gilb. For.
Rom. 144.

When publication is moved to be enlarged, it must be upon notice; and upon good reasons offered to the court, and upon affidavits, shewing the reasons why the party could not examine his witnesses sooner; and it is seldom or never done where it is

(a) || It has been refused on the application of a party who has taken the depositions of the opposite party out of the office, although by mistake. *Lawrell v. Titchborne*, 2 Cox, 289.|| to put off the hearing of the cause. (a)

But, where the adverse party can suffer no injury, as, where the cause is not set down, or where the party is not served to hear judgment, there the court will enlarge publication upon asking for it.

Ibid.

And in some cases they will do it, though the cause is set down, and the party is served to hear judgment. But this must be when it is shewn to the court, that it is not possible for the cause to come on very soon, and the court will in this case expect the party to appear *gratis* to hear judgment, on six days' notice to be given to his clerk in court, and to pray no day over, and will often oblige him to take no advantage for want of parties at the hearing. This forwards the plaintiff; for if default is made at the hearing, the decree cannot be made absolute till the next succeeding term; but, if the party who moves to enlarge publication, will not agree to appear *gratis*, and to pray no day over, he is often denied his motion, and with great justice, because in that case he intends only delay, which the court always avoids when in its power.

Id. 147.

When publication is passed, and the depositions are copied and delivered out, and either party has a mind to examine touching the credit or reputation of any of the witnesses, the way is this:

They must file objections or articles, so called, in the examiner's office. These contain in substance the objections they make to the reputation of the witness; as in cases of felony, burglary, perjury, forgery, standing in the pillory (b), or any other criminal case that would disable the party from being a good witness at the common law; for the rule of evidence is the same in equity as at law; if the party cannot be a good witness at law, no more can he be in equity. Or these articles may be founded upon the party's leading a lewd life, or being a common drunkard or swearer, or of ill repute and character in his neighbourhood, a common vagabond, a man not known, that hath no abode, or such like; though all these latter objections seldom come to any thing; for notwithstanding these, the man is a legal witness,

(b) || Provided it be for an infamous crime, for it is the crime, and not the punishment, which incapacitates. 2 Wils. 18.||

witness, and the court will hear his evidence, and judge of the credibility of it accordingly.

These articles being filed, and a certificate being produced *Id.* 148. from the examiner that they are so, the court, upon application, by motion or petition (*a*), (or, it may be done without) will give leave to the party to examine witnesses thereon; and the other party, who is to support the credit and reputation of his witness, may examine accordingly *toties quoties*, and the depositions must be published, as in other cases. But this is a case which but very rarely happens, and, generally speaking, it ends in nothing more than putting the party to an expence to no purpose. *(a)* || This is an application, which the court very cautiously attends to, and will grant only to examine as to the credit of the witness by general interrogatories, and as to such particular facts as are not important to the matters in issue in the cause. *Purcell v. McNamara*, 8 Ves. 324. *Wood v. Hammerton*, 9 Ves. 144. *Carlos v. Brooke*, 10 Ves. 49. *Anon.* 3 Ves. & Bea. 93. *White v. Fussell*, 1 Ves. & Beam. 151. 2 Ves. & Beam. 267. *n. (g)*, S. C. Notice of the application is necessary, whether it be made before or after publication; *Mill v. Mill*, 12 Ves. 406. but it need not be supported by an affidavit. *Watmore v. Dickinson*, 2 Ves. & Beam. 267. The commission for this purpose should be executed before the hearing; if afterwards, the costs must be paid by the party taking it out. *White v. Fussell*, *ubi supra*. *Russell v. Atkinson*, 2 Dick. 532. ||

When the depositions are thus copied and delivered out, and both parties come to see the interrogatories examined by each side, if they find them to be leading or impertinent, then it is the proper time to refer them to a master, for being too leading, (*b*) impertinent, or scandalous. This is done by motion or petition of course. *(b)* || Depositions have been suppressed because the commissioners employed the clerk of one of the parties as their clerk; *Wyatt's Pr. Reg.* 122. referring to 2 Ch. Rep. 393.; because they were brought before and admitted by the commissioners ready prepared; *Shaw v. Lindsey*, 15 Ves. 380.; and because they were taken from the witness using during the examination full minutes in writing, which she stated to have been originally her own, put into method by the plaintiff's attorney, and so copied with some corrections by herself. *Ferry v. Fisher*, cited in 15 Ves. 382. *Anon. Ambl.* 252. In the cases of *Shaw v. Lindsey* and *Ferry v. Fisher*, the commission was directed to proceed for the purpose only of re-examining the particular witness; but Lord *Eldon* added, in the first of those cases, that though the court does give this sort of direction; yet if it should happen, that the witness could not be examined again, the objection does not go the length of preventing the court from directing hereafter, that the deposition may be opened, if necessity should require, that the rule should be dispensed with. ||

If the master reports the interrogatories to be leading, and this report is not excepted to, then all the depositions taken to these interrogatories must stand suppressed, as of course, by motion or petition; but, if the report is excepted to, as, on the one hand, the court never countenances leading or impertinent interrogatories; so, on the other hand, they are not over-curious in these matters, because it may fall out that the interrogatories be reported leading in the very vital of the examination, and on the very point on which the cause turns; and when this comes to be the case, the party who referred them hath gained his end; for perhaps he had a very bad cause, if the depositions had stood; whereas if they are suppressed, he hath a very good one, since his adversary must have his cause without any proof at all, unless the court is pleased to grant him another commission on payment of costs for his leading interrogatories, which

which is seldom or never done after the depositions are published. And it is hard, that in equity, a man should be deprived of a plain right, through the slip of another man's pen, or the inadvertency or unskilfulness of his counsel's penning his interrogatories; and therefore, if it is possible for the court to help him, they will from the manifest inconvenience which must attend such a case. Indeed, if the interrogatories are reported to be leading in points upon which the gist of the cause does not turn, and if the depositions in these points should be suppressed, and the party have evidence enough left without it, there is no hurt done; but, if the very life and quintessence turn upon it, he will struggle to the last before he will let his depositions be suppressed.

Therefore, where interrogatories and the depositions of a witness taken on them had been suppressed, for that the interrogatories were leading, and the court was moved, that a new set of interrogatories might be drawn, and settled by the master for the examination of this witness, whose evidence was very material, and yet would be wholly lost, unless the court would indulge them this way; though the practice was admitted to be always against it, and it was urged to be of dangerous consequence; yet, one precedent being produced to this purpose, and the interrogatories which had been suppressed, being such as might be drawn by many other counsel, without any apprehension of their being leading, the court, to let in the party to the benefit of his witness's testimony, ordered interrogatories to be put in, and settled by a master for his examination over again.

If the commissioners misbehave themselves, or if the commission is executed contrary to notice given to the party, or if the depositions returned by commission are so engrossed, or so interlined, that they are not legible; in these and many other cases of the like nature, there may be good reason to suppress the depositions; but in this last case the record or engrossment of the depositions is always brought into court by the proper officer: the court take the engrossment into their hands; and if it is possible to be read, or if it is handed down to the six-clerk, and he can read it, they will hardly suppress the depositions, or put the parties to a new trouble, or to the expence of examining all over again.

Id. 150.

When the depositions are copied, they must be signed by the examiner or proper six-clerk; for if either of the six-clerks, who constantly attend the court every day of hearing, stands up and says, that the books are not signed, they are not to be admitted to be read.

Id. 118.

(a) In what cases a bill to examine witnesses in *perpetuam rei memoriam* will

The civilians had a manner of examining witnesses (a) in *perpetuam rei memoriam*, which was two-fold, either the common examination, or in *meliori forma*. The common examination was, when witnesses were very old and infirm, or sick and in danger of death, or were going into other countries; in this case it was usual to file a libel, and without staying for the *litis contestatio*,

contestatio, the plaintiff examined his witnesses immediately, and gave notice, if it were possible, to the other side, of the time and place of the examination, that he might come and cross-examine such witnesses if he thought fit; and these depositions stood good, in case the witness died or went abroad; but the plaintiff was obliged *edere actionem* within a year, otherwise these examinations went for nothing. But, if the witnesses lived, or did not go abroad into other countries, then they were to be examined *post litem contestatam*.

now lie, *vide*
Vern. 105.
185. 331. 354.
2 Vern. 159.
Abr. Eq. 233-4.
1 Atk. 571.
620. 1 P.
Wms. 117.
1 Br. Ch. Rep.
469. 2 P.
Wms. 162.

The examination *in perpetuam rei memoriam in meliori forma* is *ad transumenda instrumenta*; and in this case there must be a *litis contestatio* before the examination, because there is no need of so much celerity in proving instruments, as there is where the witnesses are likely to die, or are going into remote parts. In these cases they are not confined to proceed in any action upon these instruments within a year.

But now the usual method is, where one man brings a bill against another, and hath a most material witness to examine, upon affidavit made, that this witness is in a languishing condition or danger of dying before he can be examined in chief; or that the witness is going a long voyage to *India*, or other remote parts, from whence he cannot return by the time he is to be examined in chief, and to which place he is bound, and cannot possibly stay: in either of these cases, the court upon motion or petition of either party will, and never refuses to make an order as of course (*a*), for leave to examine such witness *de bene esse*, saving just exceptions to the other side.

Id. 140.
[A witness may be examined *de bene esse* on affidavit that the thing to be examined into lies in the knowledge only of the witness, though there be no affidavit of his being

old, or infirm, or in danger of dying. *Shirley v. Ferrers*, 3 P. Wms. 78. *Hankin v. Middleditch*, 2 Br. Ch. Rep. 641.] (*a*) || *Brydges v. Hatch*, 1 Cox's Rep. 423. *Pearson v. Ward*, *Id.* 177. But the affidavit should state the particular points to which his evidence is meant to apply. Motions of this sort have been looked upon by the court with a great deal of jealousy, and where not made on the ground of age, require notice, as well as an affidavit, either that the witness is of the age of seventy, or is the only witness to the particular fact, or is in a dangerous state, &c. *Bellamy v. Jones*, 8 Ves. 31. An order has been granted after the trial of an issue directed by the Court of Chancery, that the plaintiff be at liberty to examine a witness *de bene esse* for the purpose of securing his testimony in case of his death, upon the ground, that it was intended to move for a new trial, and the witness was above seventy years old. *Anon.* 6 Ves. 573.||

If the witness lives till he can be examined in chief, he must *Ibid.* be examined over again as other witnesses in chief are; but, if he dies in the mean time, then, upon producing and proving the register of his death, the party for whose benefit he was examined, may apply, by petition or motion, for an order, with liberty to publish his depositions, (for they cannot be published without such an order); and to the petition must be annexed a certificate of the death of the witness, and the party must shew that he died before he could be examined in chief; and hereupon the court makes an order, not only to publish his depositions, but to read them at the hearing, saving exceptions; and notice of this order is always given to the adverse clerk to prevent surprise,

surprise, and to give him an opportunity to object thereto, as he shall see occasion.

If the witness beyond sea be not returned, there must be an affidavit of it, and that the party has not heard from him for such a time, nor doth he know whether he is living or dead; and in this case there will be the like order, as in the case of the witness who died before he could be examined in chief.

|| The examination of a witness *de bene esse*, it is obvious, may be incidental to every suit in the progress of it; whereas the examination *in perpetuam rei memoriam* is the fruit of a suit instituted for that particular purpose. And herein seems to be the emphatical distinction between an examination *in perpetuam rei memoriam*, and an examination of a witness *de bene esse*; though the examination *de bene esse* may eventually be *in perpetuam rei memoriam*, if the witness so examined die before he be examined in chief.

The residence of witnesses beyond sea, or out of the jurisdiction of the court, whose testimony will be material to some of the parties in the suit, frequently occasions an application for a commission to examine witnesses abroad, and if foreigners, in their own language (a). This commission, like all other commissions for the examination of witnesses, never issues but by an order of court; which may be applied for either by motion or petition to the Master of the Rolls. If by motion, (b) notice of it must be served on the adverse clerk in court, by leaving a true copy of the notice with the clerk in court personally, or with his agent at his seat in the six-clerks' office, on the day next but one before the motion is to be made, unless *Sunday* intervenes. There must be an affidavit that some of the witnesses, whose evidence will be material, and whom it will be necessary to examine on the behalf of the party making the application, reside at —, and that the party cannot safely go to trial without their testimony. It is not necessary to state in the affidavit (c) the points to which the examination is intended, nor the names of the witnesses. Nor, if the matter in question (d) arise abroad, is it necessary to have that fact verified by affidavit; it is sufficient, if it be shewn out of the pleadings.

(a) But the depositions in this case are not to be taken in the language of the witness, but must be turned by the interpreter into *English*, and be so taken down and returned. Lord Viscount Belmore v. Anderson, 2 Cox, 288.

(b) Where in the course of the proceedings on a bill

of interpleader, a commission issued on the part of one defendant for the examination of witnesses abroad, of which notice was given to the plaintiff, but *not* to the other defendant; Lord Chancellour said, it might not perhaps be an inconvenient rule to make, that defendants to a bill of interpleader should give notice to each other of the issuing of a commission; but it had not yet been done, and he therefore could not discharge the order for irregularity. *Brymer v. Buchanan*, 1 Cox, 425. (c) *Oldham v. Carleton*, 4 Br. Ch. Rep. 88. *Rougemont v. Royal Exchange Assurance Company*, 7 Ves. 304. (d) *Jessup v. Duport*, Barnardist. 192. *Akers v. Chaney*, 2 Br. Ch. Rep. 273.

The residence of an adverse party in *England* creates an absolute impossibility of giving him that notice of the time and place of executing a commission of this nature, which would be essentially necessary to the regular execution of a commission for the examination of witnesses in this country. The court therefore

therefore has substituted notice in this instance to the adverse party's commissioners, or to his agent, in lieu of notice to the party himself.

On granting an order for a commission of this kind pending an injunction against an action, it is not the practice of the Court of Chancery, though it was formerly the practice in the Exchequer, to insist upon the payment of the money into court.

Chancery imposed this condition on the party applying, but that was on circumstances.

The return of this commission may be *without delay*, or on a *general return day* in term; but the former seems the better and more usual form.

If the witnesses reside in an enemy's country, the practice is to direct the commission to the nearest neutral port.

Where the bill is merely for a discovery and commission to examine witnesses abroad, the Court of Chancery will, it seems, permit the commission to issue before answer, if the time for answering has expired, but not if it is still running. But the Court of Exchequer will not order a commission before issue joined.

The defendant being entitled to examine witnesses in chief under a commission sued out by the plaintiff, is therefore entitled under the bill filed by the plaintiff to a commission for the examination of witnesses abroad, without filing a bill for that purpose himself.

The sending out and receiving back a commission for this purpose, must be proved by affidavit.

It was moved on the part of the plaintiffs, that depositions taken abroad might be received and filed under the following circumstances: The depositions were taken at *Gibraltar*, whence they were brought to *England* from a commissioner by a Mr. *Mawhood*, charged with the safe delivery of them in the usual way. Mr. *Mawhood* being obliged to perform quarantine on his arrival off the coast of *England*, and thinking that the depositions might be wanted before the period of his quarantine expired, he sent them by a *Portsmouth* coachman to *London*, who left them with the plaintiff's solicitor there in a box sealed up, as Mr. *Mawhood* had received them from a commissioner in *Gibraltar*. Upon reading Mr. *Mawhood's* affidavit of the identity of the seals and package, and his reasons for sending the depositions to *London*, the court ordered them to be received and filed. This was moved upon notice, but not opposed.

A commission for the examination of witnesses in *Lisbon* was

R 4

executed, 2 Cox, 426.

Cook v. Donovan, 3 Ves. & Beam. 76.
In Foderingham v. Wilson, Coop. 222. n. Lord the special cir-

Ibid. Hinde's Pr. 307.

— v. Romney, Amb. 62. Cahill v. Shepherd, 12 Ves. 335.

Noble v. Garland, Coop. 222.
Foderingham v. Wilson, ibid. Yates v. Barker, Madd. 208.

Sheward v. Sheward, 2 Ves. & Beam. 116.

Bourillon v. Alpeyne, 4 Br. Ch. Rep. 100.
Bourdieu v. Trial, Scac. 24th May 1783, 2 Fowl. Pr. Exch. 94.

Burn v. Burn, 2 Cox, 426.

executed, but the ship in which the depositions were sent to *England* was lost on the passage. The court ordered the commissioners to transmit the *drafts* of the depositions, and to certify the circumstances of the return of the commission, but would not make any order for the reading of the drafts on the hearing of the cause, until after the commissioners had made their return and certificate.

Thompson's
case, 3 P.
Wms. 195.

A commission being granted to examine witnesses at *Algiers*, the plaintiff died before the execution of it, by which the suit abated; but two witnesses were examined there before notice of the plaintiff's death, one of whom had died since his examination. The court held, that although in strictness there was an abatement of the suit by the death of the plaintiff, and no such cause *in esse* as that in which the witnesses had been examined; yet, it being in a court of equity, and where the commissioners and witnesses had no notice of the plaintiff's death; it could not in reason or justice affect the validity of the depositions; which were therefore allowed to stand *in toto*, as well with regard to the witness then living, as to the witness who was dead.||

(F) Of written Evidence: And herein of admitting Exemplifications or Copies of Records, &c. as Evidence.

Co.Litt. 283.2.

(a) That a jury may and must take knowledge of any particular record, either patent, statute, or judgment,

if it be given in evidence to them, for that is their *allegata* verbally alleged and produced, if it make to the issue. Hob. 227. & vide Leon. 206. And. 37. Plow. 92. a. 411. Dyer, 118. 9 Co. 12. Co. Litt. 227.

Gilb. L. E. 11.

[The first sort of records are acts of parliament: these are the memorials of the legislature, and therefore are the highest and most absolute proof: and they either relate to the kingdom in general, and then are called general acts of parliament, or only to the concerns of private persons, and are thence called private acts.

Id. 12. 2 Salk.

566. 10 Med.

126. Keb. 2.

Jenk. Cent.

280. pl. 5.

Hale's Hist. of

the Common

Law, 15, 16.

Style, 462.

L. E. 89. Tri.

per Pais, 417.

Of general acts of parliament the printed statute-book is evidence; not that the printed statutes are the perfect and authentick copies of the records themselves, for there is no absolute assurance of their exactness, but every person is supposed to apprehend and know the law which he is bound to observe, and therefore the printed statutes are allowed to be evidence, because they are the hints of that which is supposed to be lodged in every man's mind already.]

Str. 446. 3 R. S. L. 90.

||By

¶ By 41 G. 3. c. 90. § 9. for the better and more effectual proof of the statute law of *Great Britain and Ireland*, it is enacted, that copies of the statutes of *Great Britain and Ireland* prior to the Union, printed and published by the printer and publisher duly authorized to print and publish the same by His Majesty, shall be received as conclusive evidence of the several statutes in the courts of either kingdom.¶

[In private acts of parliament the printed statute-book is not evidence, though reduced into the same volume with the general statutes, but the party ought to have a copy compared with the parliament roll. For private statutes do not concern the kingdom in general, and therefore no man is understood to be possessed of them as he is of those general laws which are set up as the regulation of his own actions, and, consequently, the private statutes are no intimation of what is already known, but they are the rules and decrees that relate to the private fortune of this or that particular man, which no one else is under any obligation to understand or take notice of, and therefore they ought to be proved with the same punctuality as the copies of all other records.]

But my Lord Chief Justice *Parker*, in the case of the College of Physicians and Doctor *West*, allowed the printed statute to be evidence of the truth of a private act of parliament touching the institutions of the college.

10 Mod. 353.
But this matter of evidence does not appear there.
Ld. Raym. 472.

And a private act of parliament in print that concerns a whole country, as the act of *Bedford Levels*, for re-building *Tiverton*, &c. may be given in evidence without comparing it with the record. And these things are the rather admitted, because they gain some authority by being printed by the king's printer (a); and besides, from the notoriety of the subject of them, they are supposed not to be wholly unknown. And for this reason, printed copies of other things of as publick a nature have been admitted in evidence without being compared with the original; as the printed proclamation for a peace was admitted to be read without being examined by the record in Chancery. So, the *Gazette* is evidence of all acts of state. So, the articles of war, as printed by the king's printer, are evidence of such articles.

Bull. N.P. 225.
(a) ¶ To prevent the inconvenience of a strict proof, a special clause is usually inserted, providing that the act shall be deemed publick; in which case the copy printed by the king's printer will be sufficient evidence

of its contents.¶ *Vide Dougl. 594. n. R. v. Holt, 5 T. R. 436.*

The next thing is the copies of all other records, and they are twofold; under seal, and not under seal.

First, under seal, and these are called by a particular name, exemplifications, and are of better credit than any sworn copy: for the courts of justice that put their seals to the copy, are supposed more capable to examine, and more exact and critical in their examinations, than any other person is or can be; and besides, there is more credit to be given to their seal, than to the testimony of any private person; and therefore we are more sure of a fair and perfect copy when it comes attested under their

10 Mod. 125.
¶ The seal of the king, and the seals of the publick courts of justice, and of all courts established here by act of parlia-

ment, are admitted in evidence without extrinsick proof of their genuineness; as, the seal of the county palatine of *Chester*, Dy. 276. cited *per Cur.* in *Olive v. Gwin*, 2 Sid. 146. or of the great sessions in *Wales*, *ibid.* Hardr. 118. S. C. Gilb. Ev. 16. or of the ecclesiastical court on an exemplification of a will. *Kempton v. Cross*, Ca. temp. Hardw. 108. But the seals of private courts, or of a foreign colonial court, *Henry v. Adey*, 3 East, 221. or of a corporate body, *Moises v. Thornton*, 8 T. R. 307. must be proved by a witness acquainted with their impression. However, in *Woodmass v. Mason*, 1 Esp. N. P. C. 53. Lord *Kenyon* held, that the seal of the city of *London* proves itself. But qu. When an instrument purports to be under the seal of a corporation, it will be sufficient to shew that it is the official seal of the corporation. 8 T. R. 307. Phil. Ev. 290, 291.||

Exemplifications are twofold; under the broad seal, or under the seal of the court.

Sid. 145, 146. Under the broad seal; such exemplifications are of themselves records of the greatest validity, to which the jury ought to give credit, under the penalty of an attainder.

3 Inst. 173.

When a record is exemplified under the great seal, it must either be a record of the court of Chancery, or be sent for into the Chancery by a *certiorari*, for the Chancery is the centre of all the courts, and thence the subjects receive a copy under the attestation of the great seal: for in the first distribution of the courts, the Chancery held the broad seal, whence the authority issued to all proceedings, and those proceedings cannot be copied under the great seal, unless they come into the court where that seal is lodged.

Bill. N. P. 227.

Nothing but records may be given in evidence exemplified under the broad seal; for these being preserved by the proper officer of every court from all rasure and corruption, are supposed to be so fair and unblotted, that there can be no danger in the exemplification. But the exemplification of deeds under the broad seal cannot be admitted in evidence, for these being in the custody of the party and not of the law, are subject to rasures and interlineations, and therefore ought to be produced themselves as the best evidence of the contract.

3 Inst. 173.

But this rule is to be taken with exceptions, as see hereafter.

When any record is exemplified, the whole record must be exemplified, for the construction must be taken from the view of the matter taken together.

The second sort of copies under seal are the exemplifications under the seal of the court, and these are of higher credit than a sworn copy, for the reasons formerly given.

Copies not under seal are of two sorts, 1. Sworn copies; and 2. Office copies.

1. Sworn copies; these must be of the records brought into court in parchment, and not of a judgment in paper signed by the master, though upon such judgment you may take out execution; for it does not become a permanent matter till it be delivered into court, and there fixed as memorandums or rolls of that court; and until it be a roll of that court it is transferable
any

any where, and so doth not come under the reason of law; that permits us to give a copy in evidence.

Where a record is lost, a copy of it may be read without swearing it to be a true copy; for the record is in the custody of the law, and not of the party, and therefore, if lost, there ought to be no injury arising to the party's private right; and, consequently, if it be lost, the copy must be admitted without swearing to any examination concerning it, since there is nothing with which the copy can be compared, and therefore it must be presumed true without examination.

But in such cases as these, the instruments must be according to the rules required by the civil law: they must be *vetustate emporis, aut judiciaria cognitione roborata*.

So, the copy of the decree of tithes in *London* has been often given in evidence without proving it a true copy, because the original is lost.

So, a recovery of lands in ancient demesne was given in evidence, where the original was lost, and possession had gone a long time according to the recovery.

When a man gives in evidence the sworn copy of a record, he must give the whole copy of the record in evidence, for the precedent and subsequent words and sentence may vary the whole sense and import of the thing produced, and give it quite another face; and therefore so much at least ought to be produced as concerns the matter in question.

Secondly, Office copies may be given in evidence.

Here the difference is to be taken between a copy authenticated by a person trusted to that purpose, for there that copy is evidence; and a copy given out by the officer of the court that is not trusted to that purpose, for that is not evidence, without proving it actually examined.

The reason of the difference is, that where the law hath appointed a person for any purpose, it must trust him as far as he acts under the authority which it has lodged in him.

Therefore the chirograph of a fine is evidence to all persons of such a fine, for the chirographer is appointed to give out copies between the parties of those agreements that are lodged of record, and therefore his copy must be admitted as evidence without further dispute.

So, where a deed is enrolled; the indorsement of that enrolment is evidence, without further proof of the deed, because the officer is entrusted to authenticate such deeds by enrolment; and when such officer indorseth, that he hath done it pursuant to the law, then the law which entrusted him with the authority of doing it, ought to give credit to what he has done.]

sufficient evidence of the enrolment. Dougl. 56.

¶ A rule of court under the hand of the proper officer is itself an original, and may be given in evidence in a legal proceeding in that court, without being proved a true copy.

So,

V nt. 257.
Styl. Pr. Reg.
205. Mod.
117. Salk. 285.
L. E. 89.

Corvin. Dig.
292. Mod.
117.

Vent. 257.

Ibid.

Tri. per Pais,
166. 3 Inst.
173.

Pl. Com
110. b.

See 10 Ann.
c. 18. 8 G. 2.
c. 6. § 21.
In a duchy
lease, the cer-
tificate of the
auditor on the
margin, is

Dougl. 56.

Selby v. Har-
ris, 1 Ld.
Raym. 745.

Duncan v.
Scott,
1 Campb. 101.

So, where a witness, being about to leave this country, had been examined at a judge's chambers, a copy of his depositions, delivered out by the judge's clerk, and attested by the clerk's signature, was admitted in evidence, without proof of its having been examined and compared with the original depositions.||

[But, if an officer of the court, who is not entrusted to that purpose, makes out a copy, they ought to prove it examined; because being no part of his office, he is but a private man, and a private man's mere writing or word ought not to be credited without his oath.

Therefore it is not enough to give in evidence a copy of a judgment, though it be indorsed to have been examined by the clerk of the Treasury, because it is not part of the necessary office of such clerk: for he is only entrusted to keep the records for the benefit of all men's perusal, and not to make out copies of them.

So, if the deed enrolled be lost, and the clerk of the assize make out a copy of the enrolment only, this is no evidence, without proving it examined; because the clerk is entrusted to authenticate the deed itself by enrolment, and not to give out copies of the enrolment of that deed.

The office copies of depositions are evidence in Chancery, but not at common law, without examination with the roll; for the court of Chancery have for convenience allowed their office copies to be evidence in their own court, and have empowered their officers to make out such copies as should be evidence; but the particular rules of their court are not taken notice of by the courts of common law.

Chutel and
Pound.
Trin. Ass.
1700.
3 Taunt. 166.
See Tri. per
Pais, 209.

Where a fine with proclamations is to be a bar to a stranger, there the proclamations must be examined from the roll; for although the chirographer is authorized by the common law to make out copies to the parties of the fine itself, yet he is not appointed by the statute to copy the proclamations, and therefore his indorsement on the back of the fine is not binding.

Having thus shewn how the record is to be given in evidence, by the proving of a copy, we must in the next place see in what manner, and in what cases, it ought to be evidence.

And here, in the first place, it is regularly true, that when the record is pleaded and appears in the allegations, it must be tried on the issue *nul tiel record*; but, where the issue is upon fact, the record may be given in evidence to support that fact.

Style, 22.
Sid. 145.

When the issue is *nul tiel record*, the record must be brought *sub pede sigilli*; but, where the record is offered to a jury, any of the forementioned copies are evidence.

Sid. 145, 146.

But out of this rule there is an exception, that where the record is inducement, and not the gist of the action, there, it is not of itself traversable, but must be given in evidence on the proof of the action; for nothing can be of itself traversable, that doth not make a full end of the matter in question.

Tenant

Tenant for life, the remainder in fee; he in the remainder in fee suffers a common recovery with single voucher, and this recovery is ancient: The court will presume a surrender of the tenant, because when there hath been a constant enjoyment under that recovery, it shall be supposed to be a lawful foundation, for unless there had been a lawful tenant to the *præcipe*, it must be supposed that it would have been controverted and overthrown. *Green v. Froud*, Vent. 257. 1 Mod. 117. S. C. It is laid down in the case of *Warren v. Grenville*, 2 Str. 1129. that after a recovery of 40 years standing, the court will, *without any other circumstances*, presume a surrender of the estate for life. But in that very case, the court did admit other evidence of the surrender, namely, the attorney's book, the attorney himself being dead, wherein, among his charges for suffering the recovery, were two *items* for drawing and engrossing a surrender of the life-estate. Neither doth the above case of *Green v. Froud*, (for there possession had accompanied the recovery,) nor what is said in *Pig. 41.*, warrant this general position. And therefore, in the case of *Goodtitle v. Duke of Chandois*, 2 Burr. 1065., where tenant in tail of a considerable estate, part in possession, the residue held by a widow on whom it was settled for life, suffered a recovery of the whole, and settled it on the Duke of *Chandois*, and the Duke on the death of the tenant in tail entered into that part of which he died in possession, and on the death of the widow on the remainder; on which the reversioner brought an ejectment to recover this remainder, on the ground that there was no surrender of the widow's life-estate; for that no actual surrender was proved, and no sort of evidence having been offered to make such surrender probable, it could not be presumed; the court of K. B. held, that the length of time was not to be reckoned from the date of the recovery, but from the possession going with the recovery: that in this case there was no possession after the death of the tenant for life, for the reversioner brought his ejectment immediately: that where the person suffering the recovery, has a right to suffer it, the court will presume all things to have been regular, unless the contrary appear; but that here, the recoveror, being only tenant in tail in remainder, and the life-estate under the same settlement still subsisting at the time of suffering the recovery, it was most clear he had no power to alien or bar. — And even where the person suffering the recovery, has a clear right to alien, yet the court will not, from mere length of time, presume proper tenants to the *præcipes*, where it appears from the deeds that proper parties did not join, and the uses are declared to have been warranted by those deeds. *Keen v. Earl of Effingham*, 2 Str. 1267.

But, if there be tenant for life, the remainder in fee, and he in remainder suffer a common recovery with single voucher, and this recovery be modern, this record will not give a title; for the freehold is in tenant for life, and the *præcipe* ought to be brought against him; and so there is no lawful action commenced. Vent. 257.

If there be tenant for life, with remainder in tail, and they both join in a common recovery with single voucher, this will not bar the tail, because the remainder-man is not tenant to the *præcipe*; and in this case the *præcipe* is brought against them both as joint-tenants, and he in remainder hath no immediate estate of freehold in him, and the remainder-man is not bound by the recovery had against the tenant for life, unless he comes in upon the aid prayer, though the remainder is turned to a right by such recovery. Moore, 256. pl. 402. 2 Ro. Abr. 395. Pig. of Rec. 36.

But, if there be tenant for life, the remainder in tail, and they suffer a recovery, and come in as vouchees on the double voucher, then he in remainder is barred, because he in remainder is as properly called in as vouchee, as if he had been called in on the aid prayer of tenant for life, and then when he takes up the defence, and makes default, he must be barred by the judgment, 2 Ro. Abr. 396.

as for the want of a title appearing; for where any person is properly in court, and doth not defend his title, he is as properly barred as he who hath no title at all; and when tenant in tail is barred for want of title, the issue can never after recover in his *formedon*.]

2 Cruise, 158.

|| There are many exemplifications of recoveries suffered between the commencement of the reign of Queen Anne and the of George the Second, whereof no entries upon the rolls in the Treasury of the Common Pleas, nor any writ of entry, summons, or seisin can be found. Mr. Pigot having, in the course of his practice, discovered repeated instances of this neglect, procured the following statute to be passed, in order to prevent the inconveniencies which might arise to purchasers from an omission of this kind. St. 14 G. 2. c. 20. § 4. “Whereas by the default or neglect of persons employed in suffering common recoveries, it has happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights: for remedy thereof, be it enacted, that where any person or persons hath or have purchased, or shall purchase for a valuable consideration, any estate or estates in lands, tenements, or hereditaments, whereof a recovery or recoveries is, are or were necessary to be suffered, in order to complete the title, such person and persons, and all claiming under him, her, or them, having been in possession of the purchased estate or estates from the time of such purchase, shall and may, after the end of twenty years from the time of such purchase, produce in evidence the deed or deeds making a tenant to the writ or writs of entry, or other writs for suffering a common recovery or recoveries, and declaring the uses of a recovery or recoveries, and the deed or deeds so produced (the execution thereof being duly proved) shall, in all courts of law and equity, be deemed and taken as a good and sufficient evidence for such purchaser and purchasers, and those claiming under him, her, or them, that such recovery or recoveries was or were duly suffered and perfected, according to the purport of such deed or deeds, in case no record can be found of such recovery or recoveries, or the same shall appear not to be regularly entered on record: Provided always, that the person or persons making such deed or deeds as aforesaid, and declaring the uses of a common recovery or recoveries, had a sufficient estate and power to make a tenant to such writ or writs as aforesaid, and to suffer such common recovery or recoveries.”||

Bull. N.P. 231.
R. v. Hebden,
2 Str. 1109.
Andr. 389.

5 T. R. 72.

[Although, regularly, no recovery or judgment is to be admitted in evidence but against parties or privies, yet under some circumstances they may; as, in an information in nature of a *quo warranto*, a judgment of ouster was allowed to be given in evidence to prove the ouster of a third person, the mayor, by whom the defendant was admitted. And such evidence is conclusive, unless the judgment can be impeached as obtained by fraud.

As to verdicts; if a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial was not had for the same lands; for the verdict in such cases is a very persuading evidence, because what twelve men have already thought of the fact, may be supposed fit to direct the determination of the present jury. For to go contrary to what a former jury have decided in relation to any fact, is to arraign the honesty and sincerity of their judgment; and there is that common credit to be given to twelve men of the country, discerning of any fact upon their oaths, that no second jury ought rashly to depart from their judgment. Their verdict also further stands in credit, because the jury must be supposed honest men, and men of clear reputation, their verdict not having been attained by the party against whom it was given.

Lewis and
Clerges, Term
Pasch. 1700.
Trial at bar.

But then the verdict ought to be between the same parties, because otherwise a man would be bound by a decision, where he had not the liberty to cross-examine, and nothing can be more contrary to natural justice, than that any body should be injured by a determination which he was not at liberty to controvert; for that is to set up a decision not thoroughly examined, in prejudice of a cause that is under examination. Besides, one that is not party to the trial has no redress for the injury if the verdict were false, for he cannot have an attain, and therefore ought not to be injured by the verdict.

Lewis and
Clerges.

But it is not necessary that the verdict should be in relation to the same land, for the verdict is only set up to prove the point in question; and if the verdict arise upon the same question, then it is no doubt good evidence; for every matter is evidence that amounts to proof of the point in question.

Ibid. See
Carth. 79. 181.
5 Mod. 386.
3 Mod. 142.

In an action of trespass, the indictment for the same trespass and verdict thereupon, shall not be given in evidence, if the indictment be only found on the party's own oath; for if the party's oath be no evidence in his own cause (as we shall hereafter shew that it is not) then cannot the verdict which is founded only on the party's own oath be any evidence; for what cannot be evidence directly, cannot be made evidence by any such circuitry.

But, where the verdict on the indictment is founded on other evidence, besides the party's own oath, there, it may be given in evidence; for, there, this verdict seems to be under the same general rule with all others, and there the judgment of twelve men on the fact ought to sway in determination of the same fact, whether the verdict be on indictment or action:

This is the
practice *ex ce-*
lacione Mr.
Phipps, 1700.

Still, it may be objected, that the fact might have found credit from the party's own oath, and since the evidence is so intermixed, that it doth not appear on what the verdict was founded, it cannot be produced in evidence at all on the trial of the action.

Objection.

It

Answer.

It is true, this doth in part take off the force of such evidence; for as, when a verdict is produced in evidence, it may be answered that it did not arise from the merits of the cause, but from some formal defect of the proof, and that makes it no evidence, toward gaining the point in question; so a verdict may be diminished in point of authority, by shewing that it was in part founded on the oath of the party interested in the action; and the jury are to respect it no further than as they presume it given upon, and supported by, the credit of other disinterested testimony.

Yet others have said the verdict given on the indictment cannot be given in evidence, because on that prosecution there is no liberty left to the party to attain the jury, as he hath power to do, if injured on a civil action; therefore *quære*.

|| This point, whether verdicts, which have been given in criminal proceedings, can be admitted as evidence in civil cases, does not ap-

A verdict in a criminal case, where the matter was not capital, was denied to be given in evidence in a civil case; as, where the father was acquitted on an indictment for having two wives, this could not be given in evidence in a civil case, where the validity of the second marriage was controverted. The reason seems to be, because much less evidence is necessary to maintain the action, than to attain the criminal, and therefore his acquittal was no argument that the fact was not true.

pear to be settled. Lord *Hardwicke* thought they could not. *Gibson v. McCarty*, Ca. temp. *Hardw.* 311. *Hillyard v. Grantham*, cited by Lord *Hardwicke*, *ibid.*, and in *Brownsword v. Edwards*, 2 Ves. 246. But see *Jones v. White*, 1 Str. 68. Bull. N. P. 245. and see Mr. *Phillips's Law of Evidence*, 237. 241. where the question is fully discussed. See also *Richardson v. Williams*, 12 Mod. 319.||

Trin. Ass.
1701.

If a verdict be given against the defendant on the same point, though another party were plaintiff, yet in some cases it may be given in evidence; as, if there be a trial of title between *A.* lessee of *E.* and *B.*, in which there is a verdict against *B.*, and afterwards there be a trial of the same title between *C.* lessee of *E.* and *B.*; *C.* may give the verdict found against *B.* in evidence upon the trial between him and *B.*, for this was the sense of a former jury on the fact, in which trial *B.* had the liberty to cross-examine.

Lock v. Norborne, 3 Mod. 142. L. E. 91. pl. 23.

If there be several ejectments brought against several persons, though for lands under the same title, and there be a verdict against one, that verdict cannot be given in evidence against the rest, for it is only the party against whom the verdict is given that can have relief by attain, inasmuch as the residue are not prejudiced; and these parties shall not be injured by a verdict they had not the power to controvert.

3 Mod. 164.
Comb. 72. S. C.
2 Stra. 960.

If a man have two wives, and be thereof convicted, and die, and the second wife claim dower, the verdict and conviction cannot be given in evidence, but in this case the writ must go to the bishop; for whether the marriage be lawful or not, is the point in controversy, and that is of ecclesiastical jurisdiction, and is not to be decided at common law.

But

But the verdict may be made an exhibit in the cause before the bishop, to induce him to believe there was a former marriage.

But this rule of giving verdicts in evidence on the same point, is to be taken with great restriction. If a termor for years had recovered against *B.* the reversioner might give such verdict in evidence; for *B.* has no prejudice, because he hath the liberty to cross-examine the witnesses, and to attain the jury, and it is fit the reversioner should make use of the verdict, and have benefit by it, since he had been dispossessed by the verdict, if it had gone against the termor, and therefore he may offer it in evidence. So, if there were tenant for life, the reversion in fee, and *B.* bring his action in ejectment against the tenant for life, and a verdict be given against the plaintiff, it seems that the reversioner may give this in evidence against *B.*, because he would have been prejudiced in case *B.* had recovered, for his reversion would have been turned to a naked right in him. *Quære, et vide infra.*

Lord Howard and Lady Inchiquin, 1700. *Qu.* this case, and where it is to be found?

But a person that hath no prejudice by the verdict can never give it in evidence, though his title turns upon the same point, because if he be an utter stranger to the fact, it is perfectly *res nova* between him and the defendant, and if it be no prejudice to the plaintiff, had the fate of the verdict been as it would, he cannot be entitled to reap a benefit from it. Besides, as the cause is now to be tried as a new matter, it would be unjust to let in that species of evidence, which supposes it to have been already decided.

Hard. 472.

As, if *A.* prefers a bill against *B.*, and *B.* exhibits his bill, in relation to the same matter against *A.* and *C.*, and a trial at law is directed, *C.* cannot give in evidence the depositions in the cause between *A.* and *B.*, but it must be tried entirely *ut res nova*.

Ibid.
Rushworth v. Viscountess of Pembroke, L. E. 108. pl. 622.

A. lessee of *B.* brings an ejectment against *D.* and the verdict goes for the defendant; this may at any time be given in evidence against *B.*, for the possession of *B.*'s lessee is his own possession, inasmuch as the lessee *tenet in nomine alieno*, and *B.* might in this case give any thing in evidence, as well as the plaintiff himself, and challenges might have been made to the jury for consanguinity to *B.* the reversioner: now then since *A.* hath the possession of *B.* as his bailiff, if there be a verdict against that possession, it must conclude *B.*, since he hath in this case all liberty to cross-examine as well as *A.* himself, and, by consequence, this verdict must be evidence against any other lessee of *B.*

But, if there be a recovery against tenant for life, by verdict, this is no evidence against the reversioner; for the tenant for life is seised in his own right, and the possession is properly his own, and he is at liberty to pray in aid of the reversioner or not, and the reversioner cannot possibly controvert the matter where no

aid was prayed, for he had no permission to interest himself in the controversy.

2 Ro. Abr. 680.
3 Mod. 142.

If a verdict were given against *J. S.* and then judgment were arrested, and then *J. S.* alien to *J. N.*, it seems that the verdict given against *J. S.* may be given in evidence against *J. N.*, for the alienation of *J. S.* cannot put *J. N.* in a better condition than *J. S.* was; for the substitute of *J. S.* can but succeed into his place, and at the time of the alienation the verdict might have been given in evidence against *J. S.*, and *J. S.* cannot by alienation destroy the advantage that his adversary ought to derive from the verdict; for though *J. N.* had not the liberty to cross-examine upon his title, yet *J. S.* had, and *J. N.* has but his title, and therefore cannot be supposed to make the fact better on the examination.

By the opinion of *Dodderidge J.* in the case of the Vicar of Rolvend. *Qu.*

On an ancient verdict in prohibition, where the custom of tithing is set out, whether it might be given in evidence against another parishioner that was not party to the verdict, nor had the lands in question, was doubted. But by the better opinion it might be given in evidence, because it could not be supposed to have been a contrivance to alter the custom, it appearing to be ancient, and because there can be no other proofs but of this sort of what was then thought to be the custom.]

Carr v. Heaton, 3 Gwill.
1261. See
Bishop of
Lincoln v.
Ellis, Bunb.
110.

¶ A decree in the Court of Exchequer in a cause between the vicar on one side, and the impropiator, who was the patron, on the other, (establishing the vicar's right to small tithes under an ancient endowment against the defendant, who insisted that the vicar was entitled only to an annual payment in lieu of tithes,) is evidence between succeeding vicars and impropiators; but not conclusive evidence, as it would be, if the ordinary had been a party to the first suit.¶

Bull. N. P.
235. *Carth.*
181. *R. v.*
St. Pancras,
Peake's
N. P. C. 219.

[The exception of its being *res inter alios acta* is not allowed against verdicts in case of customs and tolls; for the custom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well as those who have been parties to such facts or to such verdicts as have found and determined them. And it is not material in this case whether such verdicts be recent or ancient.]

(a) *Reed v.*
Jackson,
1 East, 355.
(b) *R. v. St.*
Pancras,
Peake's
N. P. C. 219.
(c) *Berry v.*
Banner,
Peake's Id.
156. (d) *Per*
Lawrence J.
1 East, 357.
Gilb. Ev. 31.
(e) *Biddolph*
v. Ather,

¶ So, on a question of (a) publick right of way, (b) or on the liability to repair a highway, (c) or on the publick right of election to a parochial office, a verdict in a former action between any other persons is admissible in evidence. The common reputation of the place would be evidence of the right; *a fortiori* the finding of twelve men upon their oaths. (d) On such questions, therefore, a verdict in an action between *A.* and *B.* is evidence of the point there directly determined in an action between *C.* and *D.* where the same point comes in issue; but it is clearly not conclusive. (e) And it seems not to be conclusive evidence for or against *A.* or *B.* in an action between either of them and a third person *C.*: it could not be pleaded in such a case by way of estoppel. (f)¶

2 Wils. 23. (f) Mayor of Hull v. Horner, Cowp. 111. *ad fin.* Travis v. Chaloner,
3 Gwill. 1237.

[A commission under the seal of the Exchequer, and the inquisition taken thereupon, is admissible, though not conclusive evidence; and so are depositions taken thereon, though the parties in the cause had no notice of it, nor any opportunity of defending it. Tookes v. Duke of Beaufort, 1 Burr, 146.

Where the fact to be proved is such, whereof hearsay and reputation are evidence, a special verdict between other parties stating a pedigree would be evidence to prove a descent; for in such case, what any of the family, who are dead, have been heard to say, or the general reputation of the family, entries in family books, &c. are allowed. And of this opinion was Mr. Justice Wright in the Duke of Athol's case; which opinion is generally approved, though the determination by the rest of the court was contrary; perhaps founding themselves on the case of Sir William Clarges and Sherwin, where in a trial at bar, the only question was on the legitimacy of the Duke of Albemarle, and the court would not suffer a former verdict between other parties concerning other land depending upon the same question and title to be read in evidence. But there, it did not appear, either from the issue or verdict, that the same question was inquired into or determined. Besides, the giving a verdict in evidence to prove a particular fact, viz. that John had a son Thomas, is very different from giving it in evidence to shew the opinion of a former jury, which is only their deduction from a variety of facts proved to them. Bull. N. P. 233. 2 Str. 1151. Ca. K. B. 343.

A verdict, with the evidence given, in an action brought by the carrier for goods delivered to him to be carried, may be given in evidence in an action brought by the owner against the carrier for the same goods, for it is a strong proof against him that he had the plaintiff's goods.] Tyley v. Cowling, Bull. N. P. 243. Com. Dig. tit. Evidence, (A. 5.) p. 86. 1 Ld. Raym.

744. Fisher v. Kitchingman, Willes Rep. 368.

|| In *assumpsit* for goods sold and delivered against two defendants, (one of whom suffered judgment by default, and the other defended,) the question at the trial was, whether the defendants were partners at the time when the goods were delivered. To prove the partnership, a verdict, on an issue directed by the Court of Exchequer to try that fact, was offered in evidence, and objected to, because the plaintiff was not a party to the suit, so that the verdict given in that cause was *res inter alios acta*. But Lord Kenyon ruled, "that the verdict was conclusive evidence of a subsisting partnership, and could not properly be deemed *res inter alios acta*, because both the defendants had been parties on the record in that suit, and it was open to either of them by any evidence to rebut the idea of a partnership."|| Whateley v. Menheim, 2 Esp. N. P. C. 608. *Qu.* these cases, and see *infra*.

Bull. N. P.
234. (a) Mont-
gomery v.
Clarke, 1745,
at the Dele-
gates.

[But a verdict will not be admitted in evidence without likewise producing a copy of the judgment founded upon it, because it may happen that the judgment was arrested, or a new trial granted. This rule, however, does not hold in the case of a verdict on an issue directed out of Chancery, (a) because it is not usual to enter up judgment in such case; and the decree of the court of Chancery is equally proof, that the verdict was satisfactory, and stands in force.]

Fisher v.
Kitchingman,
ubi supra.
Pitton v.
Walter, 1 Str. 151.

|| But, though the *nisi prius* record, with the *postea* indorsed, is not evidence of the verdict, it is good and proper evidence that the cause came on to be tried.||

2 Ro. Abr. 679.
pl. 10. Vent.
28. Raym. 84.
2 Str. 984.
(b) Holt says
it was the
opinion of
all the judges
of England,
that it must
be by consent.
Carth. 465.
2 Keb. 507.

In an information by the attorney general for the king, when the jury are ready to give a verdict, the attorney general may withdraw a juror (b); for this is part of the prerogative, and is in room of the nonsuit of the subject, (for the king cannot be nonsuited, being always in court,) and this prerogative is derived out of a general reason of the king's employment for the publick safety. And therefore if he hath failed in any point of proof, so that disadvantage may be expected from the verdict, it shall be at his election, whether he shall receive his verdict or not, and therefore in a second information, none of the first jury shall be admitted to give in evidence, that they were agreed in their verdict, for such evidence would be of the same weight, as if the verdict had been given, and thereby the king would be dispossessed of the benefit of his prerogative.

2 Ro. Abr. 680.

But, if the king aliens the estate on which the trial was had, so that it comes into private hands, there on a second trial between private persons, the agreement of the jury may be given in evidence; for the prerogative is annexed to the crown, and cannot extend to any private person, and therefore they take the estate with the disadvantage of having a verdict against them.

2 Ro. Abr. 679.
a. j.

But then on such trial they must have the record of the proceedings, on the first information; because as a verdict cannot be given in evidence without the record, which gave authority to the jury to proceed, no more can they give in evidence the agreement of the jury without the record on which they were impannelled.

But a verdict cannot be thus avoided in criminal cases; for there the party must consent to the withdrawing of a juror; since he is in character and estimation so highly interested, and hath a right, if he so prefer, to entitle himself to a solemn acquittal by his peers.

Tri. per Pais,
448.

As to writs, when a writ out of court is only inducement to the action, the taking out the writ may be proved without any copy of it, because possibly it might not be returned, and then it is no record, and therefore the copy of it is not required. But, where a writ itself is the gist of the action, you must have a copy from

from the record, inasmuch as you are to have the uttermost evidence the nature of the thing is capable of, and it cannot become the gist of the action till it is returned.

In an action of trespass against a bailiff for taking goods in execution, if it be brought by the party against whom the writ issued, it is sufficient for the officer to give in evidence the writ of *feri facias* without shewing a copy of the judgment. But, if the plaintiff be not the party against whom the writ issued, but claim the goods by a prior execution (or sale) that was fraudulent, there, the officer must produce not only the writ, but a copy of the judgment. For in the first case, by proving that he took the goods in obedience to a writ issued against the plaintiff, he has proved himself guilty of no trespass; but in the other case, they are not the goods of the party against whom the writ issued, and therefore the officer is not justified by the writ in taking them, unless he can bring the case within 13 Eliz. for which purpose it is necessary to shew a judgment.

1 Ld. Raym.
733.

5 Burr. 2631.
S. P. Dougl.
41. S. P. 2 Bl.
Rep. 1104.
S. P.

In *plene administravit*, the execution executed cannot be given in evidence, without the judgment, because there appears to be no authority for such execution without the judgment; for where the execution is of record, and the authority for such execution is also of record, they must both appear to the jury, otherwise they have not the uttermost evidence of the fact in question.

In an action brought by an attorney for his fees, it is sufficient to prove the taking out of the writ by a warrant made by the coroners; for the writ may not be returned of record, and, by consequence, is no record, and then the warrant made by the coroners is sufficient to prove a title to his fees; for the attorney in this case is entitled to his fees, whether the writ be returned or not.]

Silby and
Hinckly, Trin.
Ass. 1701. *per*
Gould.

¶ The return of the sheriff upon a writ, which has been duly returned and filed, is *primâ facie* evidence of the fact there stated, when that fact comes incidentally into question. If the sheriff return a rescue, the court above, to which the return is made, will give it such credit, as to issue an attachment in the first instance; though, upon an indictment for a rescue, the defendant may shew, that the return is false. And so, in an action for maliciously suing out an *alias feri facias*, the Court of King's Bench held, that the sheriff's return annexed to the writs (in which he stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the plaintiff) had been properly admitted at the trial as evidence of that fact, in support of a plea of licence pleaded by the defendant: for, as the court said, faith ought to be given to the official act of a publick officer, like the sheriff, even where third persons are concerned.]]

Phil. Ev. 294.

R. v. Elkins,
4 Burr. 2129.

Gyfford v.
Woodgate,
11 East, 297.

[Among the records of the kingdom are to be ranked the journals of the House of Lords. And a copy of the minute book

Jones v. Randall, Cowp. 17.

of the House of Lords may be given in evidence; for as Lord *Mansfield* said, "The minutes of the judgment are the solemn judgment itself;" not a word is added upon the journals, and a copy of them may certainly be read in evidence, for the inconvenience would be endless if the journals were to be carried all over the kingdom. Formerly a doubt was entertained whether the minutes of the House of Commons were admissible; because it is not a court of record; but that doubt seems now to be done away: and those of the House of Lords have always been admitted even in criminal cases.

Dougl. 594.

|| But a resolution of either House is not evidence of the truth of facts there affirmed; and therefore in the case of *Titus Oates*, who was charged with having committed perjury on the trial of persons suspected of the Popish plot, a resolution of parliament, asserting the existence of the plot, was not allowed to be evidence of that fact. 4 St. Tr. 39.||

The things that stand second in point of probability are all publick matters that are not of record.

The publick matters that are not of record all come under this general definition: they must be such matters as have an evidence in themselves, and do not expect an illustration from any other thing; such are the copies of court rolls, and transactions in Chancery, and the like. And the copies of such matters may be given in evidence, inasmuch as there is a plain and coherent proof; for the matters themselves are supposed to be self-evident, and, by consequence, when a copy of them is produced upon oath, you have a full proof, because you have proved upon oath a matter which when produced would carry its own light with it, and, by consequence, would need no proof.

Objection.

But here it will be objected, that this is not the utmost evidence which the nature of the thing is capable of, for these testimonies themselves must be better than the copies of them.

To this the answer is, that the copy upon oath is reckoned as an equivalent to the thing itself; and the testimony itself must not be rigidly required, because since these matters lie for the publick satisfaction, every man has a right to their evidence, and in several places they cannot be at the same time, and therefore the things themselves cannot be demanded, but only the copies of them.

The first sort of testimonies that are not of record are the proceedings of the Court of Chancery on the *English* side.

Co.Litt. 260.a.

The reason why the proceedings in Chancery and the rolls of the court are not records is this, because they are not the precedents of justice; for the proceedings in Chancery are founded only on the circumstances of each private case, and they cannot be rules to any other; and the judgment there is *secundum æquum & bonum*, and not *secundum leges & consuetudines*; and the reason why any record is of validity and authority is, because it is declarative of the sense of the law, and is a memorial of what is the law of the nation: now

Chancery proceedings are no memorials of the laws of *England*, because the Chancellour is not bound to proceed according to law.

But see 3 Bl. Com. c. 27.

Now because these several proceedings before mentioned are not records, they are, by consequence, not such memorials as are lodged inseparably in any certain place, but are transferable from one place to another, and therefore may be themselves given in evidence.

The bill in Chancery is evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; nor shall it be supposed to be preferred by the counsel or solicitor without the party's privity, and therefore is evidence as to the confession and admittance of the truth of any fact by the party himself; and if the counsel hath mingled in it what is not true, the party may have his action. But, where a bill is exhibited, and there are no proceedings upon it, then it cannot be given in evidence, unless they prove a privity in the party, for a man may file a bill in another's name to rob him of his evidence by a sham confession; and therefore a bill filed without any proceedings upon it has not the force of an evidence, for no man can suppose that the party did himself file the bill, for the bill, without any proceedings to bring the adversary to answer it, is of no use to the party, and therefore it must be supposed rather to be filed by a stranger to do him an injury. This is accounted to stand in point of credibility in the same circumstances, as a confession by letter under the party's own hand where no body saw the writing of it; though some have ranged it in an inferior degree, because the one is the party's own immediate confession, and the other is only the counsel's draught; yet it seems the allegation in a court of justice, that amounts to the confession of any fact, ought to have more weight and authority with it than any private owning.

Chan. Cas. 64, 65. 1 Sid. 221. Eq. Abr. 227. pl. 1. Nels. Ch. Rep. 102.

Chan. Cas. 64, 65.

1 Sid. 221. Keb. 780. L. E. 105. pl. 55.

But a mere general suggestion of facts, in order to a discovery, shall not be read in evidence; for this is no more than a surmise of the counsel, in order to come at facts: otherwise, of a fact stated in the bill on which the plaintiff founds his prayer for relief.

Bull. N. P. 235.

If a patron sues a simoniacal bond, and the parson prefers a bill in Chancery to be relieved, the bill and proceedings upon it shall be given in evidence on ejectment to make void the parson's living.]

Keb. 780. 1 Sid. 221.

¶ The general rule now is, that a bill in Chancery will not be evidence, except to shew, that such a bill did exist, and that certain facts were in issue between the parties, in order to introduce the answer or the depositions of witnesses. It is not to be received in proof of any facts alleged or denied in it (a). Lord *Kenyon* indeed is reported to have admitted a bill in Chancery (b), filed by an ancestor, to be evidence of a pedigree therein stated, as a declaration in the family. But it was resolved by the judges in the *Banbury* peerage case, on a question put to

Ph. Ev. 263. Lord Ferrers v. Shirley, Fitzg. 196. Bull. N. P. 235. Doe v. Sybourn, 7 T. R. 3. Bennet v. Neale, Wightw. 324. 685.

(a) *Banbury*
peerage case,
2 Selw. N. P.
685. (b) *Tay-*
lor v. Cole,
7 T. R. 3. n.

them by the House of Lords, that a bill in equity, not depositions, cannot be received in evidence in the courts below; on the trial of an ejectment, against a party not claiming or deriving in any manner under the plaintiff or defendant in the Chancery suit, either as evidence of the facts therein deposed to, or as declarations respecting pedigree.

In the *Banbury* peerage case, where *C. D.*'s legitimacy was in question, the claimant offered in evidence a bill filled in *C. D.*'s name by *E. F.* his uncle and next friend, stating his legitimacy; but there was no proof that *E. F.* was his uncle. The judges, being referred to for their opinion, were unanimous, that extrinsic proof of the relationship was essential, and the bill, which was 150 years old, was rejected.||

Godb. 326.
L. E. 106. pl.
57.

[But, though the bill be not evidence against the complainant, the answer is evidence against the defendant, and carries a great weight along with it, because it is delivered in upon oath.

Brochman's
case, Trin. Ass.
1701. per
Gold. 5 Mod.
10. See *Roe*
v. Ferrars,
2 Bos. & Pull.
542. 548.

But, when you read an answer, the confession must be all taken together, and you shall not take only what makes against the defendant, and leave out what makes for him: for the answer is read as the sense of the party himself, and if it is to be taken in this manner, you must take it entire and unbroken.]

R. v. Carr,
1 Sid. 418.
Bull. N. P.
237.

|| If, on exceptions being taken, a second answer is put in, the defendant may insist upon having that also read to explain what he swore in his first answer.

Lady Dart-
mouth v. Ro-
berts, 16 East,
334.

The answer is evidence not only against the party who made it, but against all claiming under him. An answer to a bill in the Exchequer on a claim of tithe hay by a vicar against the rector and others, (occupiers of lands in the parish,) will be evidence in an action by a succeeding rector, for not setting out the tithe, against the defendant who claims under one of those occupiers; and it will be so, though it be not shewn that a decree was made in the cause. Proof of an examined copy will be sufficient proof of the answer.||

2 Vent. 72.
3 Mod. 529.
Carth. 79.
3 P. Wms. 237.
L. E. 106. pl.
59.

[An infant's answer by his guardian shall never be admitted in evidence against him on a trial at law; for the law has that tenderness for the affairs of infants, that it will not suffer them to be prejudiced by the guardian's oath, for the authority the law gives to the guardian is for the infant's benefit, and not to his prejudice, and therefore the infant cannot be hurt by the guardian's oath.]

Beasley v.
Magrath,
2 Sch. & Lefr.
34.

|| The guardian being sworn and not the infant, it is in reality the guardian's answer; and therefore an answer, purporting to be the answer of an infant by his mother and guardian, may be read against the mother in another cause in which she is defendant in her own capacity.

Whether

Whether an answer by a married woman can be used as evidence against her in an action after her husband's death, nowhere appears. In the case of *Wrottesley v. Bendish*, (where it was argued, that the wife was not bound to answer on the ground that the answer could not be read against her husband, nor against herself, as she is supposed to be under the control of her husband, and not to answer freely,) Lord Chancellour *Talbot* said, "he would not give any opinion, whether the answer may be read against the wife, when discoverd; but, as in all times heretofore, the wife as well as the husband had been compelled to answer, he would not overthrow what had been the constant practice."||

3 P.Wms.237.

[The answer of the trustee can in no case be admitted as evidence against the *cestuy que trust*. Bull.N.P.237.

A bill was brought by creditors against an executor, to have an account of the personal estate; the executor sets forth by answer, that there was 1100*l.* left by the testator in his hands, and that coming afterwards to make up his accounts with the testator, he gave bond for 1000*l.*, and the other 100*l.* was presented to him as a gift for his trouble and pains taken in the testator's business, and there was no other evidence in the case, that the 1100*l.* was deposited, but merely the executor's own oath. It was argued that the answer, though it was put in issue, should be allowed, since there is the same rule of evidence in equity as at law: and therefore if a man was so honest as to charge himself when he might roundly have denied it, and no testimony could have appeared, he ought to find credit where he swears in his own discharge.

Anon. Hil.
Vacat. 1707.
per Cowper.

But it was answered and resolved by the court, that when an answer is put in issue, what is confessed and admitted need not be proved, but it behoved the defendant to make out by proofs what was insisted upon by way of avoidance. But this was held under this distinction; where the defendant admitted a fact, and insisted on a distinct fact by way of avoidance, there, he ought to prove the matter of his defence, because it may be probable that he admitted it out of apprehension that it might be proved, and therefore such admittance ought not to profit him so far as to pass for truth, whatever he says in avoidance. But, if it had been one fact, as, if the defendant had said the testator had given him 100*l.* it ought, to have been allowed unless disproved, because nothing of the fact charged is admitted, and the plaintiff may disprove the whole fact as sworn, if he can do it. But it was urged that here the probability was on the defendant's side, because he did not take a bond for this sum as for the residue. But the Chancellour said there was some presumption in that, but not enough to carry so large a sum without better attestation.

In an information for perjury, an answer may be given in evidence without any person to prove that the defendant swore it, for the identity may be proved by many things out of the answer

3 Mod. 116.
Vide infra.

answer itself: besides, the party is obliged to sign his answer; and the perjury may be further illustrated by the comparison of hands, which possibly may be evidence in concurrence with other proof, that out of the answer itself evinces the identity of the person.

Bull. N.P.'237,
238.

Bourn v. Sir
Thomas Whit-
more. Salop.
1747.

Although an answer is good evidence against a defendant, yet it is not against his alienee: nor is it any evidence for the defendant in a court of law, (except so ordered on an issue out of Chancery,) unless the plaintiff make it evidence by producing it first. As, where on an issue out of Chancery to try the terms of an agreement, which was proved by one witness, but denied by the defendant, the witness being dead before the trial, the plaintiff was under the necessity of producing the bill and answer in order to read his deposition, and by that means made the whole answer evidence, which was accordingly read by the defendant. But, where an answer in Chancery of the witness was produced to shew him incompetent, he having there sworn that he had an annuity out of the land in question, and Serjeant *Maynard* insisted to have the answer read through, the court refused it, as it was produced only to shew that he was not a competent witness in the cause, and not to prove the issue.]

Sparin v. Drax,
M. 27 Car. 2.
C. B. at bar.

|| The answer of one defendant, generally speaking, is not evidence against a co-defendant; for if that were allowed, a plaintiff might make one of his friends a defendant, for the purpose of procuring an answer in his favour against a co-defendant, who would have no opportunity of cross-examination.

Wych v. Meal,
3 P. Wms. 310.
12 Ves. 361.

Wood v. Brad-
dick, 1 Taunt.
104. Grant
v. Jackson,
Peake's
N. P. C. 203.

As an admission by one of two partners, concerning joint contracts during the partnership, is good evidence to charge the other partner in an action against him alone; so, in an action by a creditor against some of the partnership firm, the answer of another partner to a bill filed by other creditors, has been received in evidence against the defendants, not indeed to prove the partnership, but, that being established, as an admission against those who are as one person with him in interest. ||

Brochman's
case, Trin. Ass.
1701. per
Gould. Str. 35.

[Analogous to this is a man's own voluntary affidavit, which may also be given in evidence against him.

But there is a very great difference between the evidence of an answer and that of a voluntary affidavit.

Michaelmas
Term, 1714,
in Canc. inter
Roch & Rix,
Administra-
tors of Howard
& al.

An answer cannot be given in evidence without producing the bill, because without the bill there does not appear to be a cause depending. But, if there be proof by the proper officer that the bill has been searched for diligently in the office, and cannot be found, there, the answer hath been allowed to be read without a sight of the bill. And this Lord Chancellour *Broderick* allowed, though the loss of the bill was not proved by the proper officer, but by the clerk only who wrote in the office, and swore he searched carefully with the officer and could not find the bill.

An answer is proved by shewing the allegations in the court, *Hil. Ass. 1700.* viz. by shewing the bill which is the charge, and the answer which is as it were the defence to the bill; and this in civil cases shall be intended to be sworn, because the proceedings upon such defence are upon oath. — And since the proceedings of any court of judicature within the kingdom are good evidence in other courts, and the proceedings in this case are upon oath, it follows of consequence, that in all civil cases the answer is to be taken as an oath, without any further proof but from the proceedings in the cause.

But a voluntary affidavit is not part of any cause in a court of justice, and therefore it must be proved to be sworn; for if you only prove it signed by the party, the proof goes no farther than to suppose it as a note or letter, and as such you may not give it in evidence without more proof, for a note or letter is a bare acknowledgment under the hand of the party, and this is no more unless you prove it to be sworn also, for it cannot be presumed to be sworn, being not filed as an oath in a court of justice.

Such are the affidavits made before a Master in Chancery by the vendor of an estate for the satisfaction of the purchaser, that the estate is free from all charges and incumbrances.

In an action of covenant brought against two, the affidavit of one of them was given in evidence as an acknowledgment of them both, because the acknowledgment of one of them where they had a joint interest was to be looked upon as a truth relating to them both, and the consideration of the matter is to be left to the jury how far it is evidence against the other. *Smith v. Goodier, 3 Mod. 36. L. E. 121. pl. 92.*

The second difference between them is, that the copy of an answer may be given in evidence, but the copy of a voluntary affidavit cannot; the reason is, because the answer is an allegation in a court of judicature, and being matter of publick credit, the copies of it may be given in evidence for the reason formerly mentioned. But a voluntary affidavit hath no relation to any court of justice, and therefore is not entitled to publick credit, and being a private matter the affidavit itself must be produced as the best evidence. Besides, it must be proved to be sworn, which it cannot be unless it be produced. Therefore, where in an action for a malicious prosecution, the plaintiff to increase damages offered the office copy of an affidavit made by the defendant in Chancery of his being worth 2,500*l.*; Lord *Raymond* refused to let it be read, and the plaintiff was obliged to send for the original which was filed in Chancery. And notwithstanding the office copy of an answer may be given in evidence in a civil suit, yet it will not be sufficient on an indictment for perjury, though perhaps such copy would be sufficient (a) for the grand jury to find the bill; but upon the trial the original must be produced, and positive proof made that the defendant was sworn by a witness acquainted with him. But proof that a person calling himself *J. S.* was sworn, and that he signed the answer (or affidavit), and proof also by another witness of the hand-writing, would *3 Mod. 116.*

Vicary's case in the Exch.

3 Mod. 116. Ante, 54.

Bull. N. P. 238, 239. Chambers v. Robinson, Tr. 12 G. 1.

(a) It would not.

3 Mod. 116.

2 Burr. 1189. would be sufficient. So, an answer being brought out of the proper office, and *jurat* under the master's hand, and proof of its being signed by the defendant by proof of his hand-writing, is sufficient to prove it sworn by him even on an indictment for perjury. But no return of commissioners (or of a Master in Chancery) of the party's swearing will be sufficient, without some other proof of the identity of the person.

3 Mod. 117.

Style, 446.

But the voluntary affidavit of a stranger can by no means be given in evidence, because the opposite party had not the liberty to cross-examine.

The next thing is the depositions: and here we must in the first place consider what rank they stand in, in point of credibility. To enlighten this matter we must give an account of their original use. They evidently came over to us from the civil law. It is very plain that the parties exhibited their interrogatories upon their several allegations, but that the witnesses were privately examined upon these interrogatories by the same judge that tried the cause; so that the course anciently among the *Romans* is very different from the modern pleadings of the Chancery, where the sense of the witness is stated by the examiner, on which the Chancellour is to judge.

Dig. lib. 22.
tit. 5. § 3. de
Test.

That this which I have mentioned was the ancient course of the civil law, is very plain from *Adrian's* epistle to *Varus* the legate of *Cilicia*, *Tu magis scire potes quanta fides habenda sit testibus; qui, & cujus dignitatis, & cujus æstimationis sint: & qui simpliciter visi sint dicere, utrum unum eundemque meditatam sermonem attulerint; an ad ea, quæ interrogaveras, ex tempore verisimilia responderint.*

Now these examinations were first made privately, that the judge might in the first place be possessed of the naked fact, and the sense of these witnesses was after taken in writing, and then publication passed, that the judge might have all due assistance from the observation of the advocate, if he had not sufficiently compared and weighed the examination. As the trials of the civil law thus stood, when the judges viewed the behaviour of the witnesses, there is very little difference between this trial and that of the jury, save only that this sort of trial by jury is much more speedy, and the evidence is more entire, whilst in the other way the judges take up the evidence at one time and the gloss at the other, and such breaking of the evidence may be dangerous to a weak and less considering judge. Besides, the judge not being of the neighbourhood cannot so easily distinguish the credit of the witnesses, and upon this account also the trial by jury is preferable to the examination of the civil law when under the best regulation.

And, no doubt, in our Chancery proceedings the witnesses were formerly examined by the Masters, who sat in the court to inform the Chancellour of their credibility, till causes so multiplied, that the Masters were employed in other affairs, and so the examination of witnesses was left to the Examiners.

Now,

Now, since this practice has been used, no doubt, but that the credit of depositions *cæteris paribus* falls much below the credibility of a present examination *vivâ voce*, for the Examiners and Commissioners in such cases often dress up secret Examinations, and give a quite different air to them from what they would have, if the same testimony had been plainly delivered under the strict and open examination of the judge at the assizes.

But, though the depositions fall short of examinations *vivâ voce*, yet they seem superior to what a witness said at a former trial; for what is reduced to writing by an officer sworn to that purpose from the very mouth of the witness, is of more credit than what a stander-by retains in memory of the same oath; for the images of things decay in the memory, by the perpetual change of appearances; but what is reduced to writing continues constantly the same; so that we cannot be certain on a verbal attestation, but that some circumstances of the fact may be lost in the recollection. We must in the next place see in what cases depositions may be read.

1st, They may be read where the witnesses are dead; for where the witness is living, they are not the best evidence the nature of the thing is capable of, and therefore cannot be read; but, where the witness is dead, the deposition is allowable. For as records are the invention that perpetuate the decisions of law, so are depositions the only method to perpetuate the memory of the fact, and therefore they must be trusted where the witness is not in being.

2dly, Where a witness is sought and cannot be found, you may, upon oath of the matter, use his depositions; for when it appears by oath that he cannot be found, it is the best evidence that possibly can be had of the matter; for when a witness is sought and cannot be found, he is in the same circumstances as to the party that is to use him, as if he were dead.

3dly, If it be proved that a witness was subpoenaed and fell sick by the way, his deposition may be allowed to be read; for in this case the deposition is the best evidence that possibly can be had, and answers what the law requires.

But depositions taken thirty years since were admitted to be read in Chancery, though the parties were not the same, inasmuch as the cause related to the same land, and the terretenants were parties to it, and those witnesses were since dead, the plaintiff's title then not appearing. And this is an indulgence of the Chancery beyond the strict rules of the common law, and is admitted for the pure necessity, because evidence should not be lost. Besides, Chancery hath great faith in its own (a) examiners, who are supposed indifferent persons that by themselves take the sense of the parties strictly, so that by that means the depositions stand the fairer to be read at any time. *Quere*.

very great at present. "Upon my own observation," said Lord Chancellor *Loughborough*, "the depositions are abominably taken in the Examiner's Office. I have again and again

Godb. 193.
326. 2 Str.
920. Barnard.
K. B. 348.
Salk. 278. 281.
286. 4 Mod.
146. S. C.
Show. 363.
2 Salk. 555.

Godb. 326.
L. E. 106.
pl. 27.

Mod. 283.
L. E. 180.
pl. 13.

Chan. Cas. 73.
Eq. Abr. 227.
pl. 2.

(a) || Its faith
in its fixed
and regular
examiners
would not
seem to be
"again

" again observed it. I spoke to the Master of the Rolls upon it. The mode of taking depositions there tends to perplex the evidence, and creates great expence, making the witness negative one after the other all the circumstances of the interrogatory, of which he knows nothing." 3 Ves. 605. See too st. 50. G. 3. c. 164.||

Hard. 472.

4thly, A deposition cannot be given in evidence against any person that was not party to the suit, and the reason is, because he had not liberty to cross-examine the witnesses, and it is against natural justice that a man should be concluded in a cause to which he never was a party.

Ibid.

But in cases of customs and tolls, and, in general, in all cases where hearsay and reputation are evidence, depositions, under these circumstances, may be given in evidence.

5thly, A man shall never take advantage of a deposition that was not party to the suit; for if he cannot be prejudiced by the deposition, he shall never receive any advantage from it. For this would create the greatest mischief that could be; for then a man that never was party to the Chancery proceedings, might use against his adversary all the depositions that made against him, and he in his own advantage could not use the depositions that made for him, because the other party not being concerned in the suit had not the liberty to cross-examine, and therefore cannot be encountered with any depositions out of the cause.

Raym. 335.
L. E. 114.
pl. 76.

6thly, Depositions before an answer put in are not admitted to be read, unless the defendant appears to be in contempt, for if a cause do not appear to be depending, then, are the depositions considered as voluntary affidavits; for unless a suit is shewn to be commenced, it doth not appear that the adverse party had liberty to cross-examine: but, if the adverse party be in contempt, (a) then the depositions of the witnesses shall be admitted, for then it is the fault of the objector that he did not cross-examine the witnesses, since he would not join the examination of the witnesses.

(a) || It appears now to be clearly settled, that depositions are not allowed to be

read in evidence, before answer put in, or before the party is in contempt, unless he has had an opportunity of cross-examining: but, if he has had such an opportunity, and has omitted to avail himself of it, he cannot afterwards make that a ground for objecting to the depositions as evidence. Cazenove v. Vaughan, 1 M. & S. 4.||

Backhouse v. Middleton,
Ch. Ca. 175.
Smith v. Veale, 1 Ld. Raym. 735.

When the bill is dismissed, the rule as to the reading of the depositions is this: where the bill is dismissed because the matter is not proper for equity to decree, yet the depositions on the fact in the cause may be read afterwards in a new cause between the same parties. For though the matter is not proper for equity to decree, yet there was a cause properly before the court; for it is proper for the jurisdiction of equity to consider how far the law ought to be relaxed and moderated; and where there is a cause properly before the court, for whomsoever that cause be decided, yet the depositions in it must be evidence, as well as in all others.

Cha. Cas. 175.

But, if a cause in equity be dismissed, for the irregularity of the complaint, the depositions in that cause can never be read; as where a devisee, on a suit pending by his devisor, brings a bill

bill of revivor, and several depositions are taken, and then the cause on the hearing is dismissed, because a devisee claiming as a purchaser, and not by representation, cannot bring a bill of revivor: in this case, and on a new original bill exhibited, the devisee cannot use the former depositions; for in the first cause, mistaking the bill that he ought to bring, there was no complaint before the court, since the court doth not allow any devisee to complain in that manner by right of representation; and there being no cause regularly before the court, there could be no depositions in it.

In cross causes in equity an agreement was proved in one of the causes, and in that cause it was not set forth in the allegations of the bill or answer: in the other cause the agreement was set forth in the bill, and not proved in the cause; and an order was obtained before publication, that the same depositions should be read in both causes. And by the better opinion this might be; but since the order was before publication in the second cause, the defendant had liberty to cross-examine the witnesses on which particulars he pleased, and the sight of the depositions was to his advantage.

If a witness after his deposition taken, become interested, his deposition shall not be read; for the intent of taking such deposition is only to perpetuate his testimony in case the witness die. *Tilly's case*, 1 Salk. 286. *Baker v. Ld. Fairfax*, 1 Str. 101. *Holcroft v. Smith*, 1 Eq. Ca. Abr. 224. || But the practice of courts of equity is contrary. *Goss v. Tracy*, 2 Vern. 699. 1 P. Wms. 287. *Haws v. Hand*, 2 Atk. 615. *Glyn v. Bank of England*, 2 Ves. 42. Nor do courts of law, in all cases, adhere strictly to the principle of refusing to admit depositions in evidence, when the witness is still living; for they may be read when he is beyond the reach of judicial process; *Ld. Altham v. Ld. Anglesey*, *Gilb. Eq. Ca.* 16. 11 Mod. 210. S. C. or where he cannot be found, or is sick, and unable to attend. *Fry v. Wood*, 1 Atk. 445. They also admit other proof in some cases where a witness, who is alive, becomes incompetent from interest; as, where the only surviving witness to a bond becomes administrator or executor to the obligee. *Godfrey v. Norris*, 1 Str. 34. *Goss v. Tracy*, 1 P. Wms. *ubi supra*.||

If a witness be examined *de bene esse*, and before the coming in of the answer, the defendant not being in contempt, the witness die, yet his deposition shall not be read, because the opposite party had not the power to cross-examine him, and the rule of the common law is strict to this, that no evidence shall be admitted but what is or might be under the examination of both parties. *Hard.* 315. *L. E.* 111. pl. 72. *Vide supra*.

But in such cases as these, the way is to move the Court of Chancery (a), that such a witness's depositions be read, and if the Court see cause they will order it, and this order will bind the parties to assent to the reading of such depositions, though it doth not bind the court of *nisi prius*: and this is thought just, because the witnesses are examined by the officers of the court, who are supposed to favour neither party. *2 Jon.* 164. *L. E.* 113. pl. 74. (a) || It is the common practice of the Court of Chancery, when an issue or trial at law is di-

rected, to make an order that the depositions of witnesses shall be read in evidence, if it be satisfactorily proved at the trial that the witnesses are unable to attend in person. *Corbet v. Corbet*, 1 Ves. & Beam. 340. But this order is not made for the purpose of making that ad-

missible

missible in evidence which is not strictly admissible in courts of common law, but for the convenience of the parties. For if depositions are offered at the trial without such an order, the whole record, bill, answer, &c. must be proved: but, if there is an order for reading the depositions, the court of law will read them without going through the regular and strict course, which is generally necessary for the purpose of making them evidence. *Palmer v. Lord Aylesbury*, 15 Ves. 176.||

2 Keb. 31. Formerly they did not enrol their bill and answer, but as it
L. E. 113. pl. seems the bill was left loose in the office with the clerks of the
75. office, and was thereby subject to be lost; and therefore ancient
depositions may be given in evidence without the bill and answer.
Hob. 112. So, depositions taken by the command of Queen *Elizabeth*,
upon petition, without bill and answer, were, upon a solemn
hearing in Chancery, allowed to be read.

Practice of The ancient practice was also, that they never published the
Chan. 7. depositions in the lifetime of the witnesses, because the depo-
sitions in *perpetuam rei memoriam* were of no use till after the
death of the witnesses. But this practice was found very incon-
venient, because witnesses became thereby secure in swearing
whatsoever they pleased, inasmuch as they could never be pro-
secuted for perjury, the effect of their oaths not being known
till after their deaths.

3 Mod. 116, On an information for perjury, the depositions in Chancery
117. signed by the commissioners are not sufficient evidence without
proof that the party swore them; for there is no proof of the
identity of the person, but by the comparison of hands, which
(a) *Sed vide* is not a sufficient evidence in a criminal case (a), for another
infra. man might personate me, and thereby subject me to the penalty
of perjury.

Styl. 446. From what has been said it is evident, that a voluntary affi-
davit before a master in Chancery is no evidence between stran-
gers, because here is no cross-examination, since there appears
to be no cause depending; and therefore such evidence cannot
be admitted, except in those cases where a confession of the
person making the affidavit would be evidence, as, where a
widow came for administration, the marriage being contested,
an affidavit of the man himself was read. So, on an issue
directed out of Chancery to try the legitimacy of the plaintiff,
the father's oath before the judges on a private bill was allowed
to be evidence.

Bull. N. P. 242. As the spiritual courts are not of record, depositions taken
2 Roll. Abr. in them cannot be read in evidence, though the witnesses be
679. Litt. Rep. dead.
167.

1 Lev. 180. Depositions taken before commissioners of bankrupts cannot
Sir T. Jones, be read in evidence, because there cannot be a cross-examina-
53. Janson v. tion. However, by the statute 5 G. 2. c. 30. § 41. which directs
Willson, proceedings on commissions of bankrupt and the certificates to
Doug. 257. be entered of record, true copies signed and attested as therein
Bowles v. required are to be given in evidence. Therefore an office copy
Langworthy, of
5 T. R. 366.

of the deposition of the witness who swore to the act of bankruptcy was admitted, after the witness's death, to be evidence to prove the precise time when the act of bankruptcy was committed. And where an examinant produces a deed before the commissioners, under which he claims a title to the bankrupt's goods, the examination may be used afterwards in a question between him and the assignees as evidence against him to prove the execution of the deed, without calling the subscribing witness.]

|| By 49 G. 3. c. 121. § 10. in any action brought by or against an assignee, the commission and the proceedings of the commissioners are to be received as evidence of the petitioning creditor's debt and of the trading and bankruptcy, unless the other party in the action, if defendant, at or before the time of pleading to the action, and if plaintiff, before issue joined, give notice in writing to such assignee, that he intends to dispute the same. And by § 11. in all suits in equity by or against any assignee, the commission and proceedings are to be received as evidence of the petitioning creditor's debt, and of the trading and bankruptcy, against all the other parties in the suit, unless such parties, some or one of them, within ten days after rejoinder in the cause, give notice in writing to the assignee that they intend to dispute the same.

This statute applies only to those cases, where the assignees are parties to the action. In suits between third persons, if the validity of a commission comes incidentally in question, as a ground of defence, it must be regularly proved, as it would have been before the passing of the statute. *Doe v. Liston,* 4 Taunt. 741.

But the statute is not confined to cases where the assignees are named as such upon the record, but applies where the opposite party knows that they make out their title under the commission. *Simmonds v. Knight,* 3 Campb. 251.

To make the proceedings evidence under this act, it is enough to shew that they come out of the proper custody, *viz.* that of the solicitor to the commission, or to prove the signature of one of the commissioners before whom they were taken. Such evidence is necessary, although there has not been any notice of an intention to dispute the commission. *Collinson v. Hilear,* 3 Campb. 30. Ph. Ev. 275.

In an action by a bankrupt against the assignees he may call witnesses to contradict the depositions respecting the petitioning creditor's debt, the trading, or the bankruptcy, although he has not given such notice under this act to the assignees: for the words of the act being, that "the commission and the proceedings of the commissioners are to be received as evidence of, &c., unless the other party give notice in writing that he intends to dispute the same," the proceedings are *prima facie* evidence, but not conclusive. *Ellis v. Shirley,* 3 Campb. 424.

In an action of *assumpsit* for a creditor's share, under an order of commissioners of bankrupt for a dividend, the proceedings of the commissioners are conclusive evidence against the assignees; *Brown v. Bullen, Dougl.* 407.

for after the debt is liquidated before the commissioners, it cannot be litigated but by application to the great seal.

R. v. Punston,
3 Camp. 96.

On an indictment for perjury charged to have been committed by the defendant in passing his examination before the commissioners, strict evidence of the bankruptcy seems to be necessary, and the commission and proceedings under it will not be sufficient proof; for the authority of the commissioners to administer the oath takes its root, not in the commission, but in the bankruptcy.

By 1 & 2 P. & M. c. 13. § 5. "every coroner, upon an inquisition before him found, whereby any person shall be indicted of murder or manslaughter, or as accessary before the murder, shall put in writing the effect of the evidence given to the jury before him, being material, and shall certify the same evidence, together with the inquisition or indictment before him taken and found, at or before the time of the trial thereof to be had."

Ph. Ev. 280.
Lord Morley's
case, Kel. 55.
Thatcher's
case, Sir T.
Jon. 53. Brom-
wick's case,
1 Lev. 180.
Gilb. Ev. 124.
(a) Admitted
per Cur. in
Harrison's
case *cor. Holt*
case, Kel. 55.

On this statute it has been resolved unanimously by all the judges, that in case any of the witnesses, who have been examined before the coroner, are dead, or unable to travel, or kept out of the way by the means or procurement of the prisoner, their depositions may be read on his trial, the coroner first proving that they are the same which he took upon oath, without any addition or alteration. And proof (a) that the witness has been inquired after, and is not to be found, has been thought sufficient to authorize the reading of the depositions.

C. J. Atkins J. and Nevil J. 4 St. Tr. 496. *Contr.* 4th res. in Lord Morley's

Bull. N.P. 242.
R. v. Eriswell,
3 T. R. 713.
1 Saund. 362.
n. 1.

The depositions taken before the coroner would seem to be evidence, though the prisoner be absent at the time.

It is now settled, that an inquisition of *felo de se*, taken before the coroner *super visum corporis*, is not conclusive evidence of the fact against the executors or administrators of the deceased, but that they may remove it into the King's Bench, and traverse it.

By 1 & 2 P. & M. c. 13. § 4. "Justices of the peace, when any person is brought before them for manslaughter or felony, being bailable by law, shall, before any bailment, take the examination of the prisoner, and the examination of them who bring him, of the fact and circumstances thereof, and the same, or as much as may be material to prove the felony, shall put in writing, before they make the bailment; which examination, with the bailment, the said justices shall certify at the next general gaol delivery to be holden within the limits of their commission." And by 2 & 3 P. & M. c. 10. "the justice, before whom any person shall be brought for manslaughter or felony, or for suspicion thereof, before he shall commit or send such prisoner to ward, shall take the

"examination of such prisoner, and information of those that bring him, of the fact and circumstances thereof, and the same, or as much thereof as shall be material to prove the felony, shall put in writing within two days after the said examination; and the same shall certify in such manner and form, and at such time, as he should and ought to do, if such prisoner so committed or sent to ward had been bailed or let to mainprise," &c.

Before these statutes, a deposition taken before a justice of the county where a felony was committed, would not have been evidence, even though the witness had died, or was unable to travel; but it seems to be now settled in the construction of them, that a deposition of a witness, taken upon oath (a), in the presence of the prisoner (b), who has been brought before the magistrate on a charge of felony, may be given in evidence on the trial of an indictment for the same felony, if it be proved upon oath, to the satisfaction of the court, that the informant is dead (c), or not able to travel (d); or that he is kept away by the means and contrivance of the prisoner (e); provided also, that the deposition offered in evidence be proved to be the same which was sworn before the justice without any alteration. (f)

R. v. Vipont, 2 Burr. 1163. (c) 4th res. in Lord Morley's case, Kel. 55. Bromewick's case, 1 Lev. 180. Adm. per Cur. in Payne's case, 1 Salk. 281. Bull. N. P. 242. Case of Fleming v. Windham, 2 Leach's Cr. Ca. 996. Westbeer's case, 1 Leach's Cr. Ca. 14. (d) 1 Hal. P. C. 305. 586. 2 Hal. P. C. 52. Kel. 55. (e) Kel. 55. Fost. Disc. p. 337. (f) 1 Hal. P. C. 305. 2 Hal. P. C. 52. Kel. 55.

It is not requisite that the deposition should be signed by the deceased witness.

Case of Fleming and Windham, ubi supra.

The information of witnesses, taken before justices of the peace, cannot be given in evidence on an indictment for a misdemeanour, or in civil actions, or on an appeal for murder. Nor can a conviction for petty treason (g) be grounded on such evidence. But, as a prisoner may be convicted of murder on an indictment for petty treason, the depositions are admissible in evidence to support a conviction of the murder, though not sufficient to support a conviction of the petty treason.

R. v. Payne, 1 Ld. Raym. 729. (g) Fost. Disc. Radbourn's case, 2 Leach's Cr. Ca. 512. Swan's case, Fost. Disc. 106.

Where the felon is taken and examined by a magistrate in a county in which the offence was not committed, the examinations and depositions are to be transmitted into the county where the felon is indicted, and may there be read in evidence against him, though the justice is directed by the words of the statute, "to certify the examination taken before him at the next general gaol delivery within the limits of his commission."

2 Hal. P. C. 185.

Where the informant himself gives evidence, these informations may be used, on the part of the prisoner, to contradict his testimony; one of the objects of the legislature in passing the statutes being to enable the judge and jury, before whom the prisoner is tried, to see whether the testimony of the witnesses

Lambe's case, 2 Leach's Cr. Ca. 633. 3 St. Tr. 131. Hawk. P. C. b. 2. c. 46. § 22.

at the trial is consistent with the account given by them before the committing magistrate.||

12 Mod. 318.
See Str. 162.
Barnard. K.B.
243.

[Another way of perpetuating the testimony of a person deceased is by giving the verdict in evidence, and the oath of the party deceased. Where you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross-examine: besides, otherwise you cannot regularly give the verdict in evidence; and where you cannot give the verdict in evidence, you cannot give the oath on which it was founded; for if you cannot shew there was such a cause, you cannot shew that any person was examined in that cause, and without shewing there was a cause, no man's oath can be given in evidence, inasmuch as it appears to be merely a voluntary affidavit.

12 Mod. 318.
4 St. Tri. 265
10 272.
2 Hawk. P. C.
430. § 9. 12.
2 Keb. 384.

What a man himself that is living has sworn at one trial, can never be given in evidence at another trial to support him; though what the witness has said in discourse may be given in evidence to support him; because the same oath at another trial is no evidence of the truth of any man's swearing; for if a man be of that ill mind to swear falsely at one trial, he may do the same on the other on the same inducements; but what a man says in discourse, without premeditation or expectation of the cause in question, is good evidence to support him. But, if a man hath sworn at one trial different from what he hath at another, this is good evidence as to his discredit.

Green v. Gate-
wick, Mich.
24 Car. 2.
Bull. N.P. 243.

A witness was sworn in a trial at bar in *C. B.* between the same parties on the same issue, and he was subpenaed by the defendant to appear at a second trial in *K. B.* and his charges were given him; but he not appearing, persons were admitted to give evidence of what he swore in *C. B.*; for the court said, they would presume he was kept away by the plaintiff's practice. This presumption was strengthened by his having been produced by the plaintiff at the former trial.

2 Sid. 325.
2 Hawk. P. C.
430. § 8. L.E.
31. pl. 66.
2 Ro. Rep.
460, 461. See
2 Keb. 384.

On an appeal of murder, the appellant cannot give in evidence the indictment, and what a person deceased swore at the trial; for in this case we have already shewn that the indictment cannot be given in evidence against the defendant, and, by consequence, the oath cannot be given in evidence on the indictment: besides, the appeal is tried as a new cause, and therefore it is necessary to have his accusers face to face.

Sid. 325.
L.E. 31. pl. 66.

If the indictment be given in evidence for the prisoner, and the oath of a person deceased, the account of that oath must be upon oath; for nothing can be given in evidence as an oath but upon oath.

2 Mod. 231.
L. E. 125.
pl. 101.

A decree in Chancery may be given in evidence between the same parties, or any claiming under them; for their judgments must be of authority in those cases where the law gives them a jurisdiction; for it were very absurd that the law should give them a jurisdiction, and yet not suffer what is done by force of that jurisdiction, to be a full proof, for that were to suppose they were incompetent judges, where they had jurisdiction.

So, a decretal order in paper with proof of the bill and answer, or without such proof (if they are recited in the order) may be read. 1 Keb. 31.

Wherever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter; and in case the determination be final in the court of which it is a decree, sentence, or judgment, such decree, sentence, or judgment will be conclusive in any other court having concurrent jurisdiction. But here the following distinctions must be attended to. — The judgment of a court of concurrent jurisdiction *directly upon the point*, is as a plea, a bar, or as evidence conclusive *between the same parties, upon the same matter directly in point* in another court. And the judgment of a court of exclusive jurisdiction *directly on the point* is in like manner conclusive *upon the same matter, between the same parties* coming *incidentally* in question in another court for a different purpose. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction; nor of any matter incidentally cognisable, nor of any matter to be inferred by argument from the judgment.] Bull. N. P. 244.
Ambl. 756.

¶ A judgment of condemnation in the Court of Exchequer, where proceedings *in rem* have been instituted, is conclusive evidence in any other court, as to all the world, that the goods were liable to be seized; the jurisdiction of that court being not only competent, but sole and exclusive. And though no formal or express notice is given to the owner of the goods in person, yet he has sufficient notice to try the point of forfeiture, by the seizure of his property, by the proclamations according to the course of the court, and by the writ of appraisement. Per De Grey
C. J. 11 St.
Tr. 261.
Carth. 225.
Lane v. Deg-
berg, H.
11 W. 3. Bull.
N. P. 244.
2 Show. 232.
Carth. 32.
Cowp. 315.
Bull. N. P. 244,
245. 1 Salk.
290. 1 Show. 6.

Whether an acquittal in the Court of Exchequer be conclusive evidence of the illegality of the seizure would seem to be questionable, though so considered by Lord *Kenyon*. (a) Scott v. Shear-
man, 2 Bl.
Rep 979. Per
Lord *Kenyon*,
in *Geyer v.*
Aguillar, 7 T.
R. 696.

Cooke v.
Sholl, 5 T. R.
255. (a) See
also a case in
Vin. Abr. tit. Evidence, (A. b. 22.) pl. 1. *coram Price B. acc.*

A conviction by a justice of the peace, who has competent jurisdiction, is, till reversed or quashed, conclusive evidence in favour of the justice in an action against him for false imprisonment. *Secus*, where he has no jurisdiction. (b) Strickland v.
Ward, at *Win-*
chester Assizes,
coram Yates J.
7 T. R. 633. n.
12 East, 75.

16 East, 21. (b) *Hill v. Bateman*, 2 Str. 710. *Crepps v. Durdan*, Cowp. 640. *Morgan v. Hughes*, 2 T. R. 225.

Where a statute provides, that the judgment of commissioners thereby appointed shall be final, their decision is conclusive, and cannot be questioned in any collateral proceeding. ¶ Moody v.
Thurston,
1 Str. 481.
Lane. v. Heg-
berg, Bull. N. P. 19. Earl of Radnor v. Reeve, 2 B. & P. 371

As to the proceedings in the spiritual court, these are in cases matrimonial and testamentary, and all other ecclesiastical causes. How these courts gained the jurisdiction in causes testamentary, which

which were originally of temporal consueance, is not here to be considered further than is necessary to determine the weight of credibility that is to be given to their sentences. The way of authenticating testaments by the civil law was this: The testator and his witnesses subscribed the will, bound it up and sealed it with their seals: after the decease of the testator it was opened in the presence of the prætor, and he delivered copies of it, and kept the original in a publick treasury; and hence it is, that the spiritual court keeps the original will, and gives out the probate, which is but a copy of the will under their seals.

But originally among the *Germans*, the goods as well as the feud itself belonged to the lord: afterwards it was thought fit that the feudary should dispose of them, and then the will was proved in the country courts before the alderman and bishop, and if any man died intestate, they were distributed among his kindred. But after the Conquest, the probate of the will and the commission of administration was indulged to the bishop, who never had it in the times of the empire, under pretence that the provision would be better made for the souls of the deceased. If the spiritual courts exceed their commission, they have plainly no authority, and therefore they must confine themselves to the bequest of the personal estate: for the feud was not devisable until the 32 H. 8. for reasons mentioned in another place.

Ro. Abr. 678. Therefore, if a man devise lands by force of the statute of wills, or by custom, the probate of the will in the spiritual court cannot be given in evidence; for all their proceedings, so far as they relate to lands, are plainly *coram non judice*.

Nor will an exemplification of the will under the great seal be evidence of it. Comb. 46. In questions relative to lands devised, the original will ought always to be produced.

Ro. Abr. 678. But the probates of wills of the personal estate are the records of that court, and therefore a copy of them under the seal of that court must be good evidence. And this is still the more reasonable, because it is the use of the court to preserve the original will, and only to give back to the party the copy of that will under the seal of the court.

Kempton v. Cross, || Ca. temp. Hardw. 108. Garret v. Lister, 1 Lev. 25. Elden v. Keddell, 8 East, 187. 16 East, 209. Bull. N. P. 246. Davis v. Williams, 13 East, 232. Ray. v. Clark, Ibid. 238. n. (a.) The ecclesiastical court never grants an exemplification of letters of administration, but only a certificate that administration was granted: therefore, when a lessee pleads an assignment of a term from an administrator, such certificate is good evidence. So would the book of the ecclesiastical court, wherein was entered the order for granting administration. || So, an examined copy of the act-book, stating that administration was granted to the defendant at such a time, is proof of his being administrator in an action against him, without giving him notice to produce the letters of administration. || So, would the copy of the probate of the will be evidence of *J. S.* being executor; but a copy of the will would not be evidence of it.

Smartle v. Williams, Bull. N. P. 246.

Where a person in ejectment would prove the relation of father and son by his father's will, he must have the original will, and not the probate only; for where the original is in being, the copy is no evidence, and the probate is no more than a true copy under the seal of the court of a private instrument; and the law which seeks the best evidence, will not allow of the copy only. Besides, this is not proved to be a true copy, for the seal doth not prove the truth of the copy, unless the suit relate to the personal estate only.

Polhill and
Polhill, Hil.
1701.

But the ledger-book is evidence in such case, because these are not considered merely as copies, but they are the rolls of the court itself; and though the law doth not allow these rolls to prove a devise of lands where the claim is by the words of the devise, for the reasons already given; yet, when the will is only to prove a relationship, the rolls of the spiritual court, which hath authority to enrol all wills, are sufficient proofs of such testament.

Polhill and
Polhill, Hil.
Ass. 1701.
Under particular circum-
stances the
ledger book
may be evi-
dence even in
the devise of
a real estate:

as, where in an avowry for a rent-charge, the avowant could not produce which he claimed, that belonging to the devisee of the land; but producing the ordinary's register of the will, and proving former payments, it was holden to be sufficient evidence against the plaintiff, who was devisee of the land charged. Cas. K. B. 375.

the will under
the ordinary's

But the copy of the ledger-book was not allowed to be read in this case, because common practice had prevailed that it should not; though my Lord *Holt* said that since the original would have been read as a roll of the court without further attestation, it was fit the copies should be read, and that the practice should be altered. And the practice seems to be founded on the mistake, that the ledger-book is read as a copy, and so the copy of that is but the copy of a copy, whereas the ledger-book is read as a roll of the Prerogative Court.

In a suit relating to a personal estate, the probate of the will under the seal of the court is sufficient evidence; and no evidence contrary to it can be given, that such will was not the last will and testament of the party deceased, for the spiritual court are the proper judges of what is, and what is not the will of the testator; and since the authority of judging is committed to them, the temporal courts are bound by their judgments.

Raym. 404 to
406. 2 Sid.
359. Lev.
235. 2 Keb.
337. 343. 641.
Comyns, 150.
Anon. Ld.
Raym. 262.
Str. 481.

Will. Rep. 388. L. E. 125. pl. 103.

But the adverse party may give in evidence, that the probate is forged, because such evidence supposeth that the spiritual court hath given no judgment, and so there is no reason for the temporal court to be concluded, since the spiritual court hath made no judgment in this matter, for a forged probate is none at all.

Raym. 404 to
406. 2 Sid.
359.

So, they may also give in evidence, that such probate was obtained by surprise, for that is as much as to say, that the spiritual court hath made no legal decision in the matter, and therefore that the temporal court ought not to be concluded by their authority.

Raym. 404 to
406. 2 Sid.
359.

2 Sid. 359.

||To prove that the probate of a will was revoked, an

entry of the revocation in a book of the prerogative court, in which all causes were entered by the registrar, and which was kept as the only record of such proceedings and of the decree of the court, was admitted to be good evidence. Ramsbottom's case, 1 Leach's Cr. Ca. 30. n. (c.)||

Mod. 117.

Vent. 257.

3 Keb. 310.

2 Danv. Abr.

539. L. E.

89. pl. 18.

Keb. 40. 117.

See L. E. 276.

pl. 106.

A will that hath partly the form of a will, and partly the form of a deed, may be given in evidence as a will; for if the intent of the party sufficiently appear to make a disposition after his decease, the informality of the words shall not vitiate it.

Where a will remains in Chancery, by order of that court, a copy may be given in evidence; for then it becomes a roll of that court, and, by consequence, a copy of it is sufficient evidence.

Hil. Ass. 1701.

4 T. R. 670.

The rolls of a court-baron are evidence; for they are the public rolls, by which the inheritance of every tenant is preserved, and they are the rolls of the manor-court, which was anciently a court of justice relating to all property within the district.

1 Keb. 567.

720. Comb.

138.

A copy of a court-roll under the steward's hand is good evidence to prove the copyholder's estate.

Comb. 337.

12 Mod. 24.

Jenkins v.

Barker, per

Tracy, 1705.

So, an examined copy of the court-roll is good evidence, if sworn to be a true one.

If copyhold-rolls make mention of a surrender to the use of the tenant's last will, and then admit *A.* as devisee under the will, yet this is no evidence of the seisin or title of *A.* without the will itself; because the land doth not pass by the surrender without the will, and therefore the will must be shewn as the best evidence of *A.*'s possession and title.

Roe v. Parker,

5 T. R. 26.

Roe v. Jeffery,

2 M. & S. 92.

An entry in the court-rolls of a manor is admissible evidence of the mode of descent of lands in the manor, although no instances of any person having taken according to it be proved.

Denn v. Spray

1 T. R. 466.

A customary of a manor, which appeared to be of great antiquity, and had been delivered down with the court-rolls from steward to steward, was admitted to be good evidence to prove the course of descent within the manor, notwithstanding it was not signed by any one.

Chapman v.

Cowlan,

13 East, 10.

||So, in an action by a copyholder against a freeholder of a manor for surcharging the common, an old writing found among the muniments of the manor, and purporting to be signed by many of the copyholders, stating that the copyholders of the manor had an ancient unlimited right of common, but that they had agreed to a certain stint, was holden to be admissible evidence of the state of the manor at that time, as to the general prescriptive right, against the limited right insisted on by the plaintiff. And although it was not proved that the instrument had been signed by a majority of the copyholders, or that the plaintiff held the copyhold tenement under any one of those who had

had signed, yet that circumstance could not affect its admissibility, as it was offered, not on the footing of an agreement, but as evidence of tradition, and the received opinion within the manor.||

[The register of christenings, marriages, and burials is good evidence, or a copy of it. The register began in the 30 H. 8. by the instigation of the Lord *Cromwell*, who at that time was vested with all the authority which the pope's legates formerly had, under the title of vicar-general to the king, and all wills above the value of two hundred pounds were to be proved in this court; and therefore it served his purpose to set on foot a registry of all persons that were christened and buried. And this might be very well appointed by the king's authority, as supreme head of the church, since christening and burying are ecclesiastical acts: and when a book was appointed by publick authority, it must be a publick evidence. This was afterwards confirmed by the injunction of *Edward 6.* and of *Elizabeth*, and the particular manner of registering appointed; as that the registering should be in the presence of the parson and churchwardens on *Sunday*, and that the book should be kept locked in the church, to which the vicar and churchwardens should have keys. ||And the marriage act, (26 G. 2. c. 33. § 14.) after directing registers to be kept as publick books in every parish, for the purpose of registering marriages, enacts, that "immediately after the celebration of every marriage, an entry thereof shall be made in such register; in which entry or register it shall be expressed, that the marriage was celebrated by banns or licence; and if both or either of the parties married by licence be under age, with consent of the parents or guardians, as the case shall be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by two credible witnesses." By the canons in 1603, (canon 70.) copies of parish registers in every diocese ought to be regularly transmitted once in every year to the Diocesan or his Chancellour, a regulation extremely important for the purpose of guarding the evidences of title and pedigree, but which was so generally neglected, as to make it necessary for the legislature to pass an act for their better preservation. It is therefore by the statute 52 G. 3. c. 146. § 7. enacted, that copies of the register books, verified by the officiating minister of the parish, shall be transmitted annually by the churchwardens, after they or one of them shall have signed the same, to the registrars of the diocese within which the church is situated.

The registers are in the nature of records, and need not be produced, nor proved by the subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two persons describing themselves by such and such names and places of abode, though it does not prove the identity. As to that, whatever is sufficient to satisfy a jury, is good evidence of it, as proof of the similarity of the hand-writing of the parties, or proof by the bell-ringers, that they rung the bells, and were paid by the parties

Sid. 71.
Noy, 146.
Brownl. 207.
2 Ro. Abr. 115.
pl. 11. Cro.
Eliz. 411.
Moore, 451.
Salk. 281.
12 Mod. 86.
L. E. 81. pl. 2.
Godolph. 164.
||In Queen
Elizabeth's
reign a pro-
testation was
appointed to
be made and
subscribed by
ministers at
institution,
one head of
which was,
*I shall keep
the Register-
book according
to the Queen's
Majesty's in-
junctions.*||

Gibs. Cod. 229.

Birt v. Barlow,
Dougl. 174.

May v. May,
2 Str. 1073.

2 Sid. 71. The
stat. 21 Geo. 2.
c. 33. § 16.
makes this a
capital offence.

Camden v.
Anderson,
5 T. R. 709.
(a) Tinkler v.
Walpole,
14 East, 226.
Cooper v.
Sturm,
4 Taunt. 802.
Fraser v. Hop-
kins, 2 Taunt.
5. Smith v.
Fuge,
3 Campb.
456. Flower
v. Young, *Id.*
240. (b) Reusse
v. Myers, *Id.* 475.

parties immediately after the marriage; or proof by persons who were present at the wedding-dinner, &c. ||

[Though it appear in evidence that the register was made from a day-book kept by the minister for that purpose, yet the day-book will not be admitted to contradict the entry in the register, *e. g.* to prove a child base-born, where no notice is taken of it in the register, which would therefore be evidence to prove him legitimate.]

On an indictment for entering a false marriage in the register book, the defendant was fined two hundred marks; for since the register is publick evidence, it must be guarded by the law, that it be not counterfeited.]

|| By st. 26 G. 3. c. 60. & 34 G. 3. c. 68. publick registers are required to be kept for the registering of ships: and the register and certificate of register are conclusive evidence of want of title against those who are not named in the register. But the register (a) is not considered as a publick document to prove the ownership, and is not evidence to fix the parties therein named, as owners, in actions against them, unless it be shewn to have been made by their assent or recognized by them. Nor is it evidence (b) that the ship is *British* built, as there described. Nor (c) in an action brought by the plaintiff as agent, on a policy of insurance, is it evidence to prove an averment, that the interest in the ship is in the persons there described; for though the registration be necessary to complete a title, it is not of itself proof of title; property in a ship being to be proved now, as it was before these statutes were passed.

(c) Pirie v. Anderson, 4 Taunt. 652.

By 17 G. 2. c. 38. § 13. the parish books, containing true copies of all rates and assessments for the relief of the poor, directed by this act to be made, are to be open to the inspection of persons assessed, or liable to be assessed, and are to be produced at the quarter sessions, when any appeal is to be heard or determined.

By 46 G. 3. c. 46. § 1. & 3. the registers of parish indentures of apprenticeship thereby appointed to be made, are to be open to publick inspection, and are declared to be sufficient evidence of the existence of such indentures, and of the several particulars respecting them specified in the registers, in case it shall be satisfactorily proved, that the indentures are lost or destroyed.

R. v. Martin,
2 Campb. 100.

On a prosecution for a libel on a person in his office of treasurer of a parish, an entry in the vestry-book stating that he was elected at a vestry duly holden in pursuance of notice, was admitted as sufficient evidence to support the allegation in the indictment, that he was duly elected treasurer.

Price v. Little-
wood,
3 Campb. 288.

So, in an action for disturbing the plaintiff in the use of a pew in a church, an old entry in the vestry-book signed by the churchwardens, stating that the pew had been repaired by the then owner of the messuage, under whom the plaintiff claimed,
in

in consideration of his using it, was admitted as evidence of his right.

The register of the Navy Office, with proof of the method there used to return all persons dead, with the mark Dd, has been admitted to prove the death of a sailor.

lace v. Cook, 5 Esp. N. P. C. 117. See Barber v. Holmes, 3 Esp. N. P. C. 190.

So, the book from the Master's Office in the Court of King's Bench, has been admitted to prove a person one of the attornies of that court.

R. v. Crossley,
2 Esp. N. P. C.
524.

So, the log-book of a man of war, which convoyed a fleet, has been admitted to prove the time of the convoy's sailing.

D'Israeli v.
Jowett, 1 Esp.
N. P. C. 427.

The Bank-books are evidence to prove the transfer of stock : and the day-book of a publick prison, (a) containing a narrative of the transactions of the prison, is proof of the time of a prisoner's commitment or discharge; though not of the cause of his commitment. (b) ||

Breton v.
Cope, Peake's
N. P. C. 30.
Marsh v. Col-
net, 2 Esp.
N. P. C. 665.
(a) R. v.
(b) B. & P. 188.

Aickles, 1 Leach's Cr. Ca. 436. (b) Salter v. Thomas,

[The pope's licence without the king's has been admitted as good evidence of an impropriation, because anciently the pope was held to be supreme head of the church, and therefore was allowed to have the disposition of all spiritual benefices with the concurrence of the patron, without any leave of the prince of the country; and these ancient matters must be admitted according to the error of the times in which they were transacted. A pope's bull is no evidence on a general prescription to be discharged of tithes, because that shews the commencement of such a custom, and a general prescription shews that there was no time or memory of things to the contrary, so that the bull doth itself contradict such prescription.

Palm. 427.
See L. E. 6.
pl. 20.

But the pope's bull is evidence on a spiritual prescription, when you only say the lands belonged to such a monastery as was discharged of tithe at the time of the dissolution, for then they continue discharged by act of parliament.

Palm. 38.

But the copy of the bull will not be allowed in evidence; the bull itself must be produced.

Palm. 38.

If the question be, whether a certain manor be ancient demesne or not, the trial shall be by *Domes-day* book, which shall be inspected by the court. Ancient demesnes are the socage tenures that were in the hands of *Edward* the Confessor, which *William* the Conqueror, in honour of him, endowed with several privileges: *Domes-day* book was a terrier or survey of the king's lands, which was made in the time of the Conqueror, and which ascertains the particular manors which had this privilege.

Brett v. Ward,
Winch. 70.

Hob. 188.

To know whether any thing be done in or out of the ports, there lies in the *Exchequer* a particular survey of the king's ports, which ascertains their extent.

Term. Pasch.
1701. in *Scac-*
cario.

An old terrier or survey of a manor, whether ecclesiastical or temporal,

Gilb. Ev. 69.

temporal, may be given in evidence, for there can be no other way of ascertaining old tenures or boundaries.

Bull. N. P. 248.

A terrier of glebe is not evidence for the parson, unless signed by the churchwardens as well as the parson; nor even then if they be of his nomination: and though it be signed by them, yet it seems to deserve very little credit, unless it be likewise signed by the substantial inhabitants. But in all cases it is strong evidence against the parson.]

Ellingworth v. Leigh, 4 Gwill. 1615.

|| Regularly, it should be signed by the minister of the parish; but it is admissible in evidence, though it wants his signature.

Atkins v. Hatton, 2 Anstr. 386. Allott v. Wilkinson, 4 Gwill. 1593. (a) Potts v. Durant, 3 Anstr. 789. Miller v. Foster, 2 Anstr. 387. n.

A terrier derives its authority from its being found either in the bishop's registry, or in that of the archdeacon (*a*) of the diocese. Unless it comes from one of these repositories, it cannot, in general, be admitted in evidence: there must be some particular circumstances to induce the court to receive it, if found in any other place.

Bagshaw v. Bishop of Bangor, cited in Underhill v. Durham, 2 Gwill. 542.

And the survey is admissible, although the commission, under which it was taken, is not to be found.

Underhill v. Durham, *ubi supra*. Roe v. Ireland, 11 East, 284. Blundell v. Howard, 1 M. & S. 292.

Surveys of the church and crown lands were taken by commissioners in the time of the Commonwealth, under the authority of acts and ordinances of the parliament; and copies of them were deposited in many of the cathedrals. The originals would have been good evidence, as having been made by the authority and order of the government of the country, on publick occasions and on subjects of publick interest; but, as they were destroyed in the fire of *London*, the copies have been admitted as evidence, provided they have been kept in unsuspected places. These parliamentary surveys stand very high in estimation for accuracy; and therefore the silence of one of these documents as to a supposed *modus* has been considered as strong evidence against its existence.||

1 Wils. 170.

[A survey of religious houses taken in 1563, upon the dissolution of monasteries, was allowed to be good evidence to prove a vicar's right to small tithes.

Yates and Harris, Spring Ass. 1702.

An old map of lands was allowed to be evidence, where it came along with the writings and agreed with the boundaries adjusted in an ancient purchase.]

Skin. 623.

Salk. 281.

(b) So, a Year-book may be

A publick history or chronicle may be given in evidence to prove a matter relating to the kingdom in (*b*) general, because the nature of the thing requires it.

evidence to prove the course of the court. Salk. 281. — So, *Speed's Chronicle* was given in evidence to prove the death of *Isabel*, Queen Dowager to *E. 2.* Skin. 15.

Salk. 281. Stainer v. Burgesses of Droitwich.

But these will not be admitted as evidence to prove a particular right; and therefore where the question was, whether, by the custom of *Droitwich*, salt-pits could be sunk in any part of the

the town, or in a certain place only; and on a trial at bar, *Camden's Britannia* was offered in evidence; it was refused. Skin. 623. S. C. so ruled.

¶ So, where the question was, whether a particular abbey was of the inferior order, *Dugdale's Monasticon* was refused, because the original records might be had in the Augmentation Office. Id. *ibid*.

So, it has been determined, that *Dugdale's Baronage* is not evidence to prove a descent. Piercy v. —, Sir T. Jon. 164.

But the books of heralds are admitted as evidence to prove pedigrees, because the nature of the thing will not admit of better evidence. Also, this is their proper business, and about which they are conversant, and therefore their books deserve the more credit. But for this vide 2 Ro. Abr. 686. Yelv. 34. 2 Jon. 164. 224. Salk. 281. Comb.

63. and Skin. 623. where it is said, that, from the negligent manner of keeping them, they deserve but little credit*. — * This is certainly true, yet there are exceptions, as a visitation made by heralds, entered in their books, and kept in their office, has been admitted evidence of a pedigree. Pitton v. Walter, H. 5 G. Str. 162. — So, the minute-book of a former visitation, signed by the heads of the several families, and found in a private library (Lord Oxford's). *Ibid*.

An (a) almanack is sufficient evidence to prove a day Sunday, &c. Cro. Eliz. 227. Leon. 242. S. C. and S. P.

Sid. 300. 6 Mod. 41. S. P. (a) That the almanack to go by is that annexed to the Common Prayer-book. 6 Mod. 81.

¶ Corporation-books, containing an account of the privileges or publick transactions of the body are evidence in a suit between the several members, on the same footing with manor-books between the tenants of a manor. But they are not evidence in favour of the corporation to support a claim of right against a stranger; and before they can be admitted in any case, it ought to be shewn that they have been regularly kept by the proper officer. Ph. Ev. 319.

Case of Thetford, Vin. Abr. tit. Evidence (A. b. 15.) pl. 16. seems S. C.

Where books belong to a publick company, a party concerned in interest may, on motion, have copies of them to be made use of as evidence; for, being transactions of a publick nature, the publick is concerned in them. Mayor of London v. Mayor of Lynn, 1 H. Bl. 214. n. R. v. Motherwell, 1 Str. 93.

¶ The inspecting of court-rolls was the original of these motions; but then it was confined to the case of persons interested, the rolls being the common evidence, which of necessity must be kept in some one hand. And now the party applying must be a member of that body, or tenant of that manor, of the books of which he seeks the inspection; a stranger having no more right to inspect the books of a corporation, than he has to inspect those of a private person. (b) Geery and Hopkins, 7 Mod. 129. Ld. Raym. 851.

Anon. 2. Ves. 620. Shelling v. Farmer, 1 Str. 646. Murray v. Thornhill, 2 Str. 717. R. v. Bridgman, Id. 1203. Allan v. Tap, 2 Bl. Rep. 850. Wood v. Whitcomb, Vin. Abr. tit. Evidence (F. b.) pl. 9. Lewis v. Baker, 1 Barnardist. 100. College of Physicians v. Dr. West, Gilb. Rep. B. R. 134. Bishop of Hereford v. Duke of Bridgewater, Bunb. 269. Smith v. Davis, 1 Wils. 104. Talbot v. Villebois, cited 3 T. R. 142. Cox v. Copping, 1 Ld. Raym. 337. 5 Mod. 395. S. C. Mayor of Southampton v. Graves, 8 T. R. 590. (b) A different

ferent practice for some time obtained in courts of law, upon the ground that as the court of Chancery would order inspection merely for asking, it would only cause unnecessary expence to send the parties thither. *Mayor of Lynn v. Denton*, 1 T. R. 689. *Corporation of Barnstaple v. Lathey*, 3 T. R. 303. *Mayor, &c. of London v. Mayor, &c. of Lynn*, 1 H. Bl. 211. But the courts of law having discovered that such an order is not quite so much of course in a court of equity, as they had supposed it to be, have returned to their old practice; and the rule now is, that in disputes between several members of a corporation an inspection will be granted, because each has a right to inspect them; but an inspection will not be granted in the case of a corporation, which would be refused, if the suit were between private persons: nor is there any difference in this respect between a corporation aggregate and a corporation sole, nor between a corporation sole and a private person suing in his individual capacity. *Mayor of Southampton v. Graves*, *ubi supra*.

Geery v. Hopkins, *ubi supra*. But, if the parties applying are not members of the body, the books must be the common evidence of the transactions between them, so as in fact to be for this purpose the books of each. Such are the cases of entries in the Custom-house books, in the books of the East India Company, and the transfer books of the Bank.

Warriner v. Giles, 2 Str. 954. Crew v. Saunders, *ubi supra*. The evidence contained in the books must be directly material to the cause; and the liberty to inspect and copy must be restrained to such papers as relate to the matter in dispute. And this though the party applying be a member of the corporation.

Benson v. Port, cited in 1 Wils. 240. & 1 Bl. Rep. 40. S. C. *Mayor, &c. of London, v. Swinland*, 1 Barnardist. 455. *Crew v. Saunders*, *ubi supra*. *R. v. Babb*, 3 T. R. 579. *R. v. Fraternity of Hostmen in Newcastle-upon-Tyne*, 2 Str. 1223.

R. v. Worsenham, 1 Ld. Raym. 705. The court will not permit an inspection for the purpose of collecting evidence to support a criminal prosecution. But they will not withhold it from a relator in an information in the nature of a *quo warranto*, (a) if he be a member of the corporation; for it is in the nature of a civil proceeding.

Crew v. Saunders, *ubi supra*. R. v. Cornelius, 2 Str. 1005. *Regina v. Mead*, 2 Ld. Raym. 927. *R. v. Purnell*, 1 Wils. 239. 1 Bl. Rep. 37. S. C. *R. v. Lee*, cited in 1 Wils. 240. *Bradshaw v. Philips*, cited in 1 Bl. Rep. 39. *R. v. Heydon*, 1 Bl. Rep. 351. *Roe v. Harvey*, 4 Burr. 2489. (a) *R. v. Shelley*, 3 T. R. 141.

R. v. Shelley, 3 T. R. 141. Tenants of a manor (b) seem to have a right to a general inspection of the court rolls; and in that case upon an affidavit that the party was a tenant of the manor, and that application had been made to the lord for leave to inspect, which he had refused, the rule was made absolute in the first instance.

R. v. Lucas, 1 East, 235. *Roe v. Aylmar, Barnes*, 236. (b) *Qu. as to corporators*. *R. v. Babb*, 5 T. R. 579.

Hodges v. Atkins, 3 Wils. 398. 2 Bl. Rep. 877. S. C. The motion has been refused in an action against a corporation upon a right of toll, *because issue was not joined*, so that it could not appear whether the inspection would be necessary. In the case of a *Mandamus* the rule for inspecting will not be granted, until the first rule is made absolute, and a return made to the *Mandamus*. (c) And it has been thought the more convenient practice, where a rule *nisi* for a *quo warranto* information has been obtained, not to permit the inspection, till the information is granted. (d)

Dr. Groenvelt v. Dr. Burwell, Carth. 421. (c) *Per Cur.* in *R. v. Justices of Surry*, Say. Rep. 144. (d) *Per Ashurst J.* 3 T. R. 581. *R. v. Hollister*, Ca. temp. Hardw. 245.

The books of a private company cannot be inspected any more than those of a private individual. *Smith v. Huggins, Barnes, 256. Regina*

v. Mead, 2 Ld. Raym. 927. Charitable Corporation v. Woodcroft, Ca. temp. Hardw. 130.

By 32 G. 3. c. 58. § 4. a penalty of a hundred pounds is incurred by any officer of the corporation, having the custody of the corporation records, who shall refuse to allow any other officer or member to inspect books and papers, wherein are entered the admission or swearing-in of the freemen, burgesses, and members of the corporation, and to take copies or minutes of such admission, &c. ||

By the 7 Ja. 1. c. 12. reciting, That whereas divers men of trades, and handicraftsmen keeping shop-books, do demand debts of their customers upon their shop-books, long time after the same hath been due, and when, as they have supposed the particulars and certainty of the wares delivered to be forgotten, then either they themselves, or their servants, have inserted into their said shop-books, divers other wares supposed to be delivered to the same parties, or to their use, which in truth never were delivered; and this of purpose to increase, by such undue means, the said debt; and whereas divers of the said tradesmen and handicraftsmen, having received all the just debt due upon their said shop-books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors, or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof, by writing or witnesses, of the said payment, that may countervail the credit of the said shop-books, which few or none can do in any long time after the said payment; it is therefore enacted, "That no tradesman, or handicraftsman keeping a shop-book as aforesaid, his or their executors or administrators, shall be allowed, admitted, or received to give his shop-book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, some action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done."

Although the statute says a shop-book shall not be evidence after the year, yet this does not make it evidence of itself within the year, without some circumstances. *2 Salk. 690.* As in an action by a brewer, his manner of dealing was proved to be, that the draymen came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their hands, and that the drayman who had so set his hand, was

dead; but that this was his hand which was set to the book; and this was held good evidence of a delivery; otherwise, of the shop-book itself singly, without more. *Salk. 285. 2 Ld. Raym. 873. 6 Mod. 264. Price v. the Earl of Torrington.* — So, in an *indebitatus assumpsit* on a taylor's bill, a shop-book was allowed for evidence, it being proved that the servant who wrote the book was dead, and that this was his hand, and he accustomed to make the entries therein. *2 Salk. 690. Pitman and Madox, ruled by Holt C. J.* — [But when the plaintiff to prove delivery, produced a book which belonged to his cooper, who was dead, but his name set to several articles, as wine delivered to the defendant, and a witness was ready to prove his handwriting; Lord C. J. *Raymond* would not allow it, saying it differed from Lord Torrington's case, because, there, the witness saw the drayman sign the book every night. Clerk and Bedford, M. 5 G. 2.

M. 5 G. 2. Bull. N. P. 282. — || And Lord *Kenyon* ruled, in an action for the hire of a pair of horses, that an entry by the plaintiff's servant, since dead, stating the terms of the agreement with the defendant, ought not to be admitted. *Calvert v. Archbishop of Canterbury*, 2 Esp. N. P. C. 646. || [Upon an issue out of Chancery to try whether eight parcels of Hudson's Bay stock, bought in the name of Mr. *Lake*, were in trust for Sir *Stephen Evans*, his assignees (the plaintiffs) shewed, first, that there was no entry in Mr. *Lake*'s books relating to this transaction. Secondly, six of the receipts were in the hands of Sir *Stephen Evans*, and there was a reference on the back of them by *Jeremy Thomas* (Sir *Stephen*'s book-keeper) to the book B. B. of Sir *Stephen Evans*. Thirdly, *Jeremy Thomas* was proved to be dead, and upon this the question was, Whether the book of Sir *Stephen Evans* referred to, in which was an entry of the payment of the money, should be read. And the court of K. B. at a trial at bar, admitted it not only as to the six, but likewise as to the other two in the hands of Sir *Biby Lake*, the son of Mr. *Lake*.] || Bull. N. P. 282, 283. In this case, (which Lord *Hardwicke*, in *Glyn v. Bank of England*, 2 Ves. 43. has observed upon, as "new and having gone a great way,") the entry was not offered by the assignees, as evidence of payment against the seller of the goods, but as corroborating evidence to shew, that while the books of the other party concerned took no notice whatever of the goods, those of Sir *Stephen Evans*, under whom the plaintiffs claimed, treated them as bought on his account. Ph. Ev. 197. ||

" Provided that this act shall not extend to any intercourse of
 " traffick, merchandizing, buying, selling, or other trading or
 " dealing for wares delivered, or to be delivered, money due, or
 " work done, or to be done, between merchant and merchant,
 " merchant and tradesman, or between tradesman and trades-
 " man, for any thing directly falling within the circuit or com-
 " pass of their *mutual* trades and merchandize; but that for
 " such things only they and every of them shall be in case as
 " if this act had never been made; any thing herein contained
 " to the contrary thereof notwithstanding."

[Besides the case of shop-keepers' books, there are other cases where entries in private books or memorials are admitted in evidence to affect the rights of third persons, upon proof that the writer is dead, and that they are in his hand-writing. Any entry under such circumstances is admissible, when it is in restraint, not in advancement of the right of the party who made it; as, where the party charges himself by the entry with the receipt of money; for the entry in this case derives its authority from the improbability that he would commit a falsehood to writing which must operate to his disadvantage. An entry is again admissible in those cases where hearsay evidence of the writer's declarations respecting the same fact would be received in evidence (a). And in the case of ecclesiastical dues, it is every day's practice to admit entries in the parson's books as evidence for his successor. (b)]

Smartle v. Williams, Bull. N. P. 283. Comb. 249. S. C. 1 Ld. Raym. 745. Barry v. Bebbington, 4 T. R. 514. Stead v. Heaton, Id. 669. 5 T. R. 123. In the case of Searle v. Lord Barrington, 2 Str. 826. the indorsement of the payment of interest made under the hand of the obligee within the twenty years from the date of the bond, was admitted as evidence in an action on the bond by the representative of the obligee to repel the presumption arising from length of time of its being satisfied. 2 Ves. 43. — (a) Lill. Pr. Reg. 552. Woodnoth v. Lord Cobham, Bunb. 180. Glyn v. Bank of England, 2 Ves. 40. Outram v. Morewood, 5 T. R. 123. In a recent case in the Exchequer, the effect of this kind of evidence was very attentively considered. The plaintiff claimed the lands in question as part of old inclosures demised for ninety-nine years under a rent reserved to the lord of the manor, which term was alleged to be expired. In support of his title, he produced the rental of the family of fifty years' date, which charged the steward with the receipt of such and such sums, and expressed that thirteen shillings and fourpence had been annually received for these premises by the name of inclosure on lease. The defendants contended, that the rentals were evidence only of the receipt of so much money, but were not admissible to prove in what right it was received, whether as a conventional or a quit-rent. And it was urged, that if they were admitted to that extent, a steward of a manor, by such inser-

tions

tions in his rentals, might convert all the quit-rents in the manor into conventional rents on terms for years, and might even express when such terms would expire, and so get all the freeholds into the possession of the lord. But the court, *viz. Smythe* Chief Baron, *Perrott, Eyre, and Burland*, barons, said fraud is not to be presumed; and the rentals are admissible not only to prove the receipt of the money, (which was agreed on all hands,) but also to shew in what right it was received. For otherwise the receipt of a gross sum of money proves nothing; it must be allowed to shew that it was in respect of certain lands, which is evidence of tenure; and therefore it may shew the particular kind of tenure. The rentals in the hands of executors are evidence to charge or discharge them, which they could not do, unless they were allowed to shew the particular right in which the money was received. The steward, if living, would be a competent witness: as he is dead, this is the next best evidence, and therefore admissible. *Harpur v. Brook*, Tr. 14 G. 3. on a motion for a new trial. 3 Wooddes, 332. — (b) 2 Ves. 43. Bunb. 46.

If *A.* be seised of the manors of *B.* and *C.*, and during his seisin of both, he cause a survey to be taken of the manor of *B.*, and afterwards the manor of *B.* be conveyed to *E.*, and after a long time there be disputes between the lords of the manor of *B.* and *C.*, about their boundaries; this old survey may be given in evidence. *Secus*, if the two manors had not been in the hands of the same person at the time the survey was taken.]

Bridgman v. Jennings, 1 Ld. Raym. 734;

On a contest in Chancery concerning a promise made by the Lord *Abigney*, to settle lands on the Lord *Clifton* and his lady, who was the daughter of the Lord *Abigney*; the king's certificate under his sign manual, signifying the purport of the said promise, was held sufficient evidence of it.

Lord *Abigney v. Clifton*, Hob. 213. Godb. 199. S.P. but *Rolle*, referring to the case in *Hobart*, Trial (H.) pl. 1.

says, it seems not to be evidence. Ro. Abr. tit. Trial (H.) pl. 1.

[With respect to deeds, the general rule is, that where any person claims by a deed in the pleadings, there, he ought to make a profert of it to the court; and where he would prove any fact in issue by a deed, the deed itself must be shewn.

The deed consists of three things: 1st, Of sealing by the parties. 2dly, Of delivery to the party to whom the deed is made. 3dly, Of a right transferred, or obligation created.

1st, The seal was very ancient in the *Roman* and *Grecian* governments, and from them it came to the northern nations, who anciently passed all manner of right, by the actual tradition of the thing itself. The seal followed from the invention of coins, and is a derivation from the same convenience; for as coins were invented as tickets to facilitate the exchange of all manner of commodities, so when coin was wanting, or not ready for payment, tickets were given by impression in wax, and these passed instead of the coin itself. And these impressions were made with great distinction, for they contained the arms or some notorious symbol of the person contracting. Now when such distinctions were taken up and found of use, they were at last required in the authenticating of all manner of written contracts, and from hence the law grew, that there could be no solemn contract without the distinction of the seal.

2dly, The delivery was always a solemn sign used by the northern nations in the transferring of right, and as they anciently delivered the thing itself, and by that delivery made the alienation; so, when contracts took the place of the things themselves that were to be delivered, they annexed the solemnity to

the contract, and the contract was completed by the delivery, and from thence it became necessary that a delivery should be made of all contracts.

3dly, In every contract there must be some right transferred, or obligation created, and therefore there must be apt words to shew what right was transferred, and to whom, to shew what obligation was created, and to whom. And the sense and signification of the words must be expounded by the law, since it is the province of the law to determine the forms and solemnities, and operation of all manner of contracts; for the operation and effect of a contract cannot be determined but by the rules of law that are appointed as the measures of transferring right, and of creating obligations; and without such stated rules in every society, no man could be certain of any property, for then the sense of the contract must be at the mercy of the judge or jury, who might construe or refine upon it at pleasure.

There must therefore be a profert made of all solemn contracts in any action founded on such contracts,

1st, For the security of the subject, that what right is transferred, or what obligation is created, may be judged of according to the rules of law.

2dly, Because all allegations in a court of justice must set forth the thing demanded: now the thing demanded cannot be set forth without the instrument shewn upon which the demand arises, for since the demand is by the instrument, there can be no demand at all without shewing that from which it arises.

Co. Litt. 226.

(a) ¶ This may be dispensed with in pleading, where the deed has been lost by time or accident, *Read v. Brookman*,

3 T. R. 151. *Bolton v. Bp. of Carlisle*, 2 H. Bl. 259. or it may be pleaded that the deed is in the hands of the opposite party, or destroyed by him. *Totty v. Nesbitt*, 3 T. R. 153. n. (c) But, if a plaintiff, instead of declaring upon the deed, as lost or destroyed, pleads with a profert, and the defendant pleads *non est factum*, the plaintiff will not be allowed to prove the loss at the trial, and must be nonsuited. *Smith v. Woodward*, 4 East, 585. ¶

Co. Litt. 267.

10 Co. 92.

Ibid. 93.

Nor can privies in estate take any advantage of a deed without shewing it.

As, if there be tenant for life, remainder in fee, and there be a release to him in remainder, tenant for life cannot take advantage of it without shewing the deed; for since the right passed merely by the deed, to say any person released without deed will not be a good plea.

6 Co. 38. a.

When a man shews a title in himself, every thing collateral to that title shall be intended, whether it be shewn or not; for though the law requires an exactness in the derivation of the title, yet when that title is shewn, it will presume all collateral circumstances in favour of right; for when lawful conveyances, which are made with care, and on consideration, are brought forward, it would create too great nicety to require an exactness in the shewing of every collateral matter, and would tend to the entangling

entangling of right with too many difficulties, and therefore by the benignity of justice, they shall be intended. Besides, a matter collateral to a title is what doth not enter into the essence or being of a title, but arises *aliunde*, so that there must be a good derivation of your right without it.

As, when a man declares of a grant or feoffment of a manor, the attornment shall be intended; for when a title is shewn to the manor, attornment of the tenant, which is collateral to that title, shall be intended till the contrary is shewn on the other side. *

Co. Litt. 370.
Cro. Eliz. 401.
* See 4 Ann.
c. 16. § 9.
whereby all
attornments
of tenants are taken away.

So in trespass, the defendant conveys the house in which, &c. by feoffment from *J. S.* and justifies damage feasant; the plaintiff replies, that *J. S.* before the feoffment made a lease to *J. N.* who assigned to him; the defendant rejoins, that the lease was made on condition, that if *J. N.* assigned over without licence, by deed from *J. S.*, that then *J. S.* should re-enter; the plaintiff sur-rejoins, that *J. S.* did give licence by deed, without any profit of the deed; and yet this sur-rejoinder was good, because the plaintiff's title was by assignment of the lease from *J. N.*, and, consequently, the licence from *J. S.* is but a matter collateral to the assignment, and, by consequence, the deed must be intended to be well and legally made, though it be not shewn to the court.

6 Co. 38.
Cro. Ja. 102.

But, if the matter be collateral to the plaintiff's title, then there is another difference, and that is where the deed is necessary *ex provisione hominis*, and where it is necessary *ex institutione legis*. For where the deed is necessary *ex institutione legis*, there, you must shew it, for it is repugnant that the law should require a deed, and not put you to shew that deed when it is made; as, if you are obliged to shew the attornment of a corporation, there you must shew a deed, inasmuch as corporeal bodies, by the rules of the law, cannot act but by corporeal instruments; for the body consists in agreement and union, by creation of law, by patents or instruments under seal, and there is no act of the aggregate body but in the same manner; so that there can be no attornment without a deed; and the law cannot allow the attornment of such a body without it; therefore no attornment is shewn, unless a deed is shewn also.

6 Co. 38.

But, when a deed is necessary *ex provisione hominis*, there, when it is collateral, as in case of the licence before mentioned, it need not be shewn, for the private act of the parties shall not controul the judgment of the law, that intends all such collateral matters without shewing.

Ibid.

There is a difference to be taken between things that lie in livery, and things that lie in grant; for things that lie in livery may be pleaded without deed, but for a thing that lies in grant, regularly, a deed must be shewn.

1st, Of things in livery,—It is well known that livery was the ancient conveyance, which was a solemn delivery of land in sight of the inhabitants; and because this was done *coram paribus*

curia, and the tenant ever after resided in the possession, it was reckoned the most notorious way of conveyance; and since this was the ancient *Gothick* way, and because they reckoned it of itself most manifest, the solemnities of a deed were not necessary.

2 Ro. Abr. 682. And therefore a man may plead that *J. S.* enfeoffed him without saying *per indenturam*, and yet give the indenture in evidence, because the indenture is not the feoffment, but the feoffment is made by the livery, and by that only the party is invested with the feud, and the indenture is only evidence of such feoffment.

Ibid. But, if a man pleads, that *J. S.* hath enfeoffed him *per fait*, whether he may give a parol feoffment in evidence, hath been reasonably doubted, because he has bound himself up to a feoffment by deed, and if the jury have only evidence of a parol feoffment, and yet find the issue, the deed may be used by way of estoppel ever after, where in truth there was no such deed.

Ibid. So, a demise may be had without deed, as well as a feoffment, for here the party resides in the possession, and therefore the old way of contracting governs in this case. And so a man may plead a demise without deed, and give the indenture in evidence, for the indenture may be used as an evidence of the contract that would be good, whether there were any indenture or not. But, if the demise were laid by indenture, it seems that they could not give a parol demise in evidence.

Co. Litt. 352. Livery also is an estoppel, and is by *Coke* called an *estoppel in pais*, because it is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony; for when solemnities are settled for transferring a possession, they ought to be held as sacred by the law; and therefore a man is concluded from destroying that of which he himself is the author, or from impeaching that which is held as sacred to transfer all possessions.

Ibid. 225. Therefore, if the defendant pleads the livery and seisin of the plaintiff, the plaintiff cannot reply that the livery was conditional, without shewing the deed; inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only.

Co. Litt. 226. But the jury are not estopped on the general issue, from finding such a conditional feoffment, for the jury are men of the neighbourhood that are supposed to be present at the solemnity, and they are sworn *ad veritatem dicendam*, and therefore they cannot be estopped from finding the truth of the matter, and, by consequence, may exhibit the condition on the feoffment.

But since the use of these solemnities before the men of the country had ceased, by allowing secret liveries only in the presence of two witnesses, therefore the statute of frauds and perjuries hath enacted, that no leases, estates, or interests of freehold, or for a term of years, or uncertain interest (not being copyhold) shall be assigned, granted, or surrendered, unless it be by deed or note in writing, under the hand of the party or his agent thereunto lawfully authorized in writing, or by act and operation of

of law; so that by this statute the ceremony of livery only is not sufficient to pass estates of freehold or terms for years. But it is not necessary to set forth such contract on the pleadings, for they are, as they were formerly, *feoffavit et demisit*. Buck's case,
Trin. 1701.

A man may plead a condition to determine an estate for years, without deed; for this begins without any livery, and therefore the party is not estopped by any notorious ceremony from averring the condition. Co. Litt. 225.
Litt. § 365.

But, where a man sets out a feoffment, the other party may reply, that it was by deed, and shew the condition, for then there is an estoppel; and so the matter is in equal balance, and therefore, must be determined according to truth.

2dly, Of things lying in grant, — And these are all rights, as fairs, markets, advowsons, and rights to lands, where the owner is out of possession; and these being rights, they cannot possibly pass by investiture of the possession, because they cannot possibly be delivered over, or possessed, and therefore they must pass by the next sort of grants that holds the second place in point of solemnity, and that is by grant under the hand and seal of the party.

Now a person that claims any thing lying in grant, must show his deed from the party that had the original grant, or otherwise he must prescribe in the thing he pretends to, and the prescription, being immemorial and supposing a grant, supplies the place of the grant.

He also that has a particular estate, by the agreement of the parties, must shew not only his own conveyance, but the deeds paramount; for there can be no title made to a thing in agreement, but by shewing such agreement, and the particular tenant ought to covenant to have the power of the deeds, inasmuch as he has no title, unless he can derive the estate that arises in agreement, up to the first original grant. 10 Co. 94.

But, where any person claims any estate, by particular act in law, there he may make his claim without shewing the deeds; as tenant in dower, or by elegit, or the guardian in chivalry, may claim an estate in a thing lying in grant without the deed; for when the law creates an estate, and yet doth not give the particular tenant the property of the deeds, it must be allowed that the estate be defended without them, otherwise the creation of the estate were altogether in vain. 10 Co. 93.

So, they may plead a condition without shewing the deeds, because they claim an estate by the act of the law, and therefore are not estopped by the livery; so that they may claim an estate defeated by the condition without a deed. Also, they are not supposed to have the deeds and muniments of the estate, and therefore for the reason formerly given, may do it without deed. Co. Litt. 225.

But tenant by the curtesy cannot claim an estate lying in grant, without deed, because he has the property in and custody of the deeds, in right of his wife, and that property cannot be divested out of him, during the continuance of his estate. 10 Co. 94.
Co. Litt. 226. a.
|| But 10 Co.
94. b. does
not warrant
but only in the
this distinction between tenant in dower, and tenant by the curtesy generally, in the case of a release made to the wife.

10 Co. 94.
Co.Litt.226.a.

So also he cannot defeat an estate of freehold without shewing the deed, nor can the lord by escheat do it without shewing the deed; for the act of livery is an estoppel that runs with the land, and bars all persons to claim it, by virtue of any condition without the condition appears in a deed; for the notoriety and solemnity of the act is that which makes it obligatory to all persons, so that they cannot impeach it, without shewing a precedent title, for that livery cannot be defeated, but by shewing something equally notorious; and since in both these cases the custody of the deeds resides with them, they must shew the condition.

Co. Litt. 267.
10 Co. 94. b.

So that the general rule is, where any person ought to have the custody of the deeds, there, where such person is compelled to shew his title, he ought to make a profert of those deeds to the court; for every man ought to have his deeds, and cannot take advantage of his own negligence in losing them; therefore in the case formerly put, of tenant for life, the remainder in fee, and a release is made to him in remainder, in such case tenant for life ought to make a profert of the deed, for in this case they have both parts of the same feud, and therefore tenant for life is supposed to be equally entitled to the deeds as he in remainder.

Co. Litt. 226.
Styl. Regr.
205.

But, where a person is an utter stranger to any deed, there, in pleading, he is not compelled to shew it; for where he is not supposed by the law to have the custody of the deeds, he cannot be compelled in pleading to shew such deeds to the court, for that were to compel the party to impossibilities.

Co.Litt.226.a.

As, if a man mortgageth his land, and the mortgagee leaseth the land for years, reserving a rent, and then the condition is performed, the mortgagor re-enters; the lessee in bar of an action of debt shall plead the condition and re-entry, without shewing the deed, for the lessee was never, nor could be, entitled to the custody of the deed, and therefore it were altogether unjust to compel him to produce it.

Co, Litt. 226.

So, if a man bring a *præcipe* against A., he shall plead that he was only a mortgagee, and that the mortgage was satisfied, so that he hath no longer seisin of the estate, and this without shewing the deed; for upon performance of the condition, the property of the deed was no longer in the mortgagee, but it ought to be re-bailed to the mortgagor, and having no longer any title to the deed, he may plead the condition, without shewing it.

10 Co. 94.

So, in an action of waste, or in discharge of the arrears of rent, the tenant pleads a grant of the reversion and attornment, after such waste committed, or such arrear due, the tenant cannot shew the grant, *causa qua supra*.

5 Co. 74. b.

A deed enrolled must be offered to the court in pleading, though the deed be enrolled in the same court in which the plea is depending, for this is no record but a deed recorded; for a record must be the act of the court, and therefore the decisions of justice by the court, that lie as precedents for future observation,

ation, are the record of the court; and letters patent, which are the king's acts, are the highest sort of records; but a deed enrolled is only a private act of the party authenticated in court. And from thence this difference is drawn, that letters patent enrolled in the same court, or records of the same court, need not be proffered to the court, but a deed enrolled must; for all records that are publick acts, and that lie for the direction of the court, in matters of judicature, must be taken notice of, and therefore they need but refer to it with a *prout patet per recordum*, for the court will take notice of the course and orders of court, upon reference to them; but deeds are no more than the private act of the parties authenticated by the court, and they do not lie for the direction of the court, but take hold of its authority to give them credit; and therefore the court doth not take notice of them, unless they be pleaded. But the letters patent of another court the court doth not take notice of, unless they be offered; for since they are none of the records that are directed to this court of justice, it is not the office of the court to take notice of them, and therefore it is their duty to offer them as they do all other allegations.

10 Co. 92.
Stra. 520.

To a deed acknowledged in court, a man cannot plead *non est factum*, for being done in the court, the truth of the fact is so far to be credited, that he shall never deny the deed; but he may avoid the operation of the deed by pleading *riens passa par le fait*, for that doth not impeach the credit of the court in which it was acknowledged.

Since the term, to avoid the entering up the several continuances of business, is reckoned as one continued law-day, therefore deeds pleaded shall be in the custody of the law during the whole term, this being considered as the day wherein they are pleaded; and being then before the court, any body may take advantage of them. But since they belong to the custody of the party, if the deed be not denied, it shall go back to the party, after the term is over, and then nobody can take advantage of it, without a new profer; for then it is not before the court; and therefore the plaintiff in the King's Bench may take the advantage of a condition in a deed in his replication, because it is *et predictus A. dicit*, as of the same term; but he cannot take advantage in a replication of a deed in the Common Pleas, because they enter an imparlance to another term: but, where the deed comes in, and is denied, it remains in court for ever, because that is the only point in debate on which the decision of the court is founded, and therefore, like all other decisions, it must remain among the other records of the court; and because it is tied up to this court, and is impossible to be removed, it shall be pleaded in another court without shewing.

5 Co. 74, 75.

As no party shall take advantage of his own negligence, in not keeping his deeds, which in all cases ought to be fairly produced to the court; so his adversary shall not take any advantage of his violent detaining of them; for the one by a violent taking away of the deeds gives a just excuse to the other for not

Co. Litt. 226.
2 Stra. 1186.
1198.

having them at command, and no man can ever make any advantage of his own injury; and therefore it is a good plea for one party to say, that the other entered and took away the chest wherein the deeds were.

Cro. Ja. 32:

In an action of debt upon a bond, it is matter of substance to make a profert of the deed, because this is the contract on which the court are to found their judgment, and therefore it ought to be exhibited to the court.

2 Saund. 402.

3 Keb. 61.

|| It is now expressly made matter of

form by 4 Ann.

c. 16. § 1. and

must be specially demurred to.||

It is not matter of substance to shew letters of administration; for whether they are legally granted or not belongs to the spiritual courts, who are governed by the rules of the civil law, and therefore their legality cannot be weighed at common law, since it has different measures of judicature.

Evidence of Deeds.

10 Co. 92.

b. 93:

Secondly, of giving deeds in evidence to the jury, — And here the general rule is, that where any thing is to be proved, the deed itself must be given in evidence, and not the copy of it; and the deed must regularly be proved by one witness at least.

Mich. 1718. in
the Exch. per
Curiam.

This is now to be understood where the deed is of a late date; for if the deed be of thirty years' standing, which now makes an ancient deed, and the person to whom the deed was made, or those deriving under him, have been in possession under the deed, such ancient deed shall be read, without proof, though the witness to it be alive. And this the Lord Chief Baron *Gilbert* declared to be the rule of evidence at *nisi prius*. And if the person to whom the deed was made hath been in possession of the lands contained in the deed, such possession shall be presumed to be under the ancient deed, unless the contrary be proved.

First, the deed ought to be given in evidence, and not the copy only, for though in records the copy was admitted in evidence, yet the law will not regularly allow it in private deeds, for they are not within the same reason as copies of records, for a record is fixed in a certain place, and therefore the original cannot be had, and, by consequence, the copy is the best evidence.

But deeds are only private evidences, and not fixed or confined to a certain place, but are lodged in the custody of the party, and not of the law, and therefore they must be produced in evidence; for the law requires the best evidence which the nature of the thing is capable of, and the deed is much better evidence than the copy of it; for the rasure and interlineation that might vacate the deed, might appear in the deed itself; and the very offering a copy carries a presumption, as if the original were defective, and therefore the copy is not to be admitted. Besides, since the deeds are in the custody of the party, the deeds themselves must be produced; for a man cannot make his own fault in losing the deeds any part of his excuse.

But

But there are some exceptions out of this general rule.

1st, And that is where they prove the deeds themselves to be burnt, for the proof of this matter will excuse the deed from being produced to the jury. But, notwithstanding, a profert is necessary to the court, for there is that conveniency in keeping to known rules, that they cannot be broken, though they tend to the mischief of particular persons; and there cannot be a more convenient rule, than that the cause of every complaint ought to be shewed to the court.

10 Co. 92.
b. 93. Mod. 4.
266. L. E. 99.
pl. 31. We
have already
seen that a
deed may be
pleaded as
lost and de-
stroyed by

time and accident without a profert. Read v. Brookman, 3 T. R. 151.

Now to prove the import of the deed, that it was in such a house, and that the house was burnt, is the best evidence that can be had of such deed, and gives reasonable grounds for the jury to find it.

2dly, A copy of a deed is good evidence, where the deed is in the defendant's hands, and he will not produce it; for when the original is in the defendant's hands, the copy is the best evidence. For the presumption that opposes the copy is, because the original deed is, or ought to be, in the party's hands that would produce the copy. Now that presumption is destroyed where the plaintiff proves the deed itself to be in the hands of the defendant, for then it cannot be presumed that there was any better evidence, or that there was any interlineation that obliged the plaintiff to cover it; for if the copy were not perfect and exact, it would be overthrown by the defendant's producing the original.

Mod. 266.
Gilb. Ev. 13.
Garnons v.
Swift, 1 Taunt.
507.

A copy of an agreement between the abbot of *Quarrer* and the monks of *Lyra* was produced in evidence; to which it was objected that it could not be read, being neither a record nor a publick instrument. But a copy of the *Oxford* statute (a) was exhibited, forbidding any book to be taken out of the *Bodleian* library: and then the court allowed the copy of this agreement, though they considered it as not within the general rules of evidence, but received it on the very particular circumstances of this case.

Bunb. 191.

(a) This statute, it seems, should have been proved by a sworn copy.

But the copy of a deed must be proved by a witness that compared it with the original, for there is no proof of the truth of the copy, or that it hath any relation to the deed, unless there be somebody to prove its comparison with the original.

See Mod. 4.
94. 114. 6. Mod.
248. 2 Vern.
471. 603. L. E.
104.

Where the effect or contents of a deed are proved, and where the deed is afterwards given in evidence, and they disagree, there, the deed itself shall control the other evidence. So it is, where the jury on a special verdict collect the contents of a deed, and yet afterwards find the deed *in hæc verba*; the court, there, is not to regard the collection they have made of the substance of the deed, but the deed itself; for that collection derives its authority from the deed, and therefore must of itself fail and come to nothing, when it is opposite to the deed of which it is a collection.

Vaugh. 77.

3dly, Where

3dly, Where the possession has gone along with any deed for many years, there, a very old copy of the deed may be given in evidence, with proof also that the original is lost. And that is according to the rule of the civil law, *Si vetustate temporis et judicariâ cognitione sint roboratæ*; for possession could not be supposed to go along in the same manner, unless there had been originally such a deed, and so executed as the copy mentions; and the copy cannot be supposed to be only offered in evidence to avoid sight of the original, since it is so ancient, that the antiquity alone prevents all suspicion of its being counterfeit, and the antiquity is known from the ancientness of the possession. But,

Qu. Whether such a copy shall be received without the proof of its being a true copy, by comparison with the deed itself?

Gilb. Ev. 86.
5 Co. 54. Style,
445. Keb. 117.
Tri. per Pais,
355. Salk. 280.
Notwithstanding that deeds of bargain and sale enrolled have frequently in trials at Nisi

4thly, The inspection of a deed enrolled shall be given in evidence. Where the deed needs enrolment, there, the enrolment is the sign of the lawful execution of such deed, and the officer appointed to authenticate such deed by enrolment is also empowered to take care of the fairness and legibility of it, and therefore a copy of such enrolment must be sufficient; for when the law hath appointed them to be made publick acts, the copy of such publick acts shall be, like all other publick acts, a sufficient attestation.

Prius been given in evidence without being proved; yet the law may well be doubted. In support of the practice, the case of Smartle and Williams in Salk. 280. is much relied on; but that case is wrong reported; for it appears by 3 Lev. 387. that the acknowledgment was by the bargainor, and so it is stated in Salk. MSS. Besides, it appears from both the books that it was only a term that passed, and, consequently, it was no enrolment within the statute. Bull. N. P. 255, 256.

5 Co. 54. Style,
445. Keb. 117.
Tri. per Pais,
355. Salk. 280.
2 Vern. 471.
591. However, though the deed needs no enrolment, yet if it be enrolled, it is now the practice to admit it in evidence without proof of its execution. 1 Vent. 296, 297. In the case of Smartle and Williams, Salk. 280. the deed did not need enrolment, yet being enrolled on the acknowledgment of the bargainor, it was read against him without being proved. Bull. N. P. 256. || It would seem, that a copy of an enrolment of a bargain and sale of freehold in lands, &c. is as good evidence as the original itself; but that a copy of the enrolment is not evidence of a bargain and sale of a chattel interest, or of the contents of any other deed enrolled for safe custody, except as against the party acknowledging the deed; and that against such party, and against all claiming under him, a copy of the enrolment of any deed is admissible in evidence. Ph. Ev. 355. Lady Holcroft v. Smith, 2 Freem. 259. See 14 East, 231. 2 Taunt. 5. and Hobhouse v. Hamilton, 1 Sch. & Lefr. 207. See also tit. "Bargain and Sale," *supra*.||

But, where a deed needs no enrolment, there, though it be enrolled, the *inspeximus* of such enrolment is no evidence, because since the officer hath no authority to enrol it, such enrolment cannot make it a publick act, and, consequently, cannot entitle the copy to be given in evidence, because such practices may be improved to very ill purposes; for then, if the deed were doubtful, it were but to enrol it, and bring the copy or inspection of it in evidence, and thereby avoid the giving in evidence a deed that was anyway suspicious.

Style, 445.

But the *inspeximus* on an ancient deed may be given in evidence, though the deed need no enrolment; for an ancient deed may

may be easily supposed to be worn out or lost, and the offering the *insperimus* in evidence induces no suspicion that the deed is doubtful; for it hath a sanction from antiquity, and if it had been ill executed, it must be supposed to be detected when it was newly made.

5thly, the recital of one deed in another is no evidence of the deed recited, though the deed containing the recital be well proved, because there still wants an attestation of the first deed. But, if the person, objecting to the evidence of the recited deed, claims under the person who executed the deed that recites the former deed, the reciting deed is evidence against him of the reality of the recited deed, because he that claims under me stands in my place, and therefore what is evidence against me, must be evidence against him.

Thus in the case of *Fitz-Gerald and Eustace*; *Eustace*, the plaintiff, claimed in equity a debt on the defendant's estate, by virtue of a power reserved in the grandfather's settlement on the defendant's father, to charge the estate for payment of debts and younger children's portions. There, defendant objected that there were not proper parties, because the grandfather had made a mortgage, pursuant to that power, to one *Cox* who was not party to the bill, and did not produce the original mortgage, but only an assignment thereof to *Wybrants*, to which the grandfather was party; yet the court allowed it to be evidence of the original mortgage, because the plaintiffs claimed under the grandfather who was party to the assignment.

And in the following case, the recital of a bond in a deed executed by the same party who was the obligor in the bond, was allowed to be sufficient evidence of the bond. *A.* gave a bond to *B.* for payment of 2000*l.* within a year after his death, he having seduced her and had a child by her, and afterwards *A.* by deed-poll reciting that he had given such bond, agreed the 2000*l.* should be laid out in an annuity for the use of *B.* and the child for their lives. *A.* died. *B.* sued the administratrix on the bond, but there being only one witness to it, and (though his hand-writing was proved, yet) he swearing that he did not see the bond sealed and delivered, *B.* was nonsuited, upon which she brought her bill to be paid out of the assets. Lord Chan. *King* held, that the recital in the deed that *A.* had given such a bond was sufficient evidence of there having been such, that it was a confession by the obligor himself, and stronger than a verbal confession, being under his hand and seal; and His Lordship decreed accordingly.

¶ Where an examined copy of a deed cannot be had, parol evidence may be given of its contents. But a ground must be laid for the introduction of such evidence. If it be, that the original has been lost, it must be shewn that all due inquiry has been made, and the person, into whose possession it has been last traced, should be called to give some account of it. But, if such person be dead and he had stated, in answer to inquiries made

|| *Ford v. Gray*,
1 Salk. 285. ||

Mich. 1718.
in the Ex-
chequer, per
Gilbert Chief
Baron. Gilb.
Ev. 87.

Marchioness
of Annandale
v. Harris, 2 P.
Wms. 432.
|| See also Shel-
ley v. Wright,
Willes, 11. ||

Ph. Ev. 347.

R. v. Castle-
ton, 6 T. R.
236. R. v.
St. Sepulchres,
2 Bott. 353.
R. v. West

made

Riding of
Yorkshire,
Ph. Ev. 348.
Bull. N.P. 254.
R. v. Castle-
ton, *ubi supra*.
R. v. Culpep-
per, Skin. 673.
Per Holt C. J.

Goodier v.
Lake, 1 Atk.
446.

R. v. Johnson,
7 East, 66.
8 East, 284.
Pritt v. Fair-
clough,
3 Campb. 305.

made of him in his lifetime respecting it, that it was destroyed while in his possession, any further search would be unnecessary. If there have been two or more parts of a deed executed, the loss or destruction of all the parts should be proved before the secondary evidence can be received. The original deed too should be proved to have been duly executed, unless such proof would be dispensed with if the original itself were produced, or unless the want of the original is occasioned by the default of the other party, in which case the execution may reasonably be presumed against him. Where an original note of hand is lost, a copy cannot be read in evidence, unless the note is proved to be genuine.

Proof by a witness, that the paper in question was thrown aside as useless, and that he believes it to be lost or destroyed, will be sufficient to let in the secondary evidence. And where it appeared, that the defendant had acknowledged the receipt of a letter of a particular date, which he refused to produce at the trial, an entry in a letter-book (purporting to be a copy of a letter of the same date from the plaintiff to the defendant, and inserted by a deceased clerk, who kept the book according to the course of business, and with great punctuality) was admitted as evidence of the contents of the letter in question.¶

2dly, As to the second part of the rule, the deed must be proved to the jury by one witness at least; for though the deed be produced under hand and seal, and the hand of the party that executes the deed be proved, yet this is no full proof of the deed, for the delivery is necessary to the essence of the deed, and the deed takes effect from the delivery, so that unless the delivery be proved, there is no perfect proof of the deed, and there is no proof of the delivery but by a witness who saw the delivery.

¶ So strictly is this rule observed, that an acknowledgment of the obligor himself (*a*) that he executed a bond, and even an admission (*b*) by the defendant in an answer to a bill filed against him for a discovery, will not dispense with the testimony of the subscribing witness. The rule is precisely the same, whether the acknowledgment is offered as evidence against the party himself, who made it, or against a third person; or whether the deed is an existing instrument, (*c*) or cancelled; or whether it is the foundation of the action, (*d*) or comes in collaterally as part of the evidence in the cause. And this rule applies to all written instruments, which are attested; as, if an attested notice to quit (*e*) has been given to the defendant, which it becomes necessary to prove in an action of ejectment, the subscribing witness must be called to prove it or his absence must be accounted for: it is not enough to prove that it was served on the tenant, that he read it, and did not object to it. If indeed a party to a suit agrees that the other party shall act upon the instrument, as if the witness were produced, that will dispense with his testimony.

(*a*) Abbot v.
Plumbe,
Doug. 216.
(*b*) Coll v.
Dunning,
4 East, 53.

(*c*) Breton v.
Cope, Pecke's
N. P. C. 30.
(*d*) Manners v.
Postan, 4 Esp.
N. P. C. 239.
(*e*) Doe v.
Durnford,
2 M. & S. 62.

Laing v.
Kaine, 2 Bos.
& Pull. 85.

If the attesting witness is dead, or blind, (a) or incompetent to give evidence, from insanity, (b) from infamy of character, (c) or from interest acquired after the execution of the deed, (d) or if he is absent in a foreign country, (e) or out of the jurisdiction of the superior *English* courts, so as not to be amenable to their process, (f) or if he cannot be found after strict and diligent inquiry, (g) in all these cases, proof of his hand-writing will be sufficient proof of the execution; and that without proof of the hand-writing of the party to the deed. (h)

v. Tracey, 1 P. Wms. 287. Godfrey v. Norris, 1 Str. 34. Swire v. Bell, 5 T. R. 371. (c) Coghlan v. Williamson, Dougl. 93. Wallis v. Delancey, 7 T. R. 266. Adam v. Kerr, 1 Bos. & Pull. 361. (f) Prince v. Blackburn, 2 East, 250. (g) Anon. 12 Mod. 607. *per Holt* C. J. Cunniffe v. Sefton, 2 East, 183. Crosby v. Percy, 1 Taunt. 365. Parker v. Hoskins, 2 Taunt. 223. Wardel v. Fermor, 2 Campb. 282. (h) Prince v. Blackburn, *ubi supra*, Adam v. Kerr, *ubi supra*. Wallis v. Delancey, *ubi supra*. Lord Kenyon *contra*.

But, if there is no subscribing witness on the deed, or (which is in fact the same) the subscribing witness denies having any knowledge of the transaction, (i) or the name of a fictitious person is inserted; (k) or, if the attesting witness was interested at the time of the execution of the deed, and continues so at the time of the trial; (l) or, if the person, who has put his name as subscribing witness, did so without the knowledge or consent of the parties; (m) or, if, after diligent inquiry, nothing can be heard of the subscribing witness, so that he can neither be produced himself, nor his hand-writing proved; or, if at the time of the execution he was of such an infamous character, as to make him incompetent to give evidence: in all these cases, the execution may be proved by proof of the hand-writing of the party to the deed; or by any person present at the execution, though his name is not indorsed as witness; (n) or by proof of an admission of the party himself, that he executed the deed. The proof of the party's hand-writing is a sufficient ground for presuming, that the deed was, as it purports to be, sealed and delivered. (o)

4 Taunt. 220. (n) Com. Dig. tit. Evidence, (B. 3.) (o) Grellier v. Neale, *ubi supra*. Burrowes v. Lock, 10 Ves. 474.

In the case of a deed executed in the *East Indies*, and attested by a witness resident there, the stat. 26 G. 3. c. 57. § 38. enacts, "that it shall be sufficient to prove the hand-writing of the party to the deed, and of the attesting witness, and that the witness is resident in the *East Indies*."

Signing was not an essential part of a deed at common law; though the legislature has since made it as necessary as sealing. But even now, that all deeds are signed, the old form of attestation obtains, *viz.* "sealed and delivered by the party in the presence of us;" to which memorandum the witnesses set their names. It has been lately questioned, whether where a power is required to be executed by a deed signed and attested by witnesses, it is well executed by a deed with this old form of attestation, in which the fact of signature is omitted. And the Court

(a) Wood v. Drury, 1 Ld. Raym. 744. (b) Vin. Abr. tit. Evidence, (T. b. 48.) pl. 12. Burdett v. Taylor, 9 Ves. 381. (c) Jones v. Mason, 2 Str. 833. (d) Goss v. Kelly, 371. (e) Coghlan v. Kerr, 1 Bos. & Pull. 361. (f) Prince v. Blackburn, 2 East, 250. (g) Anon. 12 Mod. 607. *per Holt* C. J. Cunniffe v. Sefton, 2 East, 183. Crosby v. Percy, 1 Taunt. 365. Parker v. Hoskins, 2 Taunt. 223. Wardel v. Fermor, 2 Campb. 282. (h) Prince v. Blackburn, *ubi supra*, Adam v. Kerr, *ubi supra*. Wallis v. Delancey, *ubi supra*. Lord Kenyon *contra*. Ph. Ev. 363. (i) Grellier v. Neale, Peake's N. P. C. 145. Ley v. Ballard, 3 Esp. N. P. C. 173. Fitzgerald v. Elsee, 2 Campb. 635. Lemon v. Dean, *Id.* 636. n. See Phipps v. Parker, 1 Campb. 412. *contra*. (k) Fassett v. Brown, Peake's N. P. C. 23. (l) Swire v. Bell, *ubi supra*. (m) McCraw v. Gentry, 3 Campb. 232.

(a) Wright v. Wakeford,
4 Taunt. 213.
17 Ves. 454.
(b) Doe v.

Peach, 2 M. & S. 576. Wright v. Barlow,
3 M. & S. 512. See this question very ably discussed by Mr. Sugden in his Treatise of Powers, and see also his observations upon this act in the same book, p. 231 to 250. — The act though occasioned by the decisions

in Wright v. Wakeford and Doe v. Peach, yet treats the points as doubtful, and recognizes the established practice in these cases to be, to express the facts of sealing and delivery only in the memorandum of attestation.

McQueen v. Farquhar,
11 Ves. 467.

17 Ves. 457.

of Common Pleas, (a) *dissent*. Mansfield C. J., have holden that it is not, and their opinion has been adopted in two subsequent cases (b) by the Court of King's Bench. These decisions have induced the legislature to pass an act to amend the law in this respect; and by 54 G. 3. c. 168. it is enacted, "that every deed or other instrument *already made* with the intention to execute any power, authority, or trust, or to signify the consent or direction of any person, whose consent or direction might be necessary to be so signified, should (if duly signed and executed, and in other respects duly attested) be from the date thereof, and so as to establish derivative titles, if any, of the same validity and effect, and no other, at law and in equity, and proveable in like manner, as if a memorandum of attestation of signature, or being under hand, had been subscribed by the witness or witnesses thereto; and the attestation of the witness or witnesses thereto, expressing the fact of sealing, or of sealing and delivery, without expressing the fact of signing or any other form of attestation, shall not exclude the proof or the presumption of signature."

Where the deed executing the power was required to be signed in the presence of witnesses, but they were not required to attest the signature, and the word "signed" was omitted in the attestation; but in the body of the deed actually executed, it was stated to be signed by the donee in the presence of the witnesses, according to the power; Lord Eldon said, that upon the question, whether after execution it ought to be taken that the donee did sign in the presence of the witnesses attesting the sealing and delivering, there would be a miscarriage in a judge directing a jury, if that fact was found, not to presume that the deed was signed in the presence of the same witnesses as it professed to be. That attestation therefore, he added, was good. And His Lordship has since observed, that he thought this case rightly decided. That was the case of powers to be executed in the presence of witnesses; and, in one instance, with this farther requisite expressed, to be attested by witnesses. The power, actually exercised by the deed, upon which the question arose, was to be exercised in the presence of witnesses. The deed, said to be an execution of the power upon the face of it, was expressed to be executed in the presence of the witnesses; and so far from determining, that attestation of the sealing was attestation of the signing, I merely said, added His Lordship, there would be a miscarriage in a judge, if he did not direct the jury to presume, that the deed was signed, as it professed to be, on the face of it, in the presence of the witnesses, who attested the sealing and delivery; a way of putting it, that so far from deciding, expressly avoided, the question, whether attestation of the sealing and delivery is to be taken as attestation of the signing also.

Although

Although sealing be essential to the validity of a deed, yet any seal may be used, and any number of persons may use the same seal, or one may seal for the rest with their consent, and the deed will be as binding as if every one had put his several seal. Perk. c. 2.
§ 134. Ball v. Dunsterville,
4 T. R. 313.

Where a bond, having been executed by *A.* and attested by one witness, was carried into an adjoining room, and shewn to *B.* who was desired to attest it also, which he accordingly did in the presence of *A.*, and it appeared that *B.* knew *A.*'s handwriting, and that *A.* knew he was acquainted with it, and that *B.* himself had acknowledged the instrument; it was holden that the whole might be considered as one transaction, and that there was sufficient proof of the execution. Parke v.
Mears, 2 Bos. & Pull. 217.
Ph. Ev. 361,
362. S. C.

So, where the subscribing witness to a deed being called, said, that she did not see it executed, but that the defendant brought it to her, and desired her to put her name to it as a subscribing witness, which she did; this was deemed sufficient proof of the execution. Grellier v.
Neale, Peake's
N. P. C. 146.

Witnesses are not to prove instruments by a general phrase; not merely to say that they were present at the execution, that they saw the party execute; but they must state circumstances, what actually passed, that the deed was sealed and delivered, or the will signed, published, and declared in their presence. Burrowes v.
Lock, 10 Ves.
470.

But to the above rule there are several exceptions.

First, if the deed be (*a*) forty years' old, it may be given in evidence, without any proof of the execution of it, for the witnesses cannot be supposed to live above forty years, and forty years is proof sufficient of a prescription; for the age of a man is no more than sixty years, and a man is supposed to be twenty years before he is of age sufficient to understand the nature of right and wrong, and the general forms of contracting; so that after forty years, the witness must be supposed to be dead; (*b*) and therefore since no person living can be supposed to be coeval with such deeds, therefore they may be offered in evidence without proof. Trin. Ass. in
Kent, 1700.
Tri. per Pais,
339. 346. L. E.
101. pl. 40.
Sid. 146. Co.
Litt. 6. b.
Keb. 877.
2 Keb. 826.
Skin. 239.
2 Mod. 320.
323. 3 Salk.
154. See Lev.
25. (a) Now

reduced to thirty years. (*b*) || Suppose the witness to be alive, and in a state to be produced, *Fates J.* would not let him be called, considering the limit as fixed beyond which proof of execution would not be required. *March v. Cobnett*, 2 Esp. N. P. C. 65. But *Perrott B.* held that he must be produced, the rule being founded only on a presumption, which of course must fall, when the contrary is made to appear. *Rees v. Mansel*, Selw. N. P. 492. || An ancient writing (not being a deed) proved to have been found amongst deeds and muniments of an estate, may be given in evidence, although the due making of it cannot be ascertained; for it is difficult to develop ancient facts, and finding these instruments and memorials in such a place, affords a presumption, that they were fairly obtained, and preserved for use. *Tr. per Pais*, 370. || *Forbes v. Wall*, 1 Esp. N. P. C. 278. Some account ought to be given of the place where they were found. *Bull. N. P.* 255. But this rather applies to those cases, where the character and authenticity of old writings depend in some degree on the nature of the place or custody in which they have been kept; for where the old instrument purports to belong to the party producing it in evidence, it will be admitted without shewing where it has been kept. *R. v. Ryton*, 5 T. R. 259. *R. v. Netherthong*, 2 M. & S. 337, 338. || But an admittance into a tenement, holden of a manor, purporting to be under the steward's hand, though above forty years old, was rejected in evidence, because they could not prove the steward's hand. *Fort.* 43. to be produced,
which proof of
L. E.
Co.
b.
877.
826.
239.
320.
Salk.
Lev.
Now

Ass. 1702. *per*
Hasset.

But it has been ruled, that if a deed be forty years old, and possession have not gone along with the deed, some account of the deed ought to be given, because the presumption fails that was raised in behalf of such deeds, where there is no possession; for it is no more than old parchment, if no account of its execution be given.

Trin. Ass.
1700, in Kent.

But, if there be any blemish in the deed, by rasure or interlineation, then the deed ought to be proved, though it be forty years old: if the witnesses be living, it ought to be proved by the witnesses; but, if the witnesses be dead, the hands of the witnesses should be proved; for though there must be (as is said) a presumption in favour of the deed when it was worn out of the memory of the witnesses, yet that presumption is encountered by another presumption from the blemishes of the deed itself, and therefore the credit of the deed ought to be restored by the proof of the execution of it.

Chattle and
Pound, Hil.
Ass. 1701, in
Kent.

So that if the deed imports a fraud, as, where a man conveys a reversion to one, and afterwards conveys it to another, and the second purchaser proves his title, there, the first deed must be proved, though forty years old; for the presumption from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed to be guilty of so manifest a fraud; and therefore here also the credit of the first deed must be restored, by proving a fair execution of it.

Ro. Rep. 132.
Tri. *per* Pais,
440. 455.

If a deed of feoffment be proved, and the possession have gone along with the deed, there, the livery shall be presumed, though it be not proved; for when there has been possession in the manner which the deed sets forth, it founds a very strong presumption, that such possession was delivered in that manner; for that there should be a contract to transfer possession, and that possession should go according to that contract, are such concurring circumstances as cannot be accounted for, unless the possession was transferred according to the contract, and, consequently, the livery and seisin must be supposed by the jury.

But, if possession have not gone along with the deed, then the livery must be proved upon the feoffment; for since the livery is to give the possession on the deed, where no possession is, the presumption is, that there was no livery, and, consequently, the livery must be proved to encounter that presumption.

Ro. Rep. 132.
Tri. *per* Pais,
440.

But, if the jury find the deed of feoffment, and that the possession hath gone along with the deed, yet the judges, upon such finding, cannot adjudge it a good conveyance, for the jury are judges of the fact, and what is probable, and what is improbable; the court are only judges of what is law, and have nothing to do with any probabilities of fact; therefore it is the jury only that are to make the conclusions and deductions as to the truth of the fact; the court cannot make any conclusions or deductions of the truth of facts, if they are not drawn by necessary consequence out of the words of the verdict; for to the court the rule is *De non apparentibus et non existentibus eadem est ratio*; there-

fore they cannot conclude that there was a lawful conveyance, unless the jury find the delivery of the deed.

A deed of feoffment without livery may be given in evidence as a release; for where the party is in possession already, the deed only will be a sufficient contract to transfer a right. Tri. per Pais, 454.

Secondly, A deed may be given in evidence, on a rule of court without proving it; for the consent is conclusive, and the jury are only to try such facts as are in issue between the parties. 1 Sid. 269.
Tri. per Pais, 446.

It has been holden, that a deed which comes out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and is to be received in evidence without proof of the execution; for the other party not knowing who are the subscribing witnesses, cannot come prepared at the trial to prove the execution. ¶ But this decision has been overruled. In general, an instrument produced at the trial by one party in consequence of notice from the other party must be proved by the party calling for it by the subscribing witnesses, as in ordinary cases. It is only, where the party out of whose possession the instrument comes, takes a beneficial interest under it, that the necessity of proof is dispensed with (a). The objection that the party calling for the instrument, is ignorant of the names of the attesting witnesses, and therefore cannot come prepared to prove it, may be obviated by procuring a rule of court, or a judge's order, to inspect the instrument before the trial. (b)¶ Rex v. Inhabitants of Middlezoy, 2 T. R. 41, and the cases there cited.
Gordon v. Stereten, 8 East, 548.
Wetherston v. Edington, 2 Campb. 94.
(a) Pearce v. Hooper, 3 Taunt. 62.
(b) Cooke v. Stocks, 1 Tidd's Pr. 431. 4th Ed.
Blakey v. Porter,

1 Taunt. 386. In this last case, the plaintiff had commenced an action of covenant on an indenture of assignment of lease, one part only of which had been executed, and that was in the hands of the defendant; and the Court of Common Pleas granted the plaintiff a rule for reading and taking a copy of that part. So, Bateman v. Phillips, 4 Taunt. 157. King v. King, *Id.* 666. But these decisions have been considered as supportable, (if they can be supported at all,) only upon this principle, that the person called upon for the production of the instrument held it as a trustee for the other party; a principle, however, which would seem not to apply to the case of Bateman v. Phillips. And therefore, where an instrument was executed by two parties, each keeping one part, and the one was lost, the Court of C. P. refused to compel the other party to produce his part, in order to support an action against him on the instrument. Street v. Brown, 1 Marsh. 610.

As to Rasure, Interlineation, and Addition.

Formerly, if there were any rasure or interlineation, the judges determined upon the profert of the deed and view of it, whether the deed was good or not; for the very contrivance of those solemn contracts, such as deeds are, and their preference to verbal contracts, was founded on this, that the intent of the parties is there manifestly settled in express words, and notoriously authenticated, and, there, such contracts are totally referred to the court, if the truth of the solemnities, *viz.* of the seal, and of the delivery, be admitted, and therefore must be dissolved by a contract of equal solemnity, because how they are destroyed and avoided, must appear to the same judges that are by the law to determine of them. From hence also it came to pass, that if a deed was razed or interlined, they adjudged it a void deed, because it did not certainly appear to the court, who 10 Co. 92.

were judges of those solemn contracts, whether the mind of the party was contained in such a mangled contract or not.

Ibid.

But, as the manner of conveyancing swelled from short little deeds to large and voluminous ones, so vast room was left to the misprisions of the clerks, that must be amended, or the deed with greater labour and expence of time written over again; from thence the court thought it necessary not to discharge the deeds razed or interlined as void, upon the demurrer; but they referred to the jury upon the issue of *non est factum*, whether the deed, thus razed and interlined, was the individual contract delivered by the parties.

11 Co. 27.
2 Str. 1160.

If a deed be altered by a stranger without the consent of the obligee, in a point not material, this doth not avoid the deed; but otherwise it is, if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party that sealed and delivered it, when there is any material difference from the sense of the contract. But, if the contract contain the sense of the parties, the witnesses may well swear it to be their act; for an immaterial alteration doth not change the deed, and, consequently, the witnesses may attest that very deed without danger of perjury.

11 Co. 27.

But, if the deed be altered by the party himself, though in a point not material, yet it will avoid the deed; for when the party himself makes any alteration in his own deed, it discharges the contract; for the contract hath the whole form from the words of the obligor: now when the obligee undertakes to supply it with new words, and to alter those the party hath fixed upon, this is (according to the rules of law, which takes every man's own act most strongly against himself,) a new making and a new framing of the contract, and for a man to contract with himself is utterly void and ineffectual.

Another reason of this interpretation of law might be, to add a sanction to deeds, that persons who had them in their custody, might not alter them for fear of destroying their own securities.

11 Co. 28. b.

If there be several covenants in the deed, and one of them be altered, this destroys the whole deed; for the deed is but a complication of all the covenants, so that the deed, which is the whole, cannot be the same, unless every covenant of which it consists be the same also.

2 Ro. Abr. 29.
(a) *Quere*, whether that be not afterwards vacated by an interlineation?

All interests, that pass without deed, would pass, though the deed was afterwards interlined or altered (a): yet the interest once vested did not thereby return back again, since the deed is not absolutely necessary to the passing of the interest, but is only evidence that it was passed. But by the statute, it is necessary to shew a writing under the hands of the parties.

Ro. Rep. 39,
40. 2 Ro.
Abr. 29.

If there be blanks left in an obligation in places material, and filled up afterwards by the assent of the parties, yet the obligation is void; for where there is a material part of the contract added after the sealing and delivery, it is not the same contract that was sealed and delivered. But, if there be a blank left in an obligation, and filled up afterwards with something immaterial, this doth not avoid the contract.

As,

As, if a bond was made to *C.* with a blank left for Christian names and addition, which is afterwards filled up by the assent of the parties, yet this is a void bond. Ro. Rep. 39, 40.

But, if any material part of the contract be added after sealing and delivery, yet if it is in effect the same contract, it shall not be avoided by these additions. Zouch v. Clay, Vent. 185.

As, if *A.* with a blank left after his name, be bound to *B.* and after *C.* be added as a joint obligor, yet this does not avoid the bond, because this does not alter the contract of *A.*, for he was bound to pay the whole money without such addition. *Ibid.* 2 Lev. 35. S. C. but puts it upon the consent of all the parties. Cro. Eliz. 627.

Where a thing lies in livery, a deed formerly sealed may be given in evidence relating to it, though the seal be afterwards torn off; for the interest passed by the act of livery that invests the party with the possession, and the possession that was once transferred by the livery doth not return back again, though the deed was cancelled; and the deed is only an evidence of transferring possession, for by the act of livery the possession passes, and the deed without the seal (the livery being indorsed) is an evidence of such possession. So, if the conveyance was made by lease and release, the uses were once executed by the statute, and do not return back again by cancelling the deed. Palm. 403. Mod. 11. Vent. 14. S. C. 2 Keb. 556. S. C. But see now the statute of frauds,

But, if a man shews a title to a thing lying in grant, there he fails, if the seal be torn off from his deed; for a man cannot shew a title to a thing lying in solemn agreement, but by solemn agreement, and there can be no solemn agreement without a seal; so that possession (*a*) alone is no good title, since the thing itself doth not lie in possession but in agreement; therefore a man cannot claim a title to a water-course, but by deed and under seal. 3 Bulst. 79.

(a) But from possession a deed may be presumed.

Where a contract creates an obligation, it cannot be pleaded, if the seal be taken off; for the seal is the essential part of the deed, and without a seal it is no longer a deed, nor to be pleaded, nor given in evidence as a deed, unless in the case above mentioned, where the interest vests, though the deed hath no continuance: but, where the deed is necessary to be shewn, in order to acquire the interest, there, it must have the essentials of a deed, when it is shewn as such. 1 Ro. Rep. 39, 40. 2 Bulst. 246. 2 Ro. Abr. 28, 29, 30.

If an obligation were sealed when pleaded, and after issue joined the seal be torn off, yet shall the plaintiff recover his debt, because the deed when profered to the court was in the custody of the law, and therefore the law ought to defend it: besides, the truth of the plea, which is to be proved, must have relation to the time when the issue was taken, and at the time of the issue it had the essentials of a good deed, and therefore that is sufficient to maintain the issue. Owen, 8 Cro. Eliz. 120. 5 Co. 119. b. 2 Bulst. 247. Dyer, 59. pl. 12, 13. Co. Litt. 283. a. Doct. Placit. 262. Ro. Rep. 39, 40. 2 Ro. Abr. 29.

Also, if the seal of a deed be broken off in court, it shall there be enrolled for the benefit of the parties, because where any

any thing is impaired under the custody of the law, it shall be restored by the benignity of the law as far as possible.

Noy, 112.

If there be a joint contract or obligation, and one of the obligor's seals be torn off, it destroys the obligation, because they are both bound as one person, and if one be discharged, the other cannot stand obliged.

260. 262, 263. Poph. 161.

5 Co. 23. a.

But, if two persons be bound severally, there, if the seal of one of the obligors be broken off, yet the obligation continues in the other, because there are several contractors, and several contracts, and therefore by destroying the obligation of one of them, the obligation of the other is not taken away.

408. 546. 576.

11 Co. 28. b.

Doct. Placit.

260. 262, 263.

March. 29.

2 Show. 29.

But, if two men are bound jointly and severally, and the seal of one of them is torn off, this is a discharge of the other, for the manner of the obligation is discharged by the act of the obligee, and therefore that is (according to the rule of law, that construes every man's own act most strongly against himself) a discharge of the obligation itself. Besides, since both are jointly bound as one person, the discharge of one of them is a discharge of both; a satisfaction is supposed by the very cancelling of it to be given for the whole debt, and no obligation can rest upon the other.]

(G) Whether Parol Evidence is to be admitted to explain what appears on the Face of a Deed or Will.

5 Co. 68. a. b.

8 Co. 155. a.

Keilw. 49.

(a) For this

vide tit. Agree-

ments. (b) As

to records it

seems a gene-

ral rule, that

nothing can be

admitted, though

sworn by witnesses

of the best credit,

that contradicts

them; for being

things of the

greatest credit,

they can only be

questioned by

matters of equal

notoriety with

themselves. Ro.

Abr. 757. (c) *Vide*

Vern. 369.

IT seems to have been agreed as a general rule, even (a) before the statute of frauds and perjuries, that no parol evidence could be admitted to controul what appeared on the face of (b) a deed or will, not only from the danger of perjury, but from (c) a presumption, that whatever the parties at that time had in contemplation, was all reduced into writing.

2 Vern. 98.

387. 625.

(a) || It is true,

that a doctrine

of this sort,

that the court

might receive

evidence,

which they

thought, ac-

cording to the

strict rules of

law, ought not

to be received

as between the

parties, to give

a construction

to a written in-

strument that

is brought in

dispute, seems to be no more admissible by a court, than by a jury. In the several cases in *Vernon*, here referred to, the court refused to receive the evidence. 2 H. Bl. 524. ||

But this rule has received a relaxation, especially in the courts of equity, where a distinction has been taken between evidence that may be offered to a jury, and evidence to inform the conscience of the court, *viz.* that in the first case no such evidence should be admitted, because the jury might be inveigled thereby; but that in the second it could do no hurt, because the court were judges of the whole matter, and could distinguish what weight and stress ought to be laid on such evidence.

Also, to ascertain a fact, parol evidence hath been admitted to explain the intent of the testator: as, where the testator had two sons both named *John*, and he devised lands to his son *John* (a), here parol evidence was admitted, to shew which of his sons he meant; and it being proved, that one of his sons of that name had been absent several years beyond sea, and that the testator apprehended that he was dead, the devise was held good, and that the other should take; for without such evidence the will must be void. *Lord, 1. parol evidence admitted to shew which son ariseth from something de hors, some collateral matter out of the instrument itself. And as such ambiguity is made to appear by parol evidence, parol evidence must be admitted to explain it, as well as to raise it. See Bac. Max. Reg. 23.]* || So, where the devisor made one will in 1752, and another in 1756, without disposing of his personalty, or appointing executors by either; and by a codicil (reciting that *by his last will*, dated in 1752, he had made no disposition of his personalty,) disposed of it, and appointed executors; it was holden, that there was no latent ambiguity so as to let in parol evidence to shew that the testator intended by the codicil to confirm the will of 1756, and not to republish that of 1752. *Lord Walpole v. Earl Cholmondeley, 7 T.R. 138.* But a blank in a will for the devisee's name is an apparent ambiguity, and parol evidence cannot be admitted to shew what person's name the testator intended to insert. *Baylis v. Attorney General, 2 Atk. 239.* *Castledon v. Turner, 3 Atk. 257.* *Hunt v. Hort, 3 Br. Ch. Rep. 311.* But on a bequest to a person, whose surname was mentioned with a blank left for the christian name, the party who claimed the legacy, was allowed not only to prove acts of kindness and constant affection on the part of the deceased, but to shew further that the testator had said, "he would provide for him, and that he had left him something by his will." *Price v. Page, 4 Ves. 680.* And, where only one initial appeared in the will, (the bequest being to "Mrs. G." without any other description,) the Chancellour referred it to the Master, to receive evidence to shew who was the person intended to be described by that initial. *Abbot v. Massie, 3 Ves. 148.* ||

5 Co. 68: Lord Cheney's case. (a) [Here there is a latent ambiguity; the words themselves *prima facie* do not import an ambiguity; but the ambiguity

So, where *J. S.* devised all his household goods, as woollen, linen, pewter, and brass whatsoever, except a trunk under the chamber-window; and the question was, whether the parol proof of the person who drew the will should be admitted to explain these words; my Lord Keeper thought it might, notwithstanding the statute of frauds and perjuries; for here, it neither adds to, nor alters, the will, but only explains which of the meanings shall be taken; as, in case of a devise to son *John*, when the testator had two of the same name; and here the word *as* may be a restriction; or, if the following words be as particular instances, it may not restrain the word *whatsoever*; and he thought the words imported to carry all the household goods. And of that opinion was the Master of the Rolls; and the proof was read accordingly.

Abr. Eq. 230. Mich. 1705. Pendleton and Grant, 2 Vern. 517.

[So where *J. S.* being seised in fee of a real estate as heir on the part of his mother's mother, and being also seised in fee of a small estate as heir to his own father, devised all these lands to trustees and their heirs in trust to pay several annuities and charities; after payment of which he devised the residue of the rents and profits of the premises to his own right heirs of his mother's side for ever; and the question was, whether the heir of the mother's father, or the heir of the mother's mother was entitled to the residue of the rents and profits; parol evidence was admitted to shew, which heir of the mother's side was intended.

Harris v. Bishop of Lincoln, 2 P. Wms. 135.

Hodgson v.
Hodgson,
2 Vern. 593.
Pr. Ch. 229.
S. C.

Again, *R. H.* devised to the defendant several closes of the value of 60*l.* *per annum*, paying 100*l.* he owed to *J. S.*, and 100*l.* he owed by bond to one *Shaw*; and devised some small legacies, and gave all the rest of his personal estate to the plaintiffs, his nieces. It happened that the 100*l.* due on bond was not due to *Shaw*, but was the money of *Alice Beck*, then the wife of one *F.* By reason of this mistake, the devisee of the land refused to pay the 100*l.* The plaintiff examined *Harvey* who drew the will, and deposed that the testator declared, he meant the 100*l.* due to the person who married *Mrs. Beck* of *Lincoln*; and another witness deposed, that he meant the bond for which *C.* was bound, as his surety: Decreed for the plaintiff, first at the Rolls, and afterwards brought on upon a bill of review before the Lord Chancellor, and heard on the merits, and again decreed on the merits; his Lordship declaring he saw no hurt in admitting collateral evidence to make certain the person or the thing described. And Lord *Thurlow* in a late case (*a*) said, it was a clear proposition, that every evidence as to the description of the subject the testator has described, must be admitted. As, in the case of a specifick legacy, you must hear evidence concerning the subject to which the will applies, in order to see whether the description applies aptly or not.

(a) *Fonnerau*
v. Poyntz,
1 Br. Ch. Rep.
477.

Cuthbert v.
Peacock,
2 Vern. 593.
Debeze v.
Man, 2 Br.
Ch. Rep. 165.
In Fowler v.

Fowler, 3 P. Wms. 354. Lord *Talbot* said, his opinion was against the admission of such evidence.

Henkle v.
Royal Ex-
change As-
surance
Company,

1 Ves. 317. *Baker v. Paine*, *Id.* 456. *South Sea Company v. D'Olliffe*, 2 Ves. 376. *Pitcairne v. Ogbourne*, *Ibid.* *Lady Shelburne v. Lord Inchiquin*, 1 Br. Ch. Ca. 338. *Harvey v. Harvey*, 2 Ch. Ca. 180. *Per Reynolds C. B.* in *Fitzgerald v. Lord Fauconberg*, Fitzg. 213. But in *Hardwood v. Wallis*, cited in 2 Ves. 195. parol evidence for this purpose was rejected. In that case, an estate was agreed to be settled prior to marriage on the intended husband for life; remainder to wife for life; remainder to the first, &c. son in tail-male; remainder to all and every the daughters of that marriage. Instructions were given to an attorney to draw the settlement, who drew it as far as the limitation to the sons in tail-male; where he stopped, and wrote, *then go on as in Pippen v. Ekins*; which was a precedent he delivered to his clerk to go on from that limitation, and was a right settlement on the issue male and daughters by that wife; but the clerk drew the settlement to all the daughters of the husband without restraining it to that marriage. It was executed with this mistake. The plaintiff was the only daughter of that marriage: the husband by a second wife left a son and four daughters, the defendants. It was insisted, that letting in the daughters of the second marriage would make the first wife a purchaser for them, or the children of other successive wives, to the destruction of the interest of her only child: the draft of the attorney was proved, and the settlement in *Pippen v. Ekins*. But the Master of the Rolls, Sir *William Fortescue*, would not admit the parol evidence of the attorney to be read; and held, that the other evidence would not do: that nothing appearing in writing under the hands of the parties, the settlement could not be altered. — Evidence of this kind, it must be observed, seems to be more readily admitted to rebut an equity, than to obtain a decree upon. *Legal v. Miller*, 2 Ves. 299. *Joynes v. Statham*, 3 Atk. 388. *Eden v. Lord Bute*, 7 Br. P. C. 204. 445.

So,

So, parol evidence is admissible to shew, whether a thing be parcel or not of the estate demised by a deed. So, to shew that persons describing themselves in a certificate as officers of the parish at large, were the officers of the hamlet where the pauper was settled. In explanation of mercantile contracts it is every day's practice to resort to it.] (a)

Doe v. Burt,
T. R. 701.
Rex v. In-
habitants of
Sambourn,
3 T. R. 609.
Per Lord
Hardwicke in

Baker v. Paine, 1 Ves. 459. and *Blunt v. Cumyns*, 2 Ves. 331. (a) || It has been doubted whether this has not been carried too far. In the case of *Anderson v. Pitcher*, Lord Eldon C. J. is reported to have expressed himself to this effect: "It is now too late to say, that this warranty is not to be expounded with due regard to the usage of trade. Perhaps it is to be lamented, that in policies of insurance, parties should not be left to express their own meaning by the terms of the instrument. This seems to have been the opinion of that great judge, Lord Holt. It is true indeed, that Lord Mansfield, who may be considered as the establisher, if not as the author, of a great part of this law, expressed himself thus: "Wherever you render additional words necessary and multiply them, you also multiply doubts and criticisms. (*Lilly v. Ewer*, Dougl. 74.) Whether, however, it be not true that as much subtlety is raised by the application of usage to the construction of a contract, as by the introduction of additional words, might, if the matter were *res integra*, be reasonably questioned." ||

It has been held, that if A. purchases land in the name of B., A. may be admitted to read proofs, that he paid the purchase-money, and so make it a resulting trust, or trust by implication of law for himself.

Gascoigne
v. Thwing,
1 Vern. 366.
Bird v. Blo-
sett, 2 Vent.

361. *Ambrose v. Ambrose*, 1 P. Wms. 322. *Lloyd v. Spillet*, 2 Atk. 150. [Parol evidence offered to raise an equity, that a pension granted by the crown to the defendant absolutely and without any terms, was in trust for the plaintiff, the defendant by his answer, denying it, was rejected by Lord Thurlow, after much argument and long deliberation. *Lady Margaret Fordyce v. Willis*, 3 Br. Ch. Rep. 577.]

[So, it is competent to a party to aver other considerations than those expressed in a deed. || Thus, where the question was, whether the settlement had been gained by the purchase of an estate within the statute 9 G. 1. c. 7. § 5. parol evidence was admitted to shew, that the parties after having agreed upon twenty-eight pounds as the purchase money, (which was the consideration expressed in the deed of conveyance,) made a subsequent unwritten agreement before the execution of the deed, that the consideration should be thirty pounds, and that the latter sum was actually paid. And when fraud is imputed, the party, who complains of the fraud, may prove any consideration, however contrary to the averment in the deed, to shew the fraudulent nature of the transaction. || As, where the considerations mentioned in the deed were 10,000*l.* and *natural love and affection*, the Lords Commissioners of the Great Seal directed an issue to try, whether natural love and affection formed any part of the consideration, the estates which were conveyed by the deed being worth 30,000*l.* On an appeal this was confirmed; and the jury on the trial of this issue, finding that *natural love and affection* constituted no part of the consideration, the deed was afterwards set aside by the Lord Chancellor.]

Rex v. In-
habitants of
Scammonden,
3 T. R. 474.
cited *per Cur.*
in 6 Ves.
337. n. *Fil-*
mer v. Gott,
7 Br. P. C. 70.
But in *Clark-*
son v. Hanway,
2 P. Wms. 203.
it was holden,
that the
grantee could
not give parol
evidence to
prove blood
and kindred
to have been
the consider-
ation of a
conveyance,
the consider-
ation ex-
pressed in the
deed being an

annuity to be paid to the grantor. And in *Peacock v. Monk*, 1 Ves. 128. Lord Hardwicke said, "Where any consideration is mentioned, as of love and affection only, if it is not said also, and for other considerations, you cannot enter into proof of any other: the reason is,

because

because it would be contrary to the deed; for when the deed says, it is in consideration of such a particular thing, that imports the whole consideration, and is negative to any other. It is otherwise, where there is no consideration at all in the deed." || See also 2 Sch. & Lefr. 501. But in some particular cases within the statute of frauds, the consideration must be stated in the written memorandum, and if it is not, the defect cannot be supplied by parol evidence. *Wain v. Wartlers*, 5 East, 10. See as to this case, *Stadt v. Lill*, 9 East, 348. *Ex parte Minet*, 14 Ves. 190. *Ex parte Gardom*, 15 Ves. 287. *Bateman v. Phillips*, 15 East, 272. *Egerton v. Matthews*. 6 East, 307.||

R. v. Mettinglen, 2 T. R. 212. *R. v. Olney*, 1 M. & S. 387.

|| So, where the question was, whether a person had gained a settlement under 9 G. 1. c. 7. § 5. evidence was admitted to shew, that less than thirty pounds was the consideration, though the deed of conveyance expressed a larger sum; for that act says, that no person shall gain a settlement by virtue of any purchase, unless the consideration for such purchase shall amount to the sum of thirty pounds *bonâ fide paid*.

Small v. Allen, 8 T. R. 147.

So, for the purpose of setting aside a will on the ground of fraud, parol evidence may be given of what passed at the time of the testator's signing, and what he said; as, when it was proved, that the testator at the time of the execution, asked, whether the contents of the will were the same with those of a former will, to which he was answered in the affirmative, when in fact they were different.||

Thomas v. Thomas, 6 T. R. 671. *Beaumont v. Fell*, 2 P. Wms. 141.

[So, parol evidence may be admitted to shew that at the time of making a will, the deviser gave instructions to insert the name of *A.* in it, when the attorney inserted that of *B.* by mistake. But parol evidence of declarations made by the testator before the making of the will cannot be received to contradict it.

Hill v. Wigget, 2 Vern. 547. *So Towers v. Moor*, *Id.* 98.

An entry in the steward's book, and parol proof by the foreman of a jury was admitted as good evidence, to shew that a feme covert surrendered her whole estate, although the surrender upon the roll, and the admission thereon, was but of a moiety.]

Ep. of Meath, v. *Ld. Belmore*, 1 Wils. 215.

|| So, if a bishop's register were to be produced in evidence for the purpose of shewing a presentation by a patron, under whom the plaintiff claims, and a blank should appear in the place where the patron's name is usually inserted, the presentation might be proved in some other way.||

To this purpose are the cases in Vern. 473. *Foster and Munt*, *Chan. Ca.* 19. b. *Crompton and North*, 2 Vern. 99. *Pring and Pring*, 2 Vern. 648. *Lady*

Granville and Duchess of Beaufort, 2 Vern. 736. [*Batchelor and Searl*, *Eq. Ca.* Abr. 246. *S. C.* *Gilb. Eq. Rep. S. C.* *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 210. *Petit v. Smith*, 1 P. Wms. 7. *Brassbridge v. Woodroffe*, 2 Atk. 68. *Lake v. Lake*, 1 Wils. 313. *Ambl.* 126. *S. C.* But in *Blinkhorne v. Feast*, 2 Ves. 28. Oct. 1750. Lord *Hardwicke* expresses himself to be very tender in admitting parol evidence in cases of this kind; and it should

should be restricted to what passed at the time of making the will. *Nourse v. Finch*, 1 Ves. jun. 358. And *Lake v. Lake*, Nov. 1751, is the last case (in print) which has been decided since that time on parol evidence.]

So, where the Earl of *Gainsborough* made his will, and thereby devised several legacies, and charged his real estate with the payment of them and his debts, and devised his estate, so charged, to the defendant, his nephew, and made the plaintiff, his wife, executrix; and the bill was brought to have the personal estate discharged from the debts and legacies, suggesting that the creditors threatened to come upon and exhaust the personal estate; and that it was the intent of the testator that she should have the personal estate clear to herself, and that the directions for making the will were so; but that, either by the mistake or contrivance of the person who drew the will, it was not so expressed; and on demurrer, because no such averment could be admitted against a will in writing, the demurrer was over-ruled; and it was held by *Ravelin*son and *Hutchins*, that though such an averment could not be admitted where it was to make the party a title, yet, where it was only to rebut an equity, as in this case, it might.

Countess and Earl of *Gainsborough*,
2 Vern. 252.
Abr. Eq. 230.
S.C. and affirmed in the House of Lords.

So, where one not of kin, but a stranger, was made executor, and had considerable legacies given him, although it was decreed by Sir *Peter King*, in the mayor's court, in favour of the testator's brothers, that the surplus should be distributed; yet, upon appeal to the House of Peers, that decree was reversed, not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will; and the proof being full as to the testator's frequent declarations, that his executor, though a stranger, should have the surplus, it was decreed accordingly.

Abr. Eq. 245.
Littlebury and Buckley, affirmed in the House of Lords.

[And as parol evidence is admissible in favour of the executor to shew no resulting trust for the next of kin, so it hath also been admitted in favour of the next of kin, to take off the effect of the parol evidence adduced by the executor. And it seems from some cases (*a*) that it may be read by the next of kin originally and in the first instance.

Bishop of *Cloyne v. Young*, 2 Ves. 95.
Coote v. Bond, 2 Br. Ch. Rep. 526.
(*a*) *Fane v. Fane*, 1 Vern.

30. *Rackfield v. Careless*, 2 P. Wms. 158.

Where a testator gave legacies of the same amount in two different instruments, parol evidence was admitted to shew that he intended them to be accumulative.

Coote v. Boyd, 2 Br. Ch. Rep. 522.

Where a fine is levied, if no uses are declared, the resulting uses shall be to the conusor, but parol evidence is admissible to rebut the presumption of such resulting uses.]

Roe v. Popham, Dougl. 24.

But, notwithstanding these cases, the courts have been very unwilling to admit of parol evidence in relation to any thing that appears on the face of a will; and it is certain, that too much caution cannot well be used in this particular, especially when it is considered that the statute of frauds and perjuries, which was made to prevent perjury, contrariety of evidence and

Vide 2 Vern. 98. 337. 625. and *Salk*. 234. 2 *Ld. Raym.* 831. where, in the case of *Cole and Raw-*

uncertainty,

linson, it is laid down by my Lord Chief Justice *Holt*, that the testator's intent must be collected from the words of the will, and not from his circumstances, or any matters *dehors*, and that to travel into the affairs of the testator, would render property precarious, and introduce uncertainty and confusion in the law itself.

Selwin and Brown, 21st March 1734, *in domo procerum*. Note: This cause was first heard before his Honour the Master of the Rolls, who admitted the parol evidence, and on the strength thereof decreed, that the 3000*l.* should not be taken as part of the surplus of the testator's personal estate; but that it was extinguished for the benefit of the obligee, and accordingly ordered the bond to be cancelled; but this decree was reversed by my Lord Chancellor, though he admitted the parol proof to be read, as not thinking the testimony of a single witness, according to the circumstances of this case, sufficient to control what appeared on the face of the will. Ca. temp. Talb. 240. S. C. 4 Br. P. C. 179. S. C. (a) For this *vide* Yelv. 160. Plow. 186. a. Co. Litt. 264. 8 Co. 136. a. Cro. Eliz. 373. Hob. 10. Leon. 320.

Hence, in a late case in the House of Lords, where the testator devised several legacies, and amongst the rest gave considerable legacies to his two executors, to whom also he devised the surplus of his estate; and there being a debt of 3000*l.* due by bond to the testator from one of the executors, he insisted, that, there being sufficient assets to satisfy all the legacies, this 3000*l.* should not be brought into the surplus of the testator's estate, but that the same was extinguished for his benefit, by his being made co-executor; and that though the surplus of the estate was devised to them both, yet that this debt could not be taken to be part of that surplus, being before extinguished; and, by the evidence of the person who drew the will, fully proved, that this was the testator's intention; which evidence, it was urged, ought to be admitted, being only to rebut an equity, and oust an implication of law arising from the notions of the courts of equity, which revives the debt in these cases, and gives equal benefit to both the executors; but the lords refused going into this parol evidence, and decreed that the 3000*l.* should be taken as part of the surplus of the testator's personal estate, which both the executors were equally entitled unto. For though in some books the testator's making a debtor executor is said to be an extinguishment of the debt, because an executor cannot sue himself; yet it was never doubted, but that such a debt remained assets to satisfy other creditors. Also, it has been (a) resolved to be assets to satisfy legacies. And this devise of the surplus and residue of the testator's estate being as much a legacy, and as well recoverable in the spiritual court as any particular legacy, it was but fitting, that since the courts of equity claim now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature, that there should be the same measure of justice in both these courts.

Ulrich v. Litchfield, 2 Atk. 372.

[A testatrix bequeathed her real and personal estate to *E. T.* and *J. U.* equally between them for life; and upon the death of *E. T.* she gave the whole estate to *J. U.* in tail general, and for want of such issue to *R. U.* in fee, with a few pecuniary legacies; and charged the real estate with the payment of these legacies, if her personal estate should not be sufficient; and by her will declared,

clared, she gave all the rest and residue of her personal estate to her uncle *L. C.*'s three daughters; and particularly gave to Mrs. *S. L.* 10*l.* and made her executrix. For the residuary legatees it was insisted, that *rest* and *residue* of her personal estate must mean the residue after the particular legacies are paid off; and could not refer to the beginning of the will, because there is a fee devised, and, consequently, the testatrix has disposed of the whole: that parol evidence of the attorney who drew the will, that he had express directions to give the personal estate to the three daughters of *L. C.*, might be admitted in this case; that (to be sure) things which are quite contrary to the will shall not be proved by parol evidence, but that it may be allowed to explain words in a will, especially in this case, where it appears to be a mere blunder of the drawer: that this doth not intrench upon any of the rules with regard to parol evidence, but only clears up who was intended to have the personal estate, where the whole is devised to two different persons; and that it seems clearly to be a blunder in the drawer of the will, because the devise in the first part of it is proper only in the disposing of real estate. Lord *Hardwicke* — As to the question, whether I ought to admit parol evidence to explain the intention of the testator, I am of opinion, that this is not a case in which parol evidence can be read, and that it would be of dangerous consequence. It is true, there are some things here which would make a judge wish to admit it; but I must not follow my inclinations only; for I do not know that upon the construction of a will, courts of law or equity admit parol evidence, except in two cases: first, to ascertain the person, where there are two of the same name, or there has been a mistake in a christian or surname, and this upon absolute necessity; where if such evidence were not let in, it would make the will void. The other case is, with regard to resulting trusts relating to personal estate; where a man makes a will, and appoints an executor with a small legacy, and the next of kin claim the residue; in order to rebut the resulting trust for the next of kin, parol proof has been admitted to ascertain the person who was to have the residue. It is very true, cases may be cited, where Lord *Cowper* has admitted such evidence; for he went upon this ground, that it was by way of assisting his judgment in cases extremely dark and doubtful. I have the greatest deference for his judgment, but must own, I was never satisfied with this rule of Lord *Cowper*'s of admitting parol evidence in doubtful wills. Besides, he went further in the great case of *Strode* and *Russel*, in which there was an appeal to the House of Lords. Mr. Justice *Tracy*, who assisted Lord *Cowper* in that case, was at first of the same opinion with him; but on considering it more, he disavowed his former opinion, and was clear that it could not be admitted, and this alteration in his judgment was mentioned in the House of Lords. In the case of *Selwin* and *Brown*, I was of opinion that it ought to have been admitted; and even Lord *Talbot*, when he had heard the cause, had a remorse of judgment at the same time that

Dowset v. Sweet, Ambl.
175. *Bradwin v. Harpur, Id.* 374.

2 Vern. 621.

that he rejected the parol evidence: but the House of Lords refused it as of most mischievous consequence, and affirmed his decree.

Lowfield v.
Stoneham,
2 Str. 1261.

Upon *plenè administravit* pleaded, the question was, whether 1000*l.* received by the defendant was due to her in her own right, or as executrix to her husband, and, consequently, assets. It arose upon the following devise:—“I give to my loving brother “*John Stoneham* 1000*l.*, and in case of his death, to his wife “*Susanna*,” who was the defendant. It appeared that *John Stoneham* survived the testator: the plaintiff therefore insisted, that this legacy, which the defendant admitted that she had received, vested absolutely in him, and was assets in her hands. On the part of the defendant, it was offered to give in evidence, that the testator *in extremis* declared, he meant to give his brother only the interest of the 1000*l.*, and that the defendant should have the principal in case she survived him. The parol evidence was opposed by the plaintiff’s counsel, as being contradictory to the plain words of the will. And *Lee* Chief Justice, said, it could not be allowed, and that in the case of *Selwin* and *Brown*, the House of Lords had refused it, even where it was to support the legal interpretation of the will; and Lord *Hardwicke* about two years ago held it in the same manner in the case of the Earl of *Inchiquin* and *O’Brien*.

Meres v. An-
sell, 3 Wils.
275. Preston
v. Merceau,
2 Bl. Rep.
1249.

Although parol evidence may be received to explain, yet it can never be admitted to annul or substantially to vary a written instrument. An action on the case was brought for the use and occupation of a house, of which, it was agreed in writing, that a lease should be let by *Christiana Preston* to *Abraham Gamage* for twenty-one years, at 26*l.* *per ann.* to commence from *Michaelmas* then next. *Gamage* died and made *Merceau* his executor, who paid 26*l.* into court for one year’s rent. On the trial, the plaintiff offered to shew by parol evidence, that besides the 26*l.* *per ann.* the defendant had agreed to pay 2*l.* 12*s.* 6*d.* a year, being the ground-rent of the premises to the ground-landlord; but no evidence was offered of the actual payment of such ground-rent during the testator’s life; without which *De Grey* Chief Justice, thought such parol evidence inadmissible, and nonsuited the plaintiff. On a motion to set aside this nonsuit, it was alleged, that this was evidence not to alter or vary, but to explain the agreement; that this was not a solemn deed or will, but a mere executory act; and had a bill in Chancery been brought to carry it into execution, parol evidence would have been admitted to prove the agreement to pay the ground-rent. For in *Joynes v. Statham*, 3 Atk. 388. parol evidence was admitted to shew, that the agreement for a lease at 9*l.* a year was to be clear of taxes. But by *Blackstone* J. I am clearly of opinion that the Lord Chief Justice did right in rejecting this evidence. Courts should be very cautious in admitting any evidence to supply or explain written agreements; else the statute of frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which

that

that statute has suppressed in respect to the principal object. It never ought to be suffered so as to contradict or explain away an explicit agreement, for that is in effect to vary it. Here is a positive agreement that the tenant shall pay 26*l.* Shall we admit proof that this means 28*l.* 12*s.* 6*d.*? What is it to the tenant to whom the rent is to be paid, so as he is obliged to pay more than his contract expresses? We can neither alter the rent nor the term, the two things expressed in this agreement. With respect to collateral matters, it might be otherwise (a). He might shew who is to put the house in repair, or the like, concerning which nothing is said; but he cannot by parol evidence shorten the term to fourteen years, or extend it to twenty-five years, or make the rent other than 26*l.* *per ann.* The case in *Atkins* is of a mere executory act, in which the master was to settle the proper covenants, and therefore had a right to inquire who was to pay the taxes. Besides, there were strong suggestions of fraud in making the written agreement, as one party could neither read nor write.

fact collateral to the written instrument, in order to explain the intention R. v. Laindon, 8 T. R. 379. See *Hope v. Atkins*, 1 Price, 143.||

||(a) *Qu.* and *vide Meres v. Ansell, ubi supra.* Rich v. Jackson, 4 Br. Ch. Rep. 515. Powell v. Edmunds, 12 East, 6. But parol evidence has been admitted to ascertain a of the parties.

In a debt upon a bond payable at a certain day, the defendant pleaded, that by agreement between the defendant and the plaintiff's testator, the bond only stood as an indemnity. To this plea the plaintiff demurred, and the question was, whether the agreement pleaded could be given in evidence, contrary to the express tenor of the bond, purporting to be absolute, for payment on the day. The plaintiff contended, that the office of parol evidence extended no farther than to explain a deed consistently with its general purport, and by no means to change the nature of the special obligation; and that even on a will, the uncertainty to be removed by evidence must arise from something extrinsic to the instrument. The court agreed the plea to be bad, and the objection decisive against admitting collateral evidence to change the nature of the deed.

Mease v. Mease, Cowp. 47.

In no case can parol evidence of a parol communication between the parties be received, to add a term not inserted in the specifick agreement which they have executed; for what has passed between them may have been altered and shifted in a variety of ways, but what they have signed and sealed was fully settled. And my Lord *Thurlow* laid it down as a rule of law, which it was impossible to break in upon, that nothing could be added to the written agreement, unless in cases where there is a clear, subsequent, independent agreement varying the former, not where it is of matter passing at the same time with the written agreement.

Haynes v. Hare, 1 H. Bl. 664. Lord Portmore v. Morris, 2 Br. Ch. Rep. 249. Rich v. Jackson, 4 Br. Ch. Rep. 519. 6 Ves. 334. (n.) S. C.

An agreement in writing between a landlord and a person who was then his tenant under a lease which had some time to run, was signed by the landlord for a new lease to be granted at any time after the completion of repairs which were to be made by the tenant with all convenient speed; but blanks were left for the

Pym v. Blackburn, 3 Ves. 34.

the time of the commencement of such new lease. Upon the completion of the repairs the landlord tendered a lease to commence from that time; and upon the tenant's refusal to accept it, filed a bill for a specifick performance. The tenant admitted, by his answer, that he accepted the agreement, but insisted, that the new lease was not to commence before the old one was expired. The landlord offered evidence to shew, that it was the true meaning of the agreement that the new lease should commence from the completion of the repairs; but the Master of the Rolls rejected it.

The verbal declarations of an auctioneer cannot be admitted to contradict the printed conditions.]

Gunnis v.

Erhart,
1 H. Bl. 289.

||Jenkinson v. Pepyns, cited 6 Ves. 330. Higginson v. Clowes, 15 Ves. 516. Clowes v. Higginson, 1 Ves. and Beajn. 524. Powell v. Edmunds, 12 East, 6.||

(H) Of Presumptive Proof.

Gilb. L. E.
303.

[A PRESUMPTION, as defined by the *civilians*, is *conjectura ex certo signo proveniens que alio adducto pro veritate habetur*. For when the fact itself cannot be proved, that which comes nearest to the proof of the fact is, the proof of the circumstances, that necessarily or usually attend such a fact. And these are called presumptions, and not proofs, (a) for they stand instead of the proofs of the fact till the contrary be proved. (b)]

(a) ||So Mas-
cardus, *Pro-*
batio per

præsumptiones et conjecturas dicinon potest vera et propria probatio. (b) Presumptive proof is sufficient for this purpose; presumptions may be repelled by contrary presumptions. 1 Marshall, 68.||

Co. Litt. 6.

My Lord Coke distinguishes presumptive proof, by which he says juries are often induced, into, 1. Violent presumption, which amounts to *plena probatio*; as, if one be stabbed in a house, and a man be seen running out of it with a knife bloody, and none else in the house. 2. *Præsumptio probabilis*, which moves a little. 3. *Præsumptio levis*, which moves not at all.

Gilb. Ev. 142.

Co. Litt. 373.

(a.)

[If a man gives a receipt for the last rent, the former is presumed to be paid, because he is supposed first to receive and take in the debts of the longest standing; especially, if the receipt be in full of all demands, then it is plain there were no debts standing out. And if this be under hand and seal, the presumption is so violent, that the law admits of no proof to the contrary.]

Co. Litt. 6.

1 Ro. Rep. 132.

(c) Where

from their an-

tiquity things

receive a cre-

dit. Mod.

117. Lev. 25. & vide Palm. 427.

In case of a feoffment, if all the witnesses to the deed are dead, then a continual and quiet possession for any (c) length of time will make a strong or violent presumption, which stands for proof. And here the rule is, that *ex diuturnitate temporis omnia præsumuntur solemniter esse acta*.

¶ Possession is *prima facie* evidence of property; *id enim est cuiusque proprium, quo quisque fruitur atque utitur*. Possession of land for twenty years (a) is evidence of a fee; if evidence of a fee, it must be evidence of all that is necessary to support and perfect the title to an estate in fee. Long enjoyment (b) then under a title, which could only be by record, is strong evidence from which a jury may presume the record to have existed, whether it be a grant from the Crown within time of legal memory, or even (c) an act of parliament. But presumptions must have ground on which to stand (d); and to warrant a presumption from length of time, the possession must have been adverse, and under the eye or with the knowledge (e) of those who were immediately interested in resisting it, and capable of granting the right to it. For though the inference is drawn for the purpose and from a principle of quieting the possession, (f) not from a belief or supposition that the instrument inferred actually existed; yet there must be something from which the inference is to arise; there must be a potential existence on which to raise the presumption of an actual existence.

out any proof of a lease, this also is *prima facie* evidence for the plaintiff, and obliges the defendant to shew, that it is either a quit-rent, or that the term is unexpired. *Per curiam* in Harper v. Bröck, 5 Jac. Tr. 14 G. 3. 3 Wooddes. 333. (b) Mayor of Hull v. Horner, *Id.* 102. Crimes v. Smith, 12 Co. 4. Bedle v. Beard, *Id.* 5. 3 T. R. 157, 158. 7 T. R. 492. Roe v. Ireland, 11 East, 280. (c) Farcar's case, cited in Skinn. 78. (d) Goodtitle v. Duke of Chandois, 2 Burr. 1072. (e) Bradbury v. Grinsell, 2 Saund. 175. d. in notes. Daniel v. North, 11 East, 372. (f) Eldridge v. Knott, Cowp. 214.

Length of time may be used as evidence against the demand in a writ of right as well as in any inferior action; and an undisturbed adverse possession for forty years is sufficient to rebut the presumptive evidence of a seisin in fee in the person under whom the demandant claims, or, at least, from which to presume a conveyance of the estate to the tenant.

Length of time affords the same ground of presumption in the case of incorporeal, as of corporeal hereditaments: an uninterrupted enjoyment of an easement for twenty years or upwards is considered as evidence of a right of enjoyment; that is, as evidence from which a jury may presume a conveyance or agreement; as in an action on the case for obstructing light (g); or in the case of a market regularly kept above twenty years (h); or in the case of adverse enjoyment of a way for upwards of twenty years, without any thing to qualify or explain it (i). So, a faculty from the ordinary may be presumed from long uninterrupted usage of a pew in a church, claimed as appurtenant to a messuage. (k)

ibid. and 3 T. R. 159. (h) Holcroft v. Heel, 1 Bos. & Bull. 401. and (i) Campbell v. Wilson, 3 East, 294. Keymer v. Summers, Bull. N. P. 74. Carr v. Heaton, 3 Gwill. 1262. (k) Rogers v. Brooks, 1 T. R. 431. a. Griffith v. Matthews, 5 T. R. 296.

Adverse possession for a shorter period than twenty years, though it be not of itself, without other evidence to support the right, a sufficient ground on which to presume a grant, may yet be used as presumptive evidence of a licence. Indeed, for the

Cic. Ep. (a) Denn v. Barnard, Cowp. 595. Where a lease is proved, and it is also shewn, that the claimant hath received rent within twenty years, this infers a seisin in fee, and throws it upon the opposite party to shew that the lease is subsisting. And Eyre B. held, that where rent is received with-

Jayne v. Price, 1 Marshall, 68.

(g) Lewis v. Price, 2 Saund. by Williams, 175. a. Dougal v. Wilson, *Id. ibid.* Darwin v. Upton, 3 East, 301. 6 East, 215. 4 Burr. 1963. Doe v. Wilson, 11 East, 56.

the furtherance of justice, presumptions will be made in favour of a rightful possession, without regard to time. Where trustees *ought* to convey to the beneficial owner, it shall be presumed that they have conveyed accordingly (a); or, where the beneficial occupation of an estate by the possessor, (under an equitable title,) induces a probability, that there has been a conveyance of the legal estate to the person who is equitably entitled to it, a conveyance of the legal estate may be presumed (b). But such a presumption cannot be raised on a supposed breach of trust, or on a doubtful equity. (c)

- (a) *Per Lord Kenyon*,
7 T. R. 3. 49.
8 T. R. 122.
(b) *England v. Slade*,
4 T. R. 682.
(c) *Keene v. Deardon*,
8 East, 248.

The existence of a grant being inferred from usage, it follows as a corollary, that the same usage must determine the extent of it. We know the right only as we collect it from the enjoyment, and therefore the enjoyment must be the measure of it. Hence if a right to water is presumed from an enjoyment of twenty years, it can only be to so much as has been appropriated during that period (d). So, where a building, having been used for twenty years as a malt-house, was afterwards converted into a dwelling-house, it was holden to be entitled only to the same degree of light in its new state, which it had had in its former state (e), so that the owner of the adjoining ground might lawfully erect a wall which prevented the admission of sufficient light for domestic purposes, if what was still admitted were enough for the making of malt. ||

- (d) *Bealey v. Shaw*, 6 East, 208. (e) *Martin v. Goble*, 1 Campb. N. P. 320.
Chandler v. Thompson, 3 Campb. N. P. 80.

- Oswald v. Legh*, 1 T. R. 270. *Vide tit. Obligations*, (P.)

The circumstance of twenty years having elapsed without any demand made, is of itself a presumption that a bond has been paid. And satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption; as, an account settled between the parties in the intermediate time without any notice being taken of such a demand. || But the presumption from the lapse of twenty years may be repelled by proof of the obligor's recent admission of the debt; or of the payment of interest within that time, which is an acknowledgment that the principal sum was not then discharged.

- Jenner v. Tracy*, 3 P. Wms. 288. *Vide tit. Mortgage*, (E.) 6.
Reeks v. Postlethwaite,
Coop. 161. *Barrow v. Martin*, *Id.* 189.

Twenty years' possession by a mortgagee is a presumptive bar to a right of redemption; but its effect may be taken off by shewing the receipt of interest, that accounts have been kept, that it has been treated as a mortgage in a deed or will, and the like.

- Parishes of St. George and St. Margaret*, 1 Salk. 123. *Vide tit. Bastard*, (A.)

The fact of the birth of a child during a lawful marriage is *prima facie* evidence of its legitimacy. But, if there has been a divorce *a mensâ et thoro*, a child born afterwards (as a year after the sentence, &c.) is presumed to be illegitimate.

- Eldridge v. Knott*, *Cowp.* 214.

In the case of a quit-rent claimed by the lord of the manor, proof by the tenant, that no demand had been made upon him for

for near forty years, was not admitted to be a sufficient ground for presuming a release or extinguishment; and such presumption, it was said, could not be raised within less than fifty years, which is the period fixed by the statute of limitations. And by *Aston J.* "a presumption from mere length of time, which is to support a right, is very different from a presumption to defeat a right. Here, the presumption is to defeat the right of the lord to a small payment within the fifty years limited by the statute, and therefore upon mere length of time unaccompanied by other circumstances, such a limitation ought not to be altered, and another set up."¶

[If a person claiming a toll for passing over a highway, can shew that the liberty of passing over the soil, and the taking of a toll for such passage, are both immemorial, and that the soil and the tolls were before the time of legal memory in the same hands, though severed since, it will be presumed that the soil was originally granted to the publick in consideration of the tolls.]

Lord Pelham
v. Pickersgill,
1 T. R. 66c.

If a ship has been missing, and no intelligence received of her within a reasonable time after she sailed, it shall be presumed that she is lost.]

Green v.
Brown,
2 Str. 1199.
Newby v.

Read, Sittings after Mich. 3 Geo. 3.

Persons once in being shall be intended still living, if the contrary is not proved.

Throgmorton
v. Walton,
2 Ro. Rep. 461.
Wilson v. Hodges, 2 East, 312.

¶ But, where no account can be given of them, this presumption of the duration of life ceases at the expiration of seven years from the time they were last known to be living; a period which has been fixed by analogy to the statute of bigamy, 1. Ja. 1. c. 10., and also to the statute next following.

Doe v. Jesson,
6 East, 80. 85.
Hopewell v.
De Pinna,
2 Campb. N.P.
113.

By 19 C. 2. c. 6. reciting, "that divers lords of manors and others have used to grant estates by copy of court-roll for one, two, or more life or lives, according to the custom of their several manors; and have also granted estates by lease for one or more life or lives; or else for years determinable on one or more life or lives; and it hath often happened, that such person or persons for whose life or lives such estates have been granted, have gone beyond the seas, or so absented themselves for many years, that the lessors and reversioners cannot find out whether such person or persons be alive or dead, by reason whereof such lessors and reversioners have been held out of possession of their tenements for many years, after all the lives on which such estates depended are dead, in regard that the lessors and reversioners, when they have brought actions for the recovery of their tenements, have been put upon it to prove the death of their tenants, when it is almost impossible for them to discover the same: For remedy of which mischief so frequently happening to such lessors or reversioners, it is enacted, That if such person or persons, for whose life or lives such estates have been or shall be

[In ejectment the case was as follows: *John Gifford* was seised in fee of the lands in question, and made a lease in reversion to *Lewis Davells* for 99 years, to commence after the deaths, or other sooner determination of the estates of *John Davells*, the father, and *John Davells*, the son, who had then a

lease in possession for 99 years, if they or either of them so long lived. The plaintiff positively proved the death of *John Davells*, the son; but as to the father, the proof was, that he had been reputed dead, and

“ granted as aforesaid, shall remain beyond the seas, or elsewhere absent themselves in this realm, by the space of seven years together, and no sufficient and evident proof be made of the life or lives of such person or persons respectively, in any action commenced for recovery of such tenements by the lessors or reversioners; in every such case the person or persons, upon whose life or lives such estate depended, shall be accounted as naturally dead; and in every action brought for the recovery of the said tenements by the lessors or reversioners, their heirs or assigns, the judges, before whom such action shall be brought, shall direct the jury to give their verdict, as if the person so remaining beyond the seas, or otherwise absenting himself, were dead.”

nobody had heard of him for 15 years last past. Upon an objection, that this last proof was insufficient, it was holden clearly by *Holt C. J.*, upon the perusal of the above statute, that this case was within it, because *Lewis Davells*, the lessor of the plaintiff, had a term in reversion of the lands, and so was a reversioner within the very letter of the statute; and he held, that a remainder-man was within the equity of that law. *Holman v. Exton*, *Carth.* 246.]

[By the 6 Ann. c. 18. reciting that divers persons, as guardians and trustees for infants, husbands in right of their wives, and other persons having estates or interests determinable upon a life or lives, have continued to receive the rents and profits of such lands after the determination of their said particular estates or interests, it is enacted, “ That any person claiming any estate in remainder, reversion, or expectancy after the death of any person within age, married woman, or any other person whomsoever, may, upon affidavit that he hath cause to believe that such person within age, &c. is dead, and that his or her death is concealed by such guardian, trustee, husband, or any other person, once a year have an order from the great seal for the production of such person within age, &c., and upon the guardian, trustee, &c. refusing or neglecting to produce such infant, &c. agreeably to such order, the said infant, &c. shall be taken to be dead, and the remainder-man or reversioner shall enter upon the estate in like manner as if such infant, &c. were actually dead.”]

(I) Where the Law requires the highest Proof the Nature of the Thing is capable of.

Show. Rep.
397. *Carth.*
220. *Holt*,
284. *Salk.*
281.

IT seems in regard to evidence to be an incontestable rule, that the party, who is to prove any fact, must do it by the highest evidence of which the nature of the thing is capable.

As, where the question was, whether the abbey *de Sentibus* was an inferior abbey, or not, *Dugdale's Monasticon Anglicanum* being produced for evidence was refused, because the original records might be had in the Augmentation-office.

2 Show.
Rep. 163.

So, if a witness be to testify what another swore on a former trial,

trial, the record (a) of such trial must be produced, or his evidence is not to be admitted, &c.

(a) || The production of the *Nisi Prius*

record and *postea* indorsed on it is sufficient for this purpose. *Pitton v. Walter*, 1 Str. 162. But the person called upon to prove what a deceased witness has said upon a former trial, must repeat his very words, and not merely swear to their effect. Lord Palmerston's case cited by Lord *Kenyon* in 4 T. R. 290.||

|| So, where a licence to trade granted by the crown was lost, Rhind v. Wilkinson, 2 Taunt. 237. parol evidence of its contents was not admitted; because there must be a register of it in the Secretary of State's Office, and that register would be the best evidence.

So, where the question was, whether the defendant had put on board the plaintiff's ship some articles of a combustible and dangerous kind, without giving due notice of their nature; and it appeared in evidence, that the goods were delivered by the officer of the defendants with a written order to the plaintiff to receive them, in which nothing was said as to their nature; that they were received by the chief mate of the plaintiff's ship, who had since died, and that no other person was present at the delivery; and it was further proved by the captain of the ship and the second mate, that no communication had been made to either of them, nor, as far as they knew, to any other person aboard; the plaintiff was nonsuited, on the ground that he had not given the best evidence of the want of notice, which it was in his power to produce by calling the Company's officer, who delivered the articles on board; which nonsuit was afterwards affirmed by the Court of K. B. "The best evidence," said Lord *Ellenborough*, "should have been given of which the nature of the thing was capable. The best evidence was to have been had by calling in the first instance upon the persons immediately and officially employed in the delivery and receiving of the goods on board, who appear in this case to have been the first mate on the one side, and the military conductor on the other. And though the one of these persons, the mate, was dead, it did not warrant the plaintiff in resorting to an inferior and secondary species of testimony, viz. the presumption and inference arising from a non-communication to other persons on board, as long as the military conductor, the other living witness immediately and primarily concerned in the transaction of shipping the goods on board, could be resorted to: and no impossibility of resorting to this evidence is suggested to exist in this case."

Williams v. E. I. Company, 3 East, 192.

But, this rule will be dispensed with where a strict adherence to it would be productive of serious public inconvenience.

Supra 261-2. *R. v. Lord George Gordon*.

Don, Dougl. 593. n. 3. *Lynche v. Clerke*, 3 Salk. 154. *Jones v. Randall*, Cowp. 17.

So a *prima facie* evidence will be sufficient, where it is aided by the general presumptions of law.

Berryman v. Wise, 4 T. R. 366. Case of

the Gordons, Leech's Cr. Ca. 585. *R. v. Jones*, 2 Campb. N. P. 131. *R. v. Verelst*, Campb. N. P. 432. *Williams v. R. I. Company*, 3 East, 192. *Monke v. Butler*, 1 Ro. Rep. 83. *R. v. Haslingfield*, 2 M & S. 558.

1 N. R. 210.
 Bevan v.
 Williams,
 3 T. R. 635.
 n. a. Peacock
 v. Harris,
 10 East, 104.

So, a lower degree of evidence may be sufficient in proof of a fact from the very nature of the case, or from the manner in which the fact itself is stated on the record, or from the relative situation of the parties, or from the conduct of the adverse party.

R. v. M^cIntosh, 3 T. R. 634. Cross v. Kaye, 6 T. R. 663.

Smith v.
 Young,
 1 Campb.
 N. P. 439.

If in trover there be a demand in words, and a demand in writing, and both be perfect, either may be proved as evidence of the conversion. If indeed the verbal demand have any reference to that in writing, the writing must be produced; but, if they are concurrent and independent, the latter will not supersede the former.

Jacob v. Lind-
 say, 1 East,
 460.

So, verbal admissions by a party of his having been supplied with goods may be given in evidence, though it should appear that he has signed his name at another time, to an account acknowledging the receipt of them.

Hughes's case,
 2 East, P. C.
 1002.

So, in proof or disproof of hand-writing, the supposed writer of the instrument need not be called, but the evidence of persons well acquainted with his style of writing will be sufficient. ||

M^cGuire's

case, *Ibid.* Newland's case, *Id.* 1001. *Contr.* Smith's case, *Id.* 1000.

(K) Of Hearsay Evidence.

Mod. 183.
 Skin. 402.

IT seems agreed, that what another has been heard to say is no evidence, because he was not on oath; also, because the party who is affected thereby, had not an opportunity of cross-examining. But such speeches or discourses may be made use of by way of inducement or illustration of what is properly evidence.

2 Hawk. P. C.
 c. 46. § 14.

Also, what a witness hath been heard to say at another time, may be given in evidence, in order to invalidate or confirm the testimony he gives in court.

2 Hawk. P. C.
 c. 46. § 14.

(a) [The de-
 clarations of

So, what a person accused of a crime hath been heard to say at another time, may be given in evidence at his trial, either for (a) him or against him.

a prisoner cannot be given in evidence for him; therefore a witness for this purpose cannot be called in his defence; but he may cross-examine any of the witnesses on the part of the prosecution as to any thing they may have heard him say relating to the fact he is charged with. *Id. ibid.*]

Higham v.
 Rdgway,
 10 East, 120.
 Bull. N. P.
 233. Cowp.
 594. Vowles
 v. Young,
 13 Ves. 143.
 "The tradi-
 tion," said
 Lord Eldon
 in the case of

|| So, in inquiries into events, which happened a long time ago, and beyond the memory of living witnesses, hearsay is admitted; as, in questions of pedigree, the declarations of deceased members of the family, entries in family Bibles, or other books, recitals in family deeds, monumental inscriptions, engravings on rings, old pedigrees hung up in family mansions and the will of an ancestor, though found cancelled, and not known to have been proved or acted upon, if it appear to have been treated as a paper relating to the family.

Whitelocke v. Baker, "must be from persons having such a connection with the party to whom it relates, that it is natural and likely from their domestick habits and connections, that they are speaking the truth, and that they could not be mistaken. Declarations in the family, descriptions in wills, descriptions on monuments, in bibles and registry books, are all admitted upon this principle, that they are the natural effusions of a party, who must know the truth, and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth." 13 Ves. 514. Declarations therefore made after the commencement of a suit, or preparatory to one, would seem to be inadmissible. Vin. Abr. tit. Evidence, (T. b. 91.) The answer of the Judges to the question proposed to them in the case of the Berkeley peerage, and what was said by Lawrence J. upon that occasion. Ph. Ev. 178. But *contr.* Haywood v. Firmion, *cor.* Lord Camden, Sittings after Trinity Term, 1766, and Goodright v. Moss, Cowp. 594. Declarations made by persons not members of the family, if known to have been intimately acquainted with the family, may be received. Gilb. Ev. 112. 3 T. R. 723. though Lord Erskine rests the admissibility of such evidence upon the principle of *interest* in the relative in knowing the connections of the family, and upon that principle, considering the husband as part of the wife's family, allowed his declarations of her illegitimacy to be evidence. Vowles v. Young, *ubi supra*.

So, proof by one of the family, that a younger brother of the person last seised had many years before gone abroad, and that the repute of the family was, that he had died there, and that the witness had never heard in the family of his having been married, has been admitted as good *prima facie* evidence of such person's death without lawful issue. Doe v. Griffin, 15 East, 293.

So, the declarations of persons having the best means of knowing a fact, and no interest to falsify it, have been admitted as evidence of it after their death. Such are the declarations of a deceased parent as to the birth or the time of the birth of his child, or to the fact of his being born before marriage. Such are the entries of the receipt of ecclesiastical dues in the books of a deceased rector, which are evidence for succeeding rectors: as also are such entries in the books of a lessee of the rectory after the expiration of his lease. Similar entries made by improper rectors have been received as evidence for succeeding rectors, though certainly in violation of principle; the ground of their admission being that they could not benefit the party making them, or his representatives.]]

Herbert v. Tuckell, Sir T. Raym. 84. cited in Doe v. Rawlins, 7 East, 290. R. v. Bramley, 6 T. R. 330. May v. May, Bull. N. P. 112. 7 East, 290. 2 Ves. 43. Anon. Bunn. 46. Vin. Abr. tit. Evidence, [T. b. 73.] & [T. b. 117.] Illingworth v. Leigh, 4 Gwill. 1619. Woodnoth v. Lord Cobham, Bunn. 180. But see Legross v. Levemoor, 2 Gwill. 529. Outram v. Morewood, 5 T. R. 123. Perigal v. Nicholson, 1 Wightw. 63.

[It seems to be no objection to the admission of hearsay evidence, that the party whose declarations are brought as such would not himself now be an admissible witness, provided at the time of making those declarations he stood indifferent.] Espin. Ni. Pri. 787.

]] And further, in questions of boundaries or customs, it is no objection to the declarations of a deceased person, that he claimed himself under the same custom, provided there do not appear to have been a *lis mota* at the time: as, on a question of parochial modus, that he was a parishioner, and liable to pay tithe; or on a question of parochial or manorial boundary, that he claimed a right of common on the wastes which his declarations went to enlarge. Harwood v. Sims, Wightw. 112. Nicholls v. Parker, 14 East, 331.

Barry v. Bebbington, 4 T.R. 515. Stead v. Heaton, *Id.* 669. Harper v. Brooke, 3 Wooddes, 332. & *supra*, 288. Warner v. Greenville, 2 Str. 1129. & *supra*, 253. Doe v. Robson, 15 East, 33. Haddon v. Parry, 3 Taunt. 305. Higham v. Ridgway, 10 East, 109. Roe v. Rawlings, 7 East, 279. Bagalley v. Jones, 1 Campb. 367. Ivatt v. Finch, 1 Taunt. 141. Chapman v. Cowlan, 13 East, 10. Peaceable v. Watson 4 Taunt. 16.

Nicholls v. Parker, 14 East, 331. n. Denn v. Spray, 1 T. R. 466. Beebec v. Parker, 5 T.R. 26. Doe v. Sisson, 12 East, 62. Morewood v. Wood, 14 East, 327. n. Weeks v. Sparke, 1 M. & S. 679. Harwood v. Sims, 1 Wightw. 112.

In questions concerning publick rights reputation is admissible; for in such cases all mankind are considered as interested in preserving the evidence. And this has been extended to rights not strictly publick, such as of manors, parishes, and commons, and a modus: and where a private right, claimed by prescription, goes in abridgment of a general right of common, reputation is admissible, for it is not so properly evidence of the private right, as evidence of the manner in which the publick right is to be enjoyed. But this sort of evidence cannot be introduced till a foundation has been laid for it, by shewing an exercise of the right, or acts of enjoyment within the memory of living witnesses.

Morewood v. Wood, *ubi supra*. R. v. Eriswell, 3 T. R. 709. Webb v. Potts, Noy, 44. Reed v. Jackson, 1 East, 357. Clothier v. Chapman, 14 East, 331. n. Didsbury v. Thomas, *Id.* 323. Barnes v. Mawson, 1 M. & S. 81. Weeks v. Sparke, *Id.* 679. Bull. N. P. 295. Bp. of Meath v. Lord Belfield, *Ibid.* 1 Wils. 215. S. C. but see Lord *Kenyon's* observations on this case, 3 T. R. 723.

By the better opinion, reputation would seem not to be admissible as evidence of prescriptive rights merely private. But this has been *vexata questio*.

R. v. Erith, 8 East, 542. R. v. Nunc-ham Courtney, 1 East, 373. R. v. Chad-derton, 2 East, 29. R. v. Ferry Frytone, *Ibid.* 54. R. v. Abergwilly, *Id.* 63.

Tradition is admissible merely from necessity, and only where no other proof can be had. It is not evidence of a particular fact. Hence in questions of settlement, the declarations of a deceased parent are not admissible as to the *place* of his child's birth; nor are the declarations of a deceased person, as to his having been hired for a year, or having been relieved by a parish.

Holloway v. Roke, cited by *Buller J.* in *Davies v. Pierce*, 2 T.R. 55. Peaceable v. Watson, 4 Taunt, 16.

But to prove seisin in a devisor, the declarations of a deceased occupier of the land, that he held as his tenant, were received as evidence of that fact, for it would otherwise be almost impossible to prove the holding of this particular tenant. Besides, the declarations were in some degree against the interest of the occupier, as destroying that evidence of title, which arises from possession, and making him liable to a demand for rent.

So,

So, where the point was, whether certain lands were parcel of *A.*'s or *B.*'s estate, the declarations of a deceased occupier, who held under both *A.* and *B.*, were admitted in evidence. || *Roll v. Fellow, Vin. Abr. tit. Evidence. [A. B. 38.] pl.*

10. *Bridgman v. Jennings*, 1 *Ld. Raym.* 734. *Davies v. Pierce*, 2 *T. R.* 53.

(L) Of the Party's Confession.

THE confession of the defendant himself, whether taken on an examination before justices of the peace, in pursuance of 1 & 2 *P. & M. c. 13.*, or of 2 & 3 *P. & M. c. 10.*, upon a bailment or commitment for felony, or taken by the common law on an examination before a magistrate for treason or other crime, or spoken in private discourse, has always been allowed to be given in evidence against the party, but not against others.

But wherever a man's confession is made use of against him, it must be taken altogether, and not by parcels.

[It must not be drawn from him either by threat or promise, but must be quite voluntary.]

2 *H. H. P. c. 284. Leach's Cases*, 286, 287. *Burn's Just. tit. Examination.*

|| It is evidence, whether made before or after his apprehension; whether on a judicial examination, or after commitment; whether reduced into writing or not; and if reduced into writing, whether signed by him or not. ||

Lambe's case, 2 *Leach's Cr. Ca.* 629. 1 *East's P. C.* 133. *Keb.* 19. See *Fort. Disc.* 243.

[His examination ought not to be upon oath.

Where the confession is regularly taken, it is of itself, uncorroborated by any other evidence, sufficient to convict him.]

1 *H. H. 585. Leach's Cases*, 287.

(M) Of Similitude of Hands.

IT is observable (*a*) that this, with other circumstances, (*b*) in *Algernon Sidney's* case, was ruled to be good evidence of his having written a paper charged against him as an overt act of high treason: yet in the trial of the (*c*) seven bishops, the Court was divided in opinion, whether similitude of hands was evidence of the defendant's having signed the paper charged against them as a libel; and the parliament having declared an opinion in the (*d*) reversal of *Algernon Sidney's* attainder, that comparison of hands is no evidence of a man's hand-writing in criminal cases; it seems to have been generally holden since that time, that it is not evidence in any criminal case, whether capital or not capital. (*e*)

(*a*) 2 *Hawk. P. C. c. 46. § 15.*
(*b*) 3 *Stat. Tri.* 802. || As it appears from the report of *Algernon Sidney's* case, in the book referred to, three witnesses were called to prove a paper to be his hand-writing: the first

said, he had seen the prisoner write the indorsement upon several bills of exchange, and that he believed the paper to have been written by him: this evidence was objected to as a comparison of hand-writing, but admitted: the second witness said, he had not seen the prisoner write more than once, but that he had seen his indorsement on bills, and that the paper was very like it: the third witness said, he had seen several notes, which had come to him with

the indorsement of the prisoner's name, and that he had paid them, and had never been called to account for mispayment: the whole of the evidence was received. The prisoner, in his defence, insisted, that nothing but the comparison of hand-writing had been offered as proof against him; and the act of parliament, which reversed his attainder, states the admission of this evidence as one of the grounds of the illegality of his conviction. It recites, among other particulars, that "there had not been sufficient legal evidence of any treasons committed by him, there being produced a paper found in his closet supposed to be his hand-writing, which was not proved by any one witness to have been written by him; but *the jury was directed to believe it, by comparing it with other writings of his.*" However, if this report of the trial be correct, something more than the mere comparison of hand-writing was laid before the jury: for, according to the report, the first witness had seen the prisoner write his name several times. And though it may be objected to the two last witnesses, that the indorsements, mentioned by them, were not sufficiently proved to have been written by the prisoner, yet that objection will not apply to the other witness, whose evidence was certainly admissible. The same sort of evidence was admitted in Lord Preston's case within a year after the reversal of Sidney's attainder, and has been since received in many cases of great authority. Phil. Ev. 365., and see De la Motte's case 1781, in vol. 21. of Howell's New Coll. of St. Tr. 810. || (c) 4 Stat. Tri. 338. (d) || And if it be not evidence in a criminal case, it cannot be evidence in a civil case, for the same rules must apply to both. But see R. v. Cator, 4 Espin. N. P. Ca. 117. Eagleton v. Kingston, 8 Ves. 475. Wade v. Broughton, 3 Ves. & Beam. 172. || (e) 1 W. & M. c. 7. of private acts.

(N) Whether the Depositions of Witnesses in another Cause may be given in Evidence.

DEPOSITIONS cannot be given in evidence against any person who was not party to the suit; (a) and the reason is, because he had not liberty to cross-examine the witnesses; and it is against natural justice that a man should be concluded in a cause to which he never was a party. (b)

(A. b. 31.)
Hardr. 22. 472. Bunb. 91. 321. Gilb. Evid. 62. Prec. Ch. 212. Vin. Abr. tit. Evidence.
pl. 45. 47. Vern. 413. Eq. Cas. Abr. 227. pl. 3. (a) But, if a witness is examined in Chancery, you may read, without an order, any other depositions of the same person, in the spiritual court, or elsewhere, in any other cause, so as you make use of them only to confront the evidence he then gives. Anon. Mosely, 118. 188. (b) || It is said, *supra* 270., in *marg.* that in cases of customs and tolls, and, in general, in all cases where hearsay and reputation are evidence, depositions may be admitted, though the parties in the two suits are not the same. But after the opinions delivered by the Judges in the House of Lords in the *Banbury* and *Berkeley* peerage cases, respecting depositions in questions of pedigree, this position would seem not to be maintainable. 2 Solw. N. P. 684. Phil. Ev. 178. ||

EXCOMMUNICATION.

Co. Lit. 133. Godolph. Repert. 624.

(a) By the 33d of the Articles of the Church of England,

EXCOMMUNICATION is the highest ecclesiastical censure which can be pronounced by a spiritual Judge against a christian, for thereby he is (a) excluded from the body of the church, and disabled to bring any action, or sue any person in the common law courts.

that

that person, which by open denunciation of the church is rightly cut off from the unity of the church, and excommunicated, ought to be taken by the whole multitude of the faithful as an heathen and publican, until he be openly reconciled by penance, and received into the church by a Judge that hath authority thereunto.—It was used by way of punishment only for great and heinous crimes, according to the rule in the *Reformatio Legum*, fol. 80. *Non debet excommunicatio minutis in delictis versari, sed ad horribilium criminum atrocitatem admo- vendam est, in quibus ecclesia gravissimam infamiam sustinet, vel quod illis everteretur religio, vel quod boni mores pervertantur.* But now the frequent use of excommunication is in cases of contumacy, for not appearing or disobeying sentences, though in the smallest matters, and those oft-times of a civil nature, which is one of the principal means of bringing a contempt upon it, and yet is the only way which the spiritual court hath to enforce obedience. *Gibs. Cod. 1095.* || The use of it in cases of mere contumacy is abolished by the statute of 53 G. 3. c. 127. *infra.* and its severities, where it is still allowed, are also mitigated by that statute.—The Druids in Gaul had recourse to the process of excommunication to enforce their juris- diction, as appears from the account left us by Cæsar. The features of their excommunica- tion have so strong a resemblance to those of the excommunication of later days, that I shall take leave to extract the passage. *Illi [Druides] rebus divinis intersunt, sacrificia publica & privata procurant, religiones interpretantur.—Pere de omnibus controversiis, publicis privatisque, constituunt; & si quod est admissum facinus, si cædes facta, si de hæreditate, si de finibus con- troversia est, iidem decernunt, præmia pœnasque constituunt. Si quis aut privatus, aut publicus, eorum decreto non steterit, sacrificiis interdiciunt. Hæc pœna apud eos est gravissima. Quibus ita est interdictum, ii numero impiorum ac sceleratorum habentur; iis omnes decedunt; aditum eorum sermonemque defugiunt, ne quid ex contagione incommodi accipiant; neque iis petentibus jus redditur, neque honos ullus communicatur.* *Comm. Lib. 4.* ||

Excommunication is divided into the greater and less; the greater (a) excludes a man from the communion of the faithful, as well as of the sacraments; the less excludes him from the communion of the sacraments only; but they both equally dis- able him from bringing any action, &c. *Co. Litt. 134.* (a) || The great- er excommu- nication seems to have been formerly the same with the *anathema*; though in later times there was a material difference between them.—See an ad- mirable dissertation upon *Excommunications* and *Interdicts* in the first volume of M. Du Bou- lay's *Histoire du Droit Public Ecclesiastique François.* ||

Under this head we shall consider,

- (A) In what Cases the Spiritual Court may properly excommunicate.
- (B) In what Cases a Person shall be said to be *ipso facto* excommunicated.
- (C) By whom Excommunication is to be pronounced and certified.
- (D) What Inconveniencies and Disabilities it lays the Party excommunicated under: And herein of his Disability to bring any Action.
- (E) Of the Proceedings on the Writ of *Excommu- nicato capiendo*, both at Common Law, and by virtue of the Statute 5 Eliz. c. 23.
- (F) Of Absolving and Assoiling a Person excommu- nicate.

(A) In what Cases the Spiritual Court may properly excommunicate.

Roll Abr. 883. 12 Co. 76. **I**T seems agreed, that wherever the spiritual court hath jurisdiction in any (a) cause, and the party refuses to appear to their citation, or after sentence, being admonished, refuses to obey their decree, that he may be excommunicated. (a) That anciently the King's tenants who held *in capite*, and whose attendance was necessary on the person of the King, could not be excommunicated. 2 Inst. 631. Gibs. Cod. 1102.—That a bishop or other peer of parliament may be excommunicated. 7 Mod. 56, &c. The Bishop of St David's case.

Salk. 293. 350. Also it seems, that at common law the *significavit* of an excommunication might be upon a general clause, as *propter contumaciam*, or *de non parendis mandatis ecclesie*; but now by the Ld. Raym. 586. 618. Gibs. Cod. 1097. 5 Eliz. c. 23. the cause must be set forth in the writ *de excommunicato capiendo* itself, because by that statute the writ is made returnable in *B. R.*, which would be to no purpose if the cause were not set forth in the writ, so as to enable the Court to judge thereof.

14 H. 4. 14. b. But it was always holden, that the bishop's certificate signifying the excommunication into Chancery, on which the writ of *excommunicato capiendo* issued, ought to comprise the particular cause of the excommunication; so that the Court might judge (b) whether it were a matter within their jurisdiction, or not. (b) And therefore the Court of Chancery, for any defect in the certificate, used to grant a *supersedeas*; but before the 5 Eliz. c. 23. there were no discharges in *B. R.* on *excommunicato capiendo*, but where a man was excommunicated pending a prohibition. Salk. 293.

Roll. Abr. 884. If the excommunication appears to have been by an archdeacon of a peculiar or limited jurisdiction, it ought to appear by the certificate, either expressly, or by implication, that the matter thereof arose (c) within his (d) jurisdiction; otherwise it is void. (c) The defendant was taken upon a

capias excommunicatum, and because it was not mentioned in the *significavit* that he lived in that diocese at the time of the excommunication, it was therefore adjudged to be uncertain, and the party was discharged. Moor, 467. Beaumont's case. Show. Rep. 17. S. C. cited. Godb. 191. S. P. (d) The defendant was taken upon a *capias excommunicatum*, and the *significavit* was, that he was excommunicated for not answering articles; but it not being shewn what these articles were, it was adjudged ill. Roll. Rep. 136. Fox's case. — If a man is excommunicated for an offence, which is pardoned by a general pardon, and this being shewn to the bishop, he notwithstanding refuses to absolve him, an action on the case lieth against him. 12 Co. 76.

Salk. 293. If the excommunication in a writ of *excommunicato capiendo* The King and is recited to be *pro quibusdam causis subtractionis decimarum* Fowler, adjudged upon such a return to a *habeas corpus*. 1 Ld. Raym. 619. S. C. [(e) *Secus*, not they themselves.

if it had been the conjunctive *et*. 2 Atk. 499. Rex v. Turfoot, Ca. temp. Hardw. 314.]

So, where in a writ of *excommunicato capiendo*, the recital of the *significavit* was, that he was excommunicated for not paying the costs in *quodam negotio puerorum educationis sive instructionis sine aliquâ licentiâ in eâ parte prius obtentâ*; the writ was quashed for incertainty, because it might be a teaching to fence or dance, and not letters.

There was a presentment in the spiritual court of the Bishop of *Ely* against the defendant for teaching school * in *Cambridge* without a licence, by the churchwardens of the parish; whereupon, as the way was there, a citation was fixed up at the church door, for the defendant to come in and answer the charge of the presentment; but he, being a dissenter, and not coming to church, had no notice of the citation; and for his contempt in not coming, he was excommunicated; whereupon he applied to the bishop to get himself assoiled, for that it was a writing-school he taught, and so not within the bishop's jurisdiction; but the court refused to assoil him, unless he would put in caution to answer such articles, and abide by such sentence, as they should make thereupon; which he was advised not to do, because that would be owning their jurisdiction, and concluding himself to abide by their sentence, and thereupon he moved for a prohibition, and had it, with a special clause to assoil him. Mr. *Page* moved for the prohibition, and insisted, that they could not excommunicate any one for contempt, without shewing that the matter itself was within their jurisdiction; and as they could not excommunicate for the original matter, if it were not within their jurisdiction, so neither could they for a contempt to a citation upon that matter; and cited 8 Co. 68. *Trollop's case. Doctor and Student.* 12 Co. 77. 14 H. 4. 14. 5 Co. 23. And he said, by these books it appears, that, if the bishop refused to assoil him, an action on the case would lie against him; but now-a-days, a prohibition was thought the better way; and he said, this presentment being only for teaching school, they could not come after with articles, and charge him with any other matter, as a writing school, Latin school, or other particular school; which the court agreed, and said it was like a presentment by a grand jury here, which cannot be altered or changed by articles after; and as the grand jury are upon their oath, so are the churchwardens there; and said, that when articles are given in against any one, the citation ought to be founded upon them; but when it was by presentment, that was a charge and a citation itself, and cannot be after altered by articles; though Serjeant *Parker* said, he thought this presentment to be only in the nature of a summons, and that it was necessary articles should be drawn up against him after, to charge upon the particulars: but the prohibition with the said clause was granted.

[If the writ is in a suit *pro correctione morum*, it is too general. So, for not appearing to answer *certis articulis animæ suæ salutem, morumque correctionem concernentibus*.

If it is for *slander or defamation*, it is certain enough.]

† For the causes in which an *excommunicato capiendo* may be awarded on the statute, *vide stat.* 5 Eliz. c. 23. § 13.

Salk. 294.
The Queen v. Hill, 2 Ld. Raym. 818. 1415.

Pasch. 6 Ann. The Queen and Bentley. * None shall keep a school-master, or teach school, without the bishop's licence, 23 El. c. 1. § 6. & 7. 1 Jac. 1. c. 4. § 9. 13. & 14. Car. 2. c. 4. § 11.

Rex v. Thead, 1 Str. 43.
Rex v. Munnerly, *Id.* 76.
Rex v. Keat, 2 Str. 950.

|| So,

Rex v. Payton,
7 T. R. 153.

Rex v. Eyre,
2 Str. 1067.

|| So, that the defendant was excommunicated in a cause "of defamation and scandal *merely spiritual*," holden to be sufficient. ||

[Two *significavit*s were quashed, being only said to be in a cause which came by appeal in a matter *merely spiritual*. For by Lord *Talbot*, we are not to lend our assistance, but where it appears clearly they have jurisdiction, and are not to trust them to determine what is a matter *merely spiritual*. In *Fowler's* case, it was in causes of ecclesiastical rights, and held not sufficient.]

Rex v. Payton,
7 T. R. 153.

|| If the greater, instead of the less, excommunication be pronounced, it is only a ground of appeal, not on which to move to quash the writ. ||

(B) In what Cases a Person shall be said to be *ipso facto* excommunicated.

(a) For the causes of excommunication *ipso facto*, according to the constitutions and canons ecclesiastical of the church of *England*, vide *Godolph. Repert.* 629.

BY several (a) acts of parliament, offenders of several kinds are made to incur the punishment of excommunication *ipso facto*.

[By 27 G. 3. c. 44. no suit shall be commenced in any ecclesiastical court for striking or brawling in any church or church-yard after the expiration of eight calendar months from the commission of the offence.]

And to this purpose it is enacted by 6 E. 6. c. 4. "That if any person whatsoever shall, by words only, quarrel, chide, or brawl in any church or church-yard, that then it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending, that is to say, if he be a layman *ab ingressu ecclesiæ*; and if he be a clerk, from the ministration of his office for so long a time as the same ordinary shall by his discretion think meet and convenient, according to the fault."

And it is further enacted by the said statute, "That if any person shall smite or lay any violent hands upon any other, either in any church or church-yard, that then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

And it is further enacted by the said statute, "That if any person shall maliciously strike any person with any weapon, in any church or church-yard, or shall draw any weapon in any church or church-yard, to the intent to strike another with the same weapon, that then every person so offending, and thereof being convicted by verdict of twelve men, or by his own confession, or by two lawful witnesses before justices of assize, justices of *oyer and terminer*, or justices of peace in their sessions, by force of this act, shall be adjudged by the same justices, before whom such person shall be convicted, to

"have

“ have one of his ears cut off, &c. and besides that, every such person to be and stand *ipso facto* excommunicated, as afore-said.”

In the construction hereof the following opinions have been holden :

1. That the statute extends as well to cathedral as parochial churches and church-yards. Cro. Eliz. 224.

That notwithstanding the words of the statute be expressed, That he who smites another in the church (a), &c. shall *ipso facto* be deemed excommunicate; yet there ought either to be a precedent conviction at law, which must be transmitted to the ordinary, or the excommunication must be declared in the spiritual court, upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof till he be found guilty upon a lawful trial: also, it must be intended, in the construction of this statute, that the excommunication ought to appear judicially; for otherwise there could be no absolution.

Dyer, 275.
Lit. Rep. 149.
Heti. 86. 919.
Cro. Eliz.
Vent. 146.
(a) [For this second offence in the act, smiting in a church-yard, a precedent conviction at law is not necessary,

though if there is one, the ordinary may use it as a proof of the fact. For with respect to this, and the first offence in the act, the statute, though it provides a penalty, does not change the jurisdiction. As to the last offence, *malicious striking with any weapon*, &c. there must be a previous conviction, and a transmission of the sentence, and a declaration. Wilson v. Greaves, 1 Burr. 240. - Wenmouth v. Collins, 2 Ld. Raym. 850.]

That when the proceedings for the offences against this statute are in the spiritual court, costs may be given *pro expensis litis*, but not *pro damnis*. Cro. Ja. 462.
Heti. 86. S. P.
1 Burr. 244.

That he who strikes another in a church, &c. can no way excuse himself, by shewing that the other assaulted him. Cro. Ja. 367.

That (b) churchwardens who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute. Saund. 13.
Hawe v. Planner.
2 Keb. 124.
Lev. 196.
Sid. 301.
Mod. 168.

S. C. (b) Or perhaps private persons. 1 Hawk. P. C. c. 63. § 29.

That if the proceeding be in the temporal courts, by way of indictment, for drawing a weapon in the church, &c. and it conclude *contra formam statuti*, it must be laid to be, with an intent to strike such a person; for being laid to be *contra formam statuti*, the jury cannot inquire of any other offence than that which comes within the description of the act. Cro. Eliz. 231.
Penhallo's case. 4 Leon.
49. Noy, 171.
S. C.

That in an indictment upon this statute, for striking in the church, in order to bring the offender within the latter clause of the statute, which subjects him to the loss of an ear, &c. it must be shewn that the striking was with a weapon. Cro. Eliz. 464.

So it hath been holden, that if a man take up a stone in the church-yard, and offer to throw it at another, or having a hatchet or axe in his hand offer to strike another therewith, that this is not an offence within this part of the statute; for these are not Dalton's Justice, c. 23.
f. 49. said to have been so holden by two justices.

Comp. Incumb. 347. cited.

3 Keb. 803.
Rex v. Nicols
and Robins.
Comp. Incumb. 347.
S. C. cited.

not such weapons as may properly be said to be drawn, as a sword, dagger, &c.

Also, two persons committed to prison by certain justices of the peace for disturbing a minister in his office, were discharged upon a *habeas corpus*, by the Court of King's Bench, for that their commitment was too general, not shewing wherein they disturbed, but only that they *per apertum factum* disturbed, &c. not shewing the particular fact whereby they did disturb, viz. by brawling, fighting, or otherwise, there being several punishments to each; but the Court bound them to their good behaviour for a year.

By the 3 Ja. 1. c. 5. § 11. and 12. it is enacted, "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated, and as if such person had been so denounced and excommunicated according to the laws of this realm, until he or she shall conform, &c. and that every person sued by such person so disabled, may plead the same in disabling of such plaintiff, as if he or she were excommunicated by sentence in the ecclesiastical court, except the action of such recusant do concern some hereditament or lease, which is not to be seised into the king's hands, by force of some law concerning recusancy."

In the exposition hereof it hath been holden,

Noy, 89.
Latch. 176.
3 Lev. 333.

1. That a plea in disability, pursuant to this statute, ought to shew before what justices the conviction was, that the court may know where to send for a certificate thereof, if it be denied; and that the record itself, or at least a certificate thereof, ought immediately to be produced.

Hetl. 176.
* Why not in the nature of a plea, after the last continuance, if the plaintiff hath by his own act rendered himself incapable?

2. That if after such a plea it be certified, that the plaintiff have conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapse and be convict again, the defendant cannot plead the same in disability a second time. *

3 Lev. 333.

That it must appear. either from the conviction itself or by proper averments, that the plaintiff is convicted of popish recusancy, because no recusants, except popish ones, are within the said clause; but this is sufficiently set forth, by alleging, that the plaintiff being *papalis recusans* was indicted and convicted *secundum formam statuti*, &c.

(a) 2 Bulst.
155.

Also it is holden by (a) some, that all popish recusants convict may be taken up by the writ *de excommunicato capiendo*, and that they are not to be admitted as competent witnesses in any cause.

(b) Hawk.
P.C.c. 12. § 6.

But by (b) *Hawkins*, this seems to be a construction over-severe; for inasmuch as this, like all other penal statutes, ought to be construed strictly, and the words thereof are no more than that such persons shall stand disabled, &c. as persons lawfully excommunicate, &c. and the purport thereof may be fully satisfied by

the disability to bring any action; it seems to be too rigorous to carry them farther.

By the 25 E. 1. c. 4. it is enacted, "That all archbishops and bishops shall pronounce the sentence of excommunication against all those that by word, deed, or counsel, do contrary to the charters, or that in any point break or undo them; and that the said curses be twice a year denounced and published by the prelates aforesaid."

[The sentences pronounced at this time, and Ann. 37. H. 3. are inserted at large in Gibs. Cod. tit. 1.

c. 1. p. 2. 4.] || But these sentences of excommunication denounced in Parliament in the times of H. 3. E. 1, &c. against the infringers of *Magna Charta*, and other liberties of the church and people, were not properly excommunications, but only threatenings of the sentence, and declarations that the persons offending deserved to be accursed and excommunicated by the bishop. For an excommunication, saith *Fitzherbert*, [N.B. 64 F.] must grow upon a special suit against a man either *ex officio*, or by a party, whereupon a *significavit* may be granted.||

(C) By whom Excommunication is to be pronounced and certified.

THE sentence of excommunication can only be pronounced by the bishop, or other person in holy orders, being a master of arts at least: also, the priest's name pronouncing such sentence is to be expressed in the instrument issuing under seal out of the court.

Gibs. Cod. 1095.

Excommunication must be certified by the bishop of the diocese, whose proper subject the party is, and cannot be certified by his commissary (a) or official; the reason whereof, according to the (b) civilians, is, because no person inferior to a bishop can call in the secular arm, by the laws of the church; but my Lord (c) *Coke* assigns the reason of it to be, because no certificate of excommunication by any shall disable one, but the certificate of him to whom the court may write to absolve the party excommunicated.

Co. Litt. 133. Ro. Abr. 884. (a) [By the ancient common law, as was said by *Hankford*, 11 H. 4. 64. a. a commissary might certify excommunication; and

that he was restrained by parliament.] (b) *Lindw. de Sent. excomm. c. Prælatorum.* (c) 8 Co. 68.

Co. Litt. 133. F. N. B. 62 N. (d) Vern. 222. 3 Keb. 60. 69.

But the vicar-general, *episcopo in remotis agente*, or the guardian of the spiritualities, *vacante sede*, may do it, (d) either by direct certificate, that the person is excommunicate, or by letters testimonial, reciting the entry thereof in the register, and attesting that such entry is there found.

[And although the bishop be in his diocese, yet the certificate of the vicar-general, by his letters unto the Chancery, reciting the bishop is *in remotis agend.*, is good, and shall not be traversed.]

F. N. B. 62. N.

So, a parson excommunicated by a commissary, official or archdeacon, who derive their jurisdiction from the bishop, may be certified excommunicated by the bishop himself. (e)

8 Co. 63. Ro. Abr. 434. Reg. 65. (e) [But in

this case the rule in the register is, that the excommunication must be said in the writ to be by the authority of the bishop himself.]

the writ to be

Also,

F. N. B. 62. N. Also, the bishop, after election, though before consecration, may certify excommunication.

F. N. B. 64. C. [The chancellor of the university of *Oxford* may certify excommunication of persons within his jurisdiction.
But *Qu.*

2 Bulstr. 4. Whether the court of delegates have power to excommunicate, (though admitted in modern practice,) was formerly questioned. Where they do, a certificate of it under their seal must be produced.]
2 Ro. Abr. 233.
Lutw. 17.

1 Ventr. 222. || An excommunication may be certified by letters testimonial, as well as by direct certificate. But in both cases the certificate must be pleaded *sub sigillo*, as well in equity as at law. ||
Mitf. Eq. P.
186.

16 E. 3. 31. In times of popery, excommengement certified by the pope, or delegates commissioned by him, did not disable the plaintiff to sue, &c, because the court had no person to whom they could write to have him assoiled.
14 H. 4. 14.
Ro. Abr. 883.

8 Co. 63. The court will not receive the certificate of excommunication of one bishop from another, because they must have the certificate from the bishop whose proper subject the party was; and he might have been assoiled by his own ordinary, after the first certificate to the bishop.
F. N. B. 65. A.

Bro. Excom. Nor will they receive a certificate of a bishop deceased, because the party may stand assoiled by the present ordinary, after the decease of the bishop who has certified; and the court will not (a) receive any certificate but from such person to whom they can write to assoil.
21. Co. Litt.
134. (a) Ro.
Abr. 883.

Co. Litt. 134. [But, when the bishop hath certified the excommunication under seal, his death will not vacate the certificate.]

8 Co. 63. The certificate ought to be directed, either to the court, or at least *universis S. Matris ecclesie filiis*, and (b) ought to contain the day of the excommunication, [that is, the day on which the excommunication was published in the church, for the writ *de excommunicato capiendo* cannot be awarded till the party hath lain under the sentence forty days (c), which are to be reckoned from that day.]
(b) Ro. Abr.
883. Lindw.
150. Swinb.
309. (c) [For within forty days it was competent to him to appeal to the court of *Rome*; and the appeal would operate as a *supersedeas* to the process, and liberate the party. 20 H. 6. 25. a. b.]

F. N. B. 64. F. The certificate must signify, that the person was excommunicated by special name, and in a special suit against him *ex officio*, or by the party; for otherwise he doth not incur the sentence of the greater excommunication.

Rex. v. Burard, 1 P. Wms. 435. The defendant was excommunicated for not paying his proportion of a rate made for repairing the church of *D.* in *Suffolk*. It was moved to supersede the writ, 1st, For that it was not shewn that the defendant was commorant within the diocese at the time of the excommunication pronounced, *Moor*, 467. Sir *T. Jones*, 89. 2dly, Because there was no addition of the defendant in the writ. On the other side it was answered, (as to the first objection,) that the defendant in the libel was said to be of *D.* in *Suffolk*, which was the same parish where the church was,

was, and it should not be intended that, after the libel, he removed from thence: but, if he did remove, his flying from the process of the court should not mend his case, for then the party, by his own act, and by turning his back upon justice, might avoid such proceedings. As to the want of addition, this was said to be only necessary in the causes of excommunication mentioned in the statute of 5 Eliz. c. 23. for which reason it was true, that for want of addition, there could be no proceeding against him by way of proclamation with pains and penalties for not appearing; but still as the matter was plainly of ecclesiastical cognizance, (*viz.*) the repairing of the church, the excommunication was good, and so was *Cro. Car.* 196. *Hughes's case*, 1 *T. Jones*, 89. The inhabitants of *Bermondsey*, 1 *Show*, 16. *Johnston's case*, 1 *Salk.* 293. *The King v. Fowler*. — The Chancellor disallowed both the exceptions.

[*Mr. Keith*, minister of *May-fair* chapel, which was a chapel of ease to *St. George's* parish, *Hanover-square*, of which the plaintiff was rector, being cited into the Bishop of *London's* court for officiating as a clergyman of the church of *England* without being licensed by the bishop, and having been denounced excommunicate forty days, for contumacy and contempt of the ecclesiastical laws, upon the bishop's certificate into Chancery, the writ of *significavit* issued, which it was moved to quash. — Lord *Hardwicke* Chancellour. — This is a case of as great consequence to the good government and discipline of the church as can possibly happen. I can take notice of nothing but what appears on the *significavit* (*a*); and the question before me is, whether there is sufficient to warrant the court to issue the writ of *excommunicato capiendo*? Now, if this gentleman is out of the jurisdiction, he is not without remedy, for he may go to a court of common law after sentence, as well as before. The first and material exception is, that the particular cause of the excommunication ought to be set forth. It is not necessary for the ecclesiastical court to shew they have rightly proceeded; for if they have not, you have a remedy by appealing to higher ecclesiastical jurisdiction. Here is certainly a description of the principal cause, and if some of the matters mentioned are within the jurisdiction, it is sufficient. It is not like the case of *The King* and *Fowler*, which was held uncertain, as it was in the disjunctive, *tithes* or *other ecclesiastical dues*, so that it might be ecclesiastical dues only: if it had been *tithes* and *other ecclesiastical dues*, it would have been well enough. As to preaching, there is no pretence for his doing it without licence from the bishop: the same as to the administration of the sacrament, and celebration of marriage; for the canons of 1603, confirmed by act of parliament, are express as to that matter. Here, the ground of the contumacy is described specially, which is more than necessary; for where the cause is sufficient, it may be set forth generally. The second exception is, that it is not mentioned in what manner *Keith* officiated, or performed divine service, and therefore it might be in his own house, or a

Dr. Trebec v. Keith,
2 *Atk.* 498.

(a) The word *significavit* is here used to denote the bishop's certificate. It is sometimes used to denote the writ of *excommunicato capiendo* itself. In this latter sense it seemeth to be more properly applied; the writ having received its name from this same word in the beginning of it. *Significavit nobis venerabilis pater N.* &c.

The third exception was, that it is not said he has performed divine service since the monition. But to this His Lordship is not reported to have spoken.
(a) *Rex v. Payton*, 153. S. P.

private chapel. But the word *officiating* ought not to be so construed; for reading prayers or a sermon in a private family, is not performing divine service. *Divine service* is the expression made use of in several acts of parliament, particularly in the act of uniformity, 13 & 14 Car. 2. c. 4. § 27. relating to the service in *Welsh*: in several other acts of parliament that direct the reading of proclamations, the order is, that it be read after *divine service*. The word *officiate* relates to his office as a presbyter, which must mean his doing it in a publick manner. It is not indeed necessary for a minister to have a licence from the bishop of the diocese for every particular case, but yet the bishop may suspend him wholly where he is irregular, till he submits to perform his duty properly; and it is not here a description of the case, but of the contempt only, for which he has excommunicated him. The fourth exception is, That it is not said at the time of the excommunication he officiated within the diocese of *London*, and therefore he has been cited out of the diocese contrary to the statute of 23 H. 8. c. 9. It is not averred, indeed, that he was resident in the diocese at the time of the excommunication pronounced, but being said in the libel to be in the diocese, I will not presume he was not commorant when the monition issued; and to this purpose the case of *Thompson King v. Burrard*, 1 P. Wms. 435. was properly cited (a). There is another answer to this objection; that a man may be resident in one diocese, and come into another and commit the offence charged upon him in the *significavit*, and this for the purpose of being cited, is a residence sufficient, and he may be presented in the diocese where he committed the offence; and unless he was so considered, there would be no remedy. See Dr. *Blackmore's* case, in *Hardr.* 421. The fifth exception is, That he, who pronounced the sentence of excommunication, is not said to be a person in holy orders. The averment in the *significavit* is sufficient, for the words are, *a person lawfully authorized*, which take in the capacity of the person doing it. The sixth exception is, That it doth not appear when the excommunication was pronounced. Now, the *significavit* omits to aver, that he continued contumacious, but the *terminus a quo* and the *terminus ad quem*, are never set forth. The last exception was, That Mr. *Keith* is within the toleration act, the 1st W. & M. c. 18. The act of toleration was made to protect persons of tender consciences, and to exempt them from penalties; but to extend it to clergymen of the church of *England* who act contrary to the rules and discipline of the church would introduce the utmost confusion. All the exceptions therefore must be over-ruled.]

(D) What Inconveniencies and Disabilities it lays the Party excommunicated under: And herein of his Disability to bring any Action.

A PERSON excommunicated is thereby disabled to (a) be a witness in any cause, cannot be attorney or procurator for another, is to be turned out of church by the churchwardens, and not to be allowed Christian burial. Gibbs. Cod. 435. 1096, 1097. (a) But such a person is entitled to the benefit of clergy. Bro. Clergy, 20. — And may contract marriage. Godolph. Repert. 626.

An excommunicate person is disabled to sue or commence any action; but such disability cannot be pleaded (b) after a general imparlance, for thereby the defendant admits him a good plaintiff. 9 E. 4. 36. Co. Litt. 133. 8 Co. 63. Roll. Abr. 883. (b) Placita Gen. 10. Latch. 179. Lutw. 19, See tit. Abatement, vol. i. p. 4, 5.

¶ If the bishop himself be sued, and he plead an excommunication by himself, or his commissary, although it be for another cause than is then in question, it shall not disable the plaintiff, because the bishop himself is party. 8 Co. 68.

When excommunication is pleaded, the bishop's letter under his seal, witnessing the excommunication, must be shewn; and though the plaintiff cannot deny the plea, yet the writ shall not abate, but the defendant *eat inde sine die*, because the plaintiff, upon producing his letters of absolution, shall have a re-summmons or re-attachment. (c) Litt. § 207. 8 Co. 69. 626. Co. Litt. 134. 3 Lev. 208. 240. (c) ¶ So, in equity, he may, in such case, sue out fresh

process, and compel the defendant to answer the bill. Mitf. Eq. Pl. 187. ¶

If in an appeal of murder, &c. the defendant pleads excommunication in the plaintiff in disability, the appellee shall be bailed until the plaintiff purchases letters of absolution, and then he must plead in chief; for if the defendant should be kept in prison till the plaintiff were absolved, he might be a prisoner for life. 3 Assise, pl. 12. 2 Hawk. P. C. 114.

Excommunication is a good plea to an executor or administrator, though he sue *in auter droit*, for an excommunicate person is excluded from the body of the church, and incapable to lay out the goods of the deceased to pious uses: besides, it is one of the effects of excommunication, that he cannot be a procurator or attorney for any other person, and therefore cannot represent the deceased. (d) 43 E. 3. 13. Co. Litt. 134. Theol. 11. ¶ Vide contr. 14 & 21 H. 6. cited by Cosens in his Apology from a little treatise printed by Berthelet in the time of H. 8. ¶ (d) [But an excommunicated person may be appointed executor, and is capable of a legacy: for the sentence will not annul the executorship, or quite destroy the action, but only suspend it till absolution. God. O. L. 37, 38. Swinb. 367. ¶ Excommunication is no plea to the next friend of an infant. Pr. Reg. Ch. 278. ¶]

Excommunication is no plea on a *qui tam*, because it is for example; and the statute having given the informer an ability to sue, and not excepted excommunicated persons from the

liberty of informing, he is enabled to sue by the statute, notwithstanding the censures of the church.

23 E. 3. 97.

When a prohibition is brought against the bishop, and he pleads excommunication against the plaintiff, and in the excommunication there is no cause of such excommunication shewn; this is no good plea; for, in such case, it will be intended, that the excommunication was for endeavouring to hinder the bishop's proceeding, by application to the temporal court; and if such excommunication were allowed, it would destroy all prohibitions. And the plea of excommunication in this case is *exceptio ejusdem rei cujus petitur dissolutio*.

30 E. 3. 15.
Co. Litt. 134.

If an action be brought by the bailiffs and commonalty of a corporation, the defendant shall not plead excommunication in the bailiffs, because they sue as a corporation, and a corporation cannot be excluded from the communion of the visible church.

Bro. Excommunication, 3.
3 Bulst. 72.
20 H. 6. 25.
Placita Gen.
10. 72.
Moor, 775.

When excommunication is pleaded in the plaintiff, he shall not reply, that he has appealed from the sentence, for the sentence is in force until it is repealed; and whilst it is in force, he cannot appear in any of the courts of justice; but he may reply, he is absolved, for then his disability is taken away.

|| But the absolution must be by the bishop who excommunicated, or by the archbishop upon appeal.

Baker v.
Gough, Cro.
Ja. 82.

The plea of excommunication must state the precise time when the party was excommunicated. ||

Rex v. Buckland, 1 Str. 413.

[A party in custody on an *excommunicato capiendo* is entitled to the benefit of the rules.]

(E) Of the Proceedings on the Writ of *Excommunicato capiendo*, both at Common Law and by virtue of the Statute 5 Eliz. c. 23.

Gibs. Cod.
1102. cited
from Dr. Co-
sen's Apol.
fol. 8.
(a) But in
2 Inst. 623.
631. it is ex-
pressly said,
that *breve*
regis de excommunicato capiendo de gratia regis procedit.

IT is said that the writ *de excommunicato capiendo* is a liberty or privilege peculiar to the church of England, above all the realms in Christendom; for though the assistance of the secular arm hath ever been afforded to the church in most other Christian countries as well as this, yet in no instance is it perhaps so surely and so effectually reached out as by the execution of this writ, which is (a) *debitum justitiæ*, and not made to depend upon the pleasure of the prince.

Fitz. N.B. 140.
Salk. 293.

The writ of *excommunicato capiendo* issues out of Chancery and is founded on the bishop's certificate, signifying the excommunication, and at common law was only returnable into that Court; so that for any uncertainty or defect in the writ, the party could only be discharged in Chancery.

But now by the 5 Eliz. c. 23. intitled, *An act for the due execution of the writ de excommunicato capiendo*, reciting, "Forasmuch

“asmuch as divers persons offending in many great crimes and
 “offences, appertaining merely to the jurisdiction and determi-
 “nation of the ecclesiastical courts and judges of this realm, are
 “many times unpunished for lack and want of the good and
 “due execution of the writ *de excommunicato capiendo*, directed
 “to the sheriff of any county, for the taking and apprehending
 “of any such offenders, the great abuse whereof, as it should
 “seem, hath grown, for that the said writ is not returnable in
 “any court that might have the judgment of the well executing
 “and serving the said writ, according to the contents thereof;
 “but hitherto hath been left only to the discretion of the sheriffs
 “and their deputies, by whose negligence and defaults for the
 “most part the said writ is not executed upon the offenders as
 “it ought to be, by reason whereof such offenders be greatly
 “encouraged to continue their sinful and criminous life, much
 “to the displeasure of Almighty God, and to the great con-
 “tempt of the ecclesiastical laws of this realm:

“§ 2. Wherefore, it is enacted, That every writ of *excom-*
municato capiendo that shall be granted and awarded out of
 “the High Court of Chancery against any person or persons
 “within the realm of *England*, shall be made in the time of
 “term, and returnable before the Queen’s Highness, her heirs
 “and successors, in the court commonly called the King’s
 “Bench, in the term next after the *teste* of the same writ, and
 “the same writ shall be made to contain, at the least, twenty
 “days between the *teste* and the return thereof; and after the
 “same writ shall be so made and sealed, that then the said writ
 “shall be forthwith brought into the said Court of King’s
 “Bench, and there, in the presence of the justices, shall be
 “opened and (a) delivered of (b) record to the sheriff or other
 “officer (c), to whom the serving and execution thereof shall
 “appertain, or to his or their deputy or deputies; and if after-
 “wards it shall or may appear to the justices of the same court
 “for the time being, that the same writ so delivered of record
 “be not duly returned before them at the day of the return
 “thereof, or that any other default or negligence hath been
 “used or had in the not well serving and executing of the said
 “writ, that then the justices of the said court shall and may, by
 “authority of this act, assess such amercement upon the said
 “sheriff or other officer, in whom such default shall appear,
 “as to the discretion of the said justices shall be thought meet
 “and convenient; which amercement so assessed shall be
 “estreated into the Court of Exchequer as other amercements
 “have been used.

(a) That the precise form of the statute must herein be observed, and that the writ must be brought and openly delivered in court.

Cro. Ja. 567.
 (b) That the writ must be enrolled and delivered to the sheriff in convenient time, Cro.Car.

583. Packer’s

case. Vent. 338. S. P. and the prisoner may be discharged on motion, as well as by pleading this matter, at the return of the *habeas corpus*, & vide Sid. 285.—But, where for such a fault the court refused to discharge the prisoners, or to bail them, because they were dangerous persons, and refused to take the oath of allegiance, vide Sid. 165. Also, upon the construction of this clause of the statute, it hath been holden, 1. That one taken on a writ of *excommunicato capiendo* cannot come into B. R. but by *habeas corpus*; and if he be brought in before the writ is returnable, he shall not be allowed to plead, or move to quash the writ.

2. The writ of *excommunicato capiendo* recites the *significavit* which is in Chancery, but the writ

writ is brought into B. R. and is enrolled there before it goes to the sheriff, which enrolment is to inform the court, that at the return of the *excommunicato capiendo* they may award farther process, as the case requires. 3. If by the recital of the *significavit* it appears that there was no cause for the writ, the Court of King's Bench may quash it, and the Court of Chancery cannot, though the *significavit* be there. Salk. 294. [It was formerly doubted, whether after the writ had been issued out of Chancery, and brought into the Court of B. R. and there delivered to the sheriff, but not actually returned into B. R., the Court of Chancery, on a plain error appearing, could supersede it. *Rex v. Burrard*, 1 P. Wms. 435. But it was determined by Lord *Hardwicke*, that after the return of the writ is out, the Court of Chancery cannot, on a petition to quash the writ, do any thing in it, as they have no authority; for the Court of B. R. have the cognizance of it, and they can compel the sheriff to return it, and the application to quash it must be to them. If indeed the writ issue in the vacation, and be not yet returnable, (for it must be returned on one of the return days in the term,) the Court of Chancery will give relief and discharge the party out of custody. *Ex parte Little*, 3 Atk. 479. But, if the writ issued from the Court of Chancery be opened and enrolled in B. R., and on exceptions taken, a rule be made for the prosecutor to shew cause why the delivery of the writ to the sheriff should not be staid, and before that can be done, the return be out, another writ may be sued out from Chancery, but not from B. R. *Rex v. Eyre*, 2 Str. 1189. After a writ had been opened and entered of record, it was delivered out in order to take up the defendant; and before the return, the defendant moved and had it superseded; for the Court said, they could judge of it by the entry, and since it appeared the defendant could not be legally detained upon it, if he was taken, it was proper to supersede it, to prevent him from being restrained of his liberty contrary to law: that the intent of this statute in directing the writ to be delivered in open court, was to apprise the court of the nature of the cause; that this was now to be considered as a writ that *improvidè emanavit*, and they were not to wait till the return, till all the inconveniencies, which they should have prevented by not issuing the writ, had happened. *Rex v. Theed*, 1 Str. 43. 10 Mod. 350. S. C. (c) The words "other officers" in the statute mean bailiffs of liberties, or the coroner, who is the proper officer to execute process, where the sheriff is incapacitated: therefore, if one who is a prisoner in the Fleet be excommunicated, the Court of Chancery cannot order the cursitor to direct the writ of *excommunicato capiendo* to the warden of the Fleet, the same being a *viscountiel* writ; but the writ must be directed to the sheriff, who may return a *non est inventus* into the King's Bench, upon which return the Court will grant a *habeas corpus* to bring up the prisoner, and there charge him with an *excommunicato capiendo*. *Strudwicke's case*, 3 P. Wms. 53.]

" § 3. It is further enacted, That the sheriff, or other officer, to whom such writ of *excommunicato capiendo*, or other process by virtue of this act shall be directed, shall not in anywise be compelled to bring the body of such person or persons as shall be named in the said writ or process into the said court of King's Bench, at the day of the return thereof, but shall only return the same writ and process thither, with declaration briefly, how and in what manner he hath served and executed the same, to the intent that thereupon the said justices may then further proceed, according to the tenor and effect of this present act.

" § 4. And if the sheriff or other officer, to whom the execution of the said writ shall so appertain, do or shall return, that the party or parties named in the said writ cannot be found within his bailiwick, that then the said justices of the King's Bench for the time being, upon every such return, shall award one writ of *capias* against the said person or persons named in the said writ of *excommunicato capiendo*, returnable in the same court in the term-time, two months at least next after the *teste* thereof, with a proclamation to be contained within the said writ of *capias*, that the sheriff, or other officers, to whom the said writ shall be directed in the

“ full county-court, or else ‘at the general assizes or gaol-delivery to be holden within the said county, or at a quarter sessions to be holden before the justices of the peace within the said county, shall make open proclamation, ten days at least before the return, that the party or parties named in the said writ shall, within six days next after such proclamation, yield his or their body or bodies to the prison of the said sheriff, or other such officer, there to remain as a prisoner, according to the tenor or effect of the first writ of *excommunicato capiendo*, upon pain of forfeiture of ten pounds; and thereupon after such proclamation had, and the said six days past and expired, then the said sheriff or other officer, to whom the said *capias* shall be directed, shall make return of the same writ of *capias* into the said court of the King’s Bench of all that he hath done in the execution thereof, and whether the party named in the said writ have yielded his body to prison, or not.

“ § 5. And if upon the return of the said sheriff it shall appear, that the party or parties named in the said writ of *capias*, or any of them, have not yielded their bodies to the gaol and prison of the said sheriff, or other officer, according to the effect of the same proclamation, that then every such person, that so shall make default, shall, for every such default, forfeit to the queen’s highness, her heirs and successors, ten pounds, which shall likewise be estreated by the said justices, into the said court of Exchequer, in such manner and form as fines and amercements there taxed and assessed are used to be.

(a) This statute doth not take away or affect the *excommunicato capiendo* at common law, but in the particular cases therein mentioned gives a greater penalty to enforce it; and

therefore the writ doth not only issue upon excommunication in any other cases, but (as hath been often adjudged,) though a *capias* with proclamations and penalties go forth in a matter not within this statute, and the person be thereupon imprisoned, and pray to be discharged, because the matter for which he was excommunicated (though of a spiritual nature) is not within this statute, yet nothing shall be discharged but the penalties, and (without any new writ obtained) the excommunication and imprisonment may remain as at common law, and not be discharged but by absolution in due form. *Gibb. Cod. 1106. but for this vide Cro. Car. 197. 199. Ro. Abr. 175. Jon. 226. Latch. 174. 204. 2 Jon. 89. Show. 17. 3 Mod. 42, 43. Skin. 167. Vern. 24. Salk. 294. 7 Mod. 56. 117.*

“ § 6. And thereupon the said justices of the King’s Bench shall also award forth one other writ of *capias* against the said person or person that so shall be returned to have made default, with such like proclamation as was contained in the first *capias*, and a pain of 20*l.* to be mentioned in the second writ and proclamation; and the sheriff or other officer, to whom the said second writ of *capias* shall be so directed, shall serve and execute the said writ in such like manner and form, as before is expressed, for the serving and executing of the said first writ of *capias*; and if the sheriff or other officer shall return upon the said second *capias*, that he hath made the proclamation according to the tenor and effect of the same writ, and that the party hath not yielded his body to prison, according to the tenor of the said proclamation, that then the

“ said party, that so shall make default, shall for such his contempt and default, forfeit to the queen’s highness, her heirs and successors, the sum of twenty pounds, which said sum of twenty pounds the said justices of the King’s Bench for the time being shall likewise cause to be estreated into the said court of Exchequer, in manner and form aforesaid.

“ § 7. And then the said justices shall likewise award one other writ of *capias* against the said party, with such like proclamation and pain of forfeiture as was contained in the said second writ of *capias*, and the sheriff or other officer, to whom the said third writ of *capias* shall be so directed, shall serve and execute the said third writ of *capias*, in such like manner and form as before in this act is expressed and declared, for the serving and executing of the said first and second writs of *capias*; and if the sheriff or other officer, to whom the execution of the said third writ shall appertain, do make return of the said third writ of *capias*, that the party upon such proclamation hath not yielded his body to prison, according to the tenor thereof, that then every such party for every such contempt and default shall likewise forfeit to the queen’s majesty, her heirs and successors, other 20*l.* which sum of 20*l.* shall likewise be estreated into the said court of Exchequer, in manner and form aforesaid; and thereupon the said justices of the King’s Bench shall likewise award forth one other writ of *capias* against the said party, with like proclamation and like pain of forfeiture of 20*l.*, and that also the said justices shall have authority by this act infinitely to award such process, with such like proclamation and pain of forfeiture of 20*l.* as is before limited against the said party that so shall make default in yielding his body to the prison of the sheriff, until such time as by the return of some of the said writs before the said justices it shall and may appear, that the said party hath yielded himself to the custody of the said sheriff or other officer, according to the tenor of the said proclamation, and that the party, upon every default and contempt by him made against the proclamation of any of the said writs so infinitely to be awarded against him, shall incur like pain and forfeiture of 20*l.*, which shall likewise be estreated in manner and form aforesaid.

(a) By the 1 E. 3. c. 8. Persons excommunicate, taken at the request of the bishop, are expressly held to be irreplevisable; but it hath been held, that the court of

“ § 8. And be it further enacted by the authority aforesaid, That when any person or persons shall yield his or their body or bodies to the hands of the sheriff or other officer, upon any of the said writs of *capias*, that then the same party or parties, that shall so yield themselves, shall remain in the prison and custody of the said sheriff or other officer, without (a) bail, baston, or mainprize, in such like manner and form, to all intents and purposes, as he or they should or ought to have done, if he or they had been apprehended and taken upon the said writ of *excommunicato capiendo*.

King’s Bench may, as well before as since this statute, bail a person taken upon *excommunicato*

nicato capiendo. Bulst. 122. — But where the court refused in such a case to bail the bishop of *St. David's*, vide 7 Mod. 61. [It is a commitment in execution, and therefore it seems the court can have no power to bail. 1 Show. 16.]

“ § 9. And that if any sheriff or other officer, by whom the
 “ said writs of *capias*, or any of them, shall be returned, as is
 “ aforesaid, do make an untrue return upon any of the said
 “ writs, that the party named in the said writs hath not yielded
 “ his body upon the said proclamations, or any of them, where
 “ indeed the party did yield himself, according to the effect of
 “ the same, and that then every such sheriff or other officer,
 “ for every such false and untrue return, shall forfeit to the
 “ party grieved and damnified by such false return, the sum of
 “ 40*l.*; for the which sum of 40*l.* the said party grieved shall
 “ have his recovery and due remedy by action of debt, bill,
 “ plaint, or information, in any of the queen's courts of record;
 “ in which action, bill, plaint, or information, no *essoign*, pro-
 “ tection, or wager of law, shall be admitted or allowed for the
 “ party defendant.

“ § 10. Saving and reserving to all archbishops and bishops,
 “ and all others, having authority to certify any person excom-
 “ municated, and like authority to accept and receive the sub-
 “ mission and satisfaction of the said person so excommunicated
 “ in manner and form heretofore used, and him to absolve and
 “ release, and the same to signify, as heretofore it hath been ac-
 “ customed to the queen's majesty, her heirs and successors,
 “ into the High Court of Chancery, and thereupon to have
 “ such writs for the deliverance of the said person so absolved
 “ and released from the sheriff's custody or prison, as heretofore
 “ they or any of them had, or of right ought to or might have
 “ had; any thing in this present statute specified or contained
 “ to the contrary hereof in anywise notwithstanding.

“ § 11. Provided always, That in *Wales*, the counties pala-
 “ tine of *Lancaster*, *Chester*, *Durham*, and *Ely*, and in the
 “ *Cinque Ports*, being jurisdictions and places exempt, where
 “ the queen's majesty's writ doth not run, and process of *capias*
 “ from thence not returnable into the said Court of the King's
 “ Bench, after any *significavit*, being of record in the said Court
 “ of Chancery, the tenour of such *significavit* by *mittimus* shall
 “ be sent to such of the said head officers of the said country of
 “ *Wales*, counties palatine and places exempt, within whose
 “ offices, charge, or jurisdiction, the offenders shall be resiant,
 “ that is to say, to the chancellor or chamberlain for the said
 “ counties palatine of *Lancaster* and *Chester*, and for the *Cinque*
 “ *Ports* to the lord warden of the same, and for *Wales* and *Ely*,
 “ and the counties palatine of *Durham*, to the chief justice or
 “ justices there; and thereupon every of the said justices and
 “ officers, to whom such tenor of *significavit* with *mittimus* shall
 “ be directed and delivered, shall, by virtue of this estatute,
 “ have power and authority to make like process to the inferior
 “ officer and officers, to whom the execution of process there
 “ doth

“ doth appertain, returnable before the justices there, at their
 “ next sessions or court, two months at least after the *teste* of
 “ every such process; so always as in every degree they shall
 “ proceed in their sessions and courts against the offenders, as
 “ the justices of the said Court of King’s Bench are limited, by
 “ the tenor of this act, in term-times to do and execute.

“ § 12. Provided also, and be it enacted, That any person,
 “ at the time of any process of *capias* aforementioned awarded,
 “ being in prison, or out of this realm, in the parts beyond the
 “ sea, or within age, or of *non sane memorie*, or woman covert,
 “ shall not incur any of the pains or forfeitures aforementioned,
 “ which shall grow by any return or default happening during
 “ such time of nonage, imprisonment, being beyond the sea,
 “ or *non sane memorie*; and that by virtue of this statute, the
 “ party grieved may plead every such cause or matter in bar of
 “ and upon the distress or other process, that shall be made for
 “ levying of any of the said pains or forfeitures.

(a) That if the party excommunicated has no addition in the writ, he may be discharged on motion.

Salk. 294.

Show. Rep.

16. But, where the parties were named A. B. merchant, C. D. gent.

E. F. yeoman

de paroch. de

D. this was

held well,

though it was

objected, that

the addition

of the parish

should refer

to him only

who was last

mentioned. The King and Barnes, 3 Mod. 42. Skin. 176. S. C. adjudged. (b) This statute

(1 H. 5. c. 5.) enacts, That in every original writ of actions personal, appeals, and indictments

in which the *exigent* shall be awarded in the names of the defendants in such original writs,

appeals, and indictments, additions shall be made of their estate or degree or mystery, and

the towns, hamlets, or places, and the counties where they were or be conversant, &c.

(c) [Before this statute, it was not necessary to shew the cause in the writ, only in the bishop’s

certificate, but it was sufficient to say the party was excommunicated for manifest contumacy.

Per Holt C. J. 1 Ld. Raym. 619.]

“ § 13. And that if the offender, against whom such writ of
 “ *excommunicato capiendo* shall be awarded, shall not in the
 “ same writ of *excommunicato capiendo* have a sufficient and
 “ lawful (a) addition, according to the form of the estatute
 “ of (b) *primo* of Henry the Fifth, in cases of certain suits,
 “ whereupon process of *exigent* is to be awarded, or if in the
 “ *significavit* (c) it be not contained, that the excommunication
 “ doth proceed upon some cause or contempt of some original
 “ matter of heresy, or refusing to have his child baptized, or to
 “ receive the holy communion, as it is now commonly used to be
 “ received in the church of *England*, or to come to divine ser-
 “ vice now commonly used in the said church of *England*, or
 “ errors in matters of religion or doctrine now received and
 “ allowed in the said church of *England*, incontinency, usury,
 “ simony, perjury in the ecclesiastical court, or idolatry, that
 “ then all and every pains and forfeitures limited against such
 “ person excommunicate by this statute, by reason of such writ
 “ of *excommunicato capiendo*, wanting sufficient addition, or of
 “ such *significavit*, wanting all the causes aforementioned, shall
 “ be utterly void in law, and by way of plea to be allowed to
 “ the party grieved.

“ § 14. And if the addition shall be with a *nuper* of the
 “ place, then in every such case, at the awarding of the first
 “ *capias* with proclamation, according to the form mentioned,
 “ one writ of proclamation (without any pain expressed,) shall
 “ be awarded into the county, where the offender shall be
 “ most

“ most commonly resiant at the time of the awarding the said
“ first *capias*, with pain, in the same writ of proclamation, to
“ be returnable the day of the return of the said first *capias*,
“ with pain and proclamation thereupon, at some one such time
“ and court as is prescribed for the proclamation, upon the said
“ first *capias*, with pain, and if such proclamation be not made
“ in the county where the offender shall be most commonly resi-
“ ant, in such cases of additions of *nuper*, that then such offender
“ shall sustain no pain or forfeiture, by virtue of this statute,
“ for not yielding his or her body according to the tenor afore-
“ mentioned; any thing before specified and to the contrary
“ hereof in anywise notwithstanding.”

¶ By the 53 G. 3. c. 127. it is enacted, “ That excommunica-
“ tion, together with all proceedings following thereupon, shall
“ in all cases, save those hereafter to be specified, be disconti-
“ nued, throughout that part of the United Kingdom of *Great*
“ *Britain* and *Ireland* called *England*; and that in all causes
“ which according to the laws of this realm are cognizable in
“ the ecclesiastical courts, when any person or persons having
“ been duly cited to appear in any ecclesiastical court, or re-
“ quired to comply with the lawful orders or decrees, as well
“ final as interlocutory, of any such court, shall neglect or re-
“ fuse to appear, or neglect or refuse to pay obedience to such
“ lawful orders or decrees, or when any person or persons shall
“ commit a contempt in the face of such court, no sentence of
“ excommunication shall be given or pronounced; saving in the
“ particular cases hereafter to be specified; but instead thereof,
“ it shall be lawful for the judges or judge who issued out the
“ citation, or whose lawful orders or decrees have not been
“ obeyed, or before whom such contempt in the face of the
“ court shall have been committed, to pronounce such person or
“ persons contumacious and in contempt, and within ten days
“ to signify the same in the form to this act annexed, to His
“ Majesty in Chancery, as hath heretofore been done in signi-
“ fying excommunications; and thereupon a writ *de contumace*
“ *capiendo*, in the form to this act annexed, shall issue from
“ the Court of Chancery, directed to the same persons to
“ whom the writs *de excommunicato capiendo* have heretofore
“ been directed; and the same shall be returnable in like man-
“ ner as the writ *de excommunicato capiendo* hath been by law
“ returnable heretofore, and shall have the same force and ef-
“ fect as the said writ; and all rules and regulations not hereby
“ altered, now by law applying to the said writ and the proceed-
“ ings following thereupon, and particularly the several pro-
“ visions contained in a certain act passed in the fifth year of
“ Queen *Elizabeth*, intituled *An Act for the due execution of the*
“ *writ de excommunicato capiendo*, shall extend and be ap-
“ plied to the said writ *de contumace capiendo*, and the proceed-
“ ings following thereupon, as if the same were herein
“ particularly repeated and enacted; and the proper officers of
“ the said Court of Chancery are hereby authorized and re-
“ quired

“ quired to issue such writ *de contumace capiendo* accordingly;
 “ and all sheriffs, gaolers, and other officers are hereby autho-
 “ rized and required to execute the same, by taking and detain-
 “ ing the body of the person against whom the said writ shall
 “ be directed to be executed; and upon the due appearance of
 “ the party so cited and not having appeared as aforesaid, or
 “ the obedience of the party so cited and not having obeyed
 “ as aforesaid, or the due submission of the party so having
 “ committed a contempt in the face of the court, the judges or
 “ judge of such ecclesiastical court shall pronounce such party
 “ absolved from the contumacy and contempt aforesaid, and
 “ shall forthwith make an order upon the sheriff, gaoler, or
 “ other officer in whose custody he shall be, in the form to this
 “ act annexed, for discharging such party out of custody, and
 “ such sheriff, gaoler, or other officer shall, on the said order
 “ being shewn to him, so soon as such party shall have dis-
 “ charged the costs lawfully incurred by reason of such custody
 “ and contempt, forthwith discharge him.

“ § 2. Provided always, That nothing in this act contained
 “ shall prevent any ecclesiastical court from pronouncing or
 “ declaring persons to be excommunicate in definitive sentences,
 “ or in interlocutory decrees having the force and effect of de-
 “ finitive sentences, such sentences or decrees being pronounced
 “ as spiritual censures for offences of ecclesiastical cognizance,
 “ in the same manner as such court might lawfully have pro-
 “ nounced or declared the same, had this act not been passed.

“ § 3. And it is further enacted, That no person who shall
 “ be so pronounced or declared excommunicate, shall incur
 “ any civil penalty or incapacity whatever, in consequence of
 “ such excommunication, save such imprisonment, not exceed-
 “ ing six months, as the court pronouncing or declaring such
 “ person excommunicate shall direct, and in such case the said
 “ excommunication, and the term of such imprisonment, shall
 “ be signified or certified to His Majesty in Chancery, in the
 “ same manner as excommunications have been heretofore sig-
 “ nified, and thereupon the writ *de excommunicato capiendo*
 “ shall issue, and the usual proceedings shall be had, and the
 “ party being taken into custody shall remain therein for the
 “ term so directed, or until he shall be absolved by such eccle-
 “ siastical court.”||

(F) Of absolving and assoiling a Person excommu- nicate.

IF a person be unjustly excommunicated, that is, if he be ex-
 communicated for matter of which the spiritual court hath
 not conusance, and he be taken on a writ of *excommunicato ca-
 piendo*, the party grieved shall have (a) a writ out of Chancery
 to the sheriff, to deliver him out of prison:

So,

2 Inst. 623.
 12 Co. 76.
 & vide the
 9 E. 2. c. 7.
 (a) For this
 vide F. N. B.
 141.

So, if the spiritual court proceed *inverso ordine*, as, if they refuse a copy of the libel, &c., a prohibition shall go, with a clause to absolve, and deliver the party injured. Sid. 232.

Also, if a man be excommunicated, and offer to obey and perform the sentence, and the bishop refuse to accept and to assail him, he shall have a writ to the bishop, requiring him, upon performance of the sentence, to assail him, &c. and the reason thereof is, for that by the excommunication the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate. And so the party grieved may have his action upon his case against the bishop, in like manner as he may when the bishop doth excommunicate him for a matter which belongeth not to ecclesiastical consueance. Also, the bishop, in those cases, may be indicted at the suit of the King. 2 Inst. 623.

But, if the excommunication be for a just cause, the party must make present satisfaction before he can be absolved, or he must put in caution, that he will hereafter perform that which the bishop shall reasonably and according to law injoin him; which caution, in the civil law, is of three sorts. 1. (a) *Fidejussoria*, as when a man bindeth himself with sureties to perform somewhat. 2. *Pignoratitio* or *realis cautio*, as when a man engageth goods, or mortgageth lands for the performance. 3. *Juratoria*, when the party who is to perform any thing taketh a corporal oath to do it; which last is now the most frequent method. Gibs. Codex, 1110. (a) This method of taking caution was once held to be against law; Bulst. 122., but was afterwards on great debate allowed to be good, and that the

bishop having a discretionary power herein, it was as much in his option to take caution by obligation, as by either of the other two methods. 2 Lev. 36. Raym. 225.

If, after a person is excommunicated, there comes a general act of pardon, which pardons all contempts, &c., it seems that this offence is taken away without any formal absolution. But for this vide Cro. Gar. 199. Cro. Ja. 159. 212.

8 Co. 68. Jon. 227. 2 Lev. 36.

EXECUTION.

(A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments: And herein,

1. Of

1. *Of the Nature of Recognizances at Common Law, and on the 23 H. 8. c. 6., &c. and of the Statute Merchant and Staple.*
2. *Of the several Processes on these Securities when forfeited, in order to a full Execution: And therein,*
 1. *Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, &c., and they from each other.*
 2. *At what Time Execution may be granted on each of them.*
 3. *Who shall have Execution on them, as the Person alters.*
 4. *Against whom Execution may be granted.*
3. *What Things are bound by them, and are liable to be extended for the Satisfaction of them.*
4. *What Provision the Law has made for Tenant by Statute Merchant, &c. in case of Eviction.*
5. *The several Ways of vacating and discharging those Statutes, and this, either before or after Execution.*

(C) *Of the several Kinds of judicial Writs which lie after Judgment: And herein,*

1. *Of the Form, Teste, and Return of such Writs.*
2. *Of the Elegit.*
3. *Of the Capias ad Satisfaciendum.*
4. *Of the Fieri facias and Levavi facias.*
5. *Of the Habere facias Seisinam and Possessionem.*

(D) *Where the Party shall be concluded by the Election of one of them, and what further Remedy he has when he hath not received entire Satisfaction on his first Writ; and this, either against the Party or Sheriff.*

(E) *Of the Authority and Jurisdiction of the Court out of which the Execution issues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a superior Court.*

(F) *Who are entitled unto and may sue out Execution.*

(G) *Of the Persons against whom Execution may be sued out: And herein,*

1. *Of suing Execution where there are several Parties concerned.*
2. *Of*

2. Of suing out Execution against the Heir and Executor.
3. Of suing out Execution against Infants.
4. Of suing out Execution against a Feme Covert.
5. Of suing out Execution against privileged Persons.
6. Of suing out Execution against a Clerk in Holy Orders.

- (H) At what Time Execution may be sued out: And herein of the Necessity of a *Scire Facias*.
- (I) To what Time the Execution shall have Relation, so as to avoid any Alienation by the Party: And herein of the Statute of Frauds.
- (K) Of the King's Precedency in Executions.
- (L) Of the proper Officer to do Execution: And herein of the preceding and succeeding Sheriff.
- (M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy against him for Neglect of his Duty.
- (N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &c.
- (O) Of the Offence of hindering or obstructing an Execution.
- (P) Of the Party's Remedy when there hath been an irregular Execution, and how the same is to be set aside.
- (Q) To what he shall be restored when such erroneous Execution is set aside.

-
- (A) Of the Nature of Execution, and what Things were liable thereto by the Common Law.

EXECUTION is the obtaining actual possession of a thing recovered by judgment of law, and (a) is called the life of the law, and therefore in all cases to be favoured.

finis, & effectus legis, Co. Litt. 289. 5 Co. 87. — It differs from an action which continues only till judgment is given, and therefore a release of all actions is regularly no bar of an execution. Co. Litt. 289. 2 Roll. Abr. 404.

And here it will be necessary to consider what things are liable to execution at common law in personal actions. These we find were only the annual profits of the land as they arose, and

Co. Litt. 154. a. Carter, 194.

(a) *Executio est fructus*,

Hob. 60. 3 Co. 12. b. Sir William Herbert's case.

*See 12
Vic
C 110
see 11-*

Cro. Ja. 450.
 Plow. 440.
 2 Inst. 19. 2 Roll.
 Abr. 472.

and the goods and chattels of the debtor; for neither his body nor lands were affected by recognizances or judgment for debt or damages, except as hereinafter excepted.

Plow. 440.
 3 Co. 11.
 2 Inst. 19.

The reason why the common law subjected only the personal estate to the payment of debts, seems to be, for that it was only a chattel that was lent, and therefore the chattels of the debtor were liable only to pay it; and formerly men trusted one another no further than they had visible chattels to answer the debt. The lands were not liable, because they were obliged to answer the duties to the feudal lord; and a new tenant could not be forced upon him without his consent to the alienation; and the person was not liable, because that was obliged by the tenure to serve the King in the wars, and the several lords at home, according to the distinct natures of their tenure. But though this law was well framed for a nation bred to wars, who were to extend their fame and power by arms, yet it was no ways calculated for the circumstances and constitution of a trading people, whose power and credit rise and fall in proportion to the increase or decay of trade; therefore, in such a nation, laws ought to be so contrived and framed, as to invite foreigners to trade with it, and bring their commodities to it; and the great encouragement to this will be to allow them all possible security in their contracts and dealings; and the way to that will be to subject all the effects of the debtor, whether in lands or chattels, and his person too, to satisfy the creditor; for otherwise it would be in the power of every bad man, by converting his chattels into land, to defraud his creditor, and against all reason and equity enjoy the profits of that land which he purchased with another's money. Accordingly we find, that towards the reign of Ed. 1. when *magna charta* had given the tenants a power of alienation, without acquainting their lords, if they left enough to answer the duties of their tenure, they began to subject the land to answer the debts in trade; and as they grew more and more a trading people, it was thought reasonable that the person should be liable, that a close confinement might oblige the debtor the sooner to satisfy his creditors, as also make him the more wary how he contracted debts, without the prospect of a competent fund or provision to discharge them.

Plow. 441.
 3 Co. 11.

But even at common law we find, that the King, by his prerogative, might have execution of body, goods, and lands, but still under this restriction, that the land was not extendible while the chattels were sufficient and the debtor ready to answer the debt.

3 Co. 12. a.
 Cro. Ja. 450.
 Plow. 441.

Also, in case of a private person, the land was liable to execution, in an action of debt against an heir upon an obligation made by his ancestor; if the plaintiff had judgment, the law dispensed with the former rules, rather than that the creditor, who fairly made out his demands, should be without a remedy, and therefore gave the lands descended, in execution, to answer the debt; for since the common law allowed the action of debt against

against the heir, the creditor could have no benefit by the action, unless he were permitted to have execution of the lands which descended to the heir.

So, if *A.* had granted for him and his heirs, to *B.* and his heirs, such a rent out of his lands, in this case the heirs, being comprehended in the contract, are bound to make good the grant as far as they have assets by descent from the grantor: and this was allowed at common law, because the grantee of the rent had the land originally in view for his security; and by the grant itself, having it in his power to distrain the land for the rent, it was equal to the heir whether the land was to answer the rent by distress, or by an execution upon a judgment in a writ of annuity.

Thus stood the common law till the statute of *Acton Burnell* *, and the 13 Ed. 1. *de mercatoribus*, (which last, as appears in the preamble, was for the security of merchants and encouragement of trade,) subjected not only the goods and persons, but the lands likewise of the debtor, into whose hands soever they came after the statute acknowledged.

Also, in the same year and reign the *elegit* was given; and by this (a) statute, he who recovereth in debt or damages, may have either a *feri facias* of the chattels of the debtor, or a writ on which the sheriff shall deliver to him all the chattels of the debtor, saving only his oxen and beasts of his plough, and the one half of his land, until the debt be levied upon a reasonable price or extent.

The 25 Ed. 3. c. 17. subjected the person of the debtor, and gave the *capias ad satisfaciendum* in debt, detinue, &c., in the case of a common person.

Roll. Abr. 226.
Poph. 87.
Hob. 58. Dyer,
344. b. Co.
Litt. 144.

Hob. 60.
2 Roll. Abr.
475.
* 11 Ed. 1.

(a) Viz. 13.
Ed. 1. c. 18.
commonly
called the sta-
tute of West. 2.
vide 2 Inst.
394, 395.

Vide Dalt.
Sher. 144.
As to this vide
infra (C) 3.

(B) Of the Judgment on which Execution is to be taken out; and herein of Recognizances and Statutes which are in the Nature of Judgments: And herein,

1. Of the Nature of Recognizances at Common Law, and on the 23 H. 8. c. 6., &c. and of the Statute Merchant and Staple.

AN obligation by matter of record is a writing obligatory acknowledged before a judge, or other officer having authority for that purpose, and enrolled in a court of record; and of this there are two sorts, viz. recognizances or statutes.

The original of the acknowledgment of obligations in courts of record seems to be, that there might be no occasion to have the trouble and charge of the proving, which was formerly in the manner of contracting more expensive than at present; for formerly the persons under the *his testibus* were joined to the jury who tried the cause, and the creditor was obliged by process to bring them in to join them to the jury, which form, as my Lord Coke has observed, made great delay in the proceedings.

Co. Litt. 6.

To save this expence, the acknowledgment was made in courts of justice, and then the court attesting the deed, there needed no proceeding or trial to make it evident.

The first of these securities is the recognizance at common law, which is no more than an obligation on record, and may be acknowledged before the several judges out of term, and in any part of *England*, and may be entered on record, as well out, as in term. So, the (a) chancellor or keeper may take recognizance and award execution, or hold plea of *scire facias* and *audita querela* in the Chancery, to avoid execution, &c. as the case requires, on all recognizances taken in that court.

for a debt due to himself, it is a void recognizance; for the law will not trust him with the exercise of his power in his own case: but, if one enters into a recognizance to the chancellor and a stranger, it is a good recognizance as to the stranger; for, so far as his interest concerned, the chancellor is a proper person to take it, and cannot be said to be a judge in his own cause. *Dyer, 220. 8 Co. 118. a. Co. Litt. 141. a.*

By the custom of the city of *London*, the mayor, aldermen or the mayor singly, may take recognizances; for the custom is not only reasonable in itself, but, as all other customs of the city, has been confirmed by act of parliament.

The king, by special commission, may appoint any person to take a recognizance from one man to another, and such a recognizance duly certified with the commission into Chancery is of equal force with the former; and though the commission be so particular, that it only mentions a recognizance to be taken from *A. to B.*, yet, says *Fitzherbert*, the commissioners have a general power to take a recognizance from any other person.

But those recognizances at common law are no perfect record till they are enrolled in some court of record; yet, if they be taken on one, and enrolled on another day, they find as reasonable provision in the law; for since it allows any one judge out of court, and in any part of the kingdom, to take these recognizances, which are the highest security of the common law, it was very necessary they should be enrolled to perpetuate the contract, and by that means secure the creditor his just debt, which must have been very precarious and uncertain, while the security lay in a private hand, who might either through carelessness mislay, or by ill practices be prevailed upon to suppress it.

A statute merchant is a bond of record, acknowledged before one of the clerks of the statute merchant, and mayor of the city of *London*, or two merchants of the said city, for that purpose assigned, or before the mayor or warden of the towns, or other discreet men for that purpose assigned. This recognizance is to be entered on a roll, which must be double, one part to remain with the mayor, and the other with the clerk, who shall write with his own hand a bill obligatory, to which a seal of the king, for that purpose appointed, shall be affixed, together with the seal of the debtor.

The design of this security was to promote and encourage trade, by providing a sure and speedy remedy for merchant-strangers as well as natives, to recover their debts at the day assigned.

Brö. Recognizance 20.
Vaugh. 102.
Hob. 195.
4 Inst. 79.
(a) But, if a person enters into a recognizance to the chancellor

4 Co. 64. b.
2 Inst. 395.
Cro. Eliz. 187.
Ro. Abr. 557.

Fitz. N. B.
267. A.
Register, 149.

Hob. 195.

13 Ed. 1. st. 3.
2 Ro. Abr.
466.

signed for payment, the want of which, says the statute of (a) *Acton Burnell*, (which first created the statute merchant,) in a great measure prevented the importation of foreign commodities, and discouraged strangers from trading with us, to the detriment not only of our own merchants, and other subjects, but of the prince himself, whose customs rise and fall in proportion to the increase and decay of trade. (a) 11 Ed. 1.

But, though the statute merchant seems first to have been introduced, and was wholly calculated for the ease and benefit of merchants, as the name itself imports; yet it was not long ingrossed by them; for other men finding from their own observation, that it was much of the same nature with judgments given in *Westminster-Hall*, but obtained with infinitely less trouble and expence, out of regard to their own interest and quiet, easily fell into this way of contracting, and by degrees it came to be improved into a common assurance, as we find it at this day. Winch. 83.

The addition of the king's seal, which was never required to any contract at common law, was to authenticate and make the security of a higher nature than any other then known; for by this the king, in the person of the mayor, &c. attests the contract, and takes conusance of the debt, and, consequently, execution is to be awarded upon failure of payment at the day assigned, without any mesne process to summon the debtor, or the trouble or charge of bringing in proofs to convict him: for the judges, who are the king's representatives, for the more speedy administration of justice, require these on common contracts and specialties, to satisfy themselves of the justice and legality of the plaintiff's demands, before they award any execution against the defendant; but to this contract the king himself by the mayor, warden, &c. is a witness, and has the frank acknowledgment and confession of the debtor, that he really owes so much, which is the best and surest proof the law requires; therefore the legislators of that time, out of a just regard to the prerogative and justice of the king, on those contracts, as on judgments, allowed of an immediate execution; these being the surest means of conviction, viz. the confession of the conusor on record, which the judges at *Westminster* seldom have to frame their judgments on; and thus it must be presumed from the force of them, which is equal to judgments of the superior courts, they obtained the name of pocket judgments. 3 Sheph. Abr. 318.

The seal of the king consists of two pieces, one to lie in the custody of the mayor, and the other of the clerk that enrols the recognizance, the better to prevent any fraud or corruption this security might be liable to, if the seal lay in one hand. Cro. Eliz. 233. 319.

The statute staple is a bond of record, acknowledged before the mayor of the staple, in the presence of all or one of the constables. To this end, says the (a) statute, there shall be a seal ordained, which shall be affixed to all obligations made on such recognizances acknowledged in the staple. This seal of the staple is the only seal the statute requires to attest this contract; 2 Ro. Abr. 466. (a) 27 Ed. 3. st. 2. c. 9.* * Also vide c. 8. of the same statute;

and 36 E. 3.
c. 7.

but it is no more under the power or disposal of the mayor, than that appointed by the statute merchant; for though the statute appoints him the custody of it, yet it is in such a manner, that he cannot affix it to any obligation without their consent, it being to remain in the mayor's hands, under the security of their own seals.

4 Inst. 238.

To understand a little of the original and constitution of the staple, and the advantage the nation had by this establishment, we must observe, that the place of residence, whither the merchants resorted with their staple commodities, was anciently called *estapel*, which signifies no more than *mart* or *market*; and this was formerly appointed out of the *realm*, as at *Calais*, *Antwerp*, &c. and other ports on the continent which were nearest to us, and whither the merchants might with safety coast it.

Maline's Lex.
Merc. 337-8.
Vide the 27 E.
3. c. 1.

But besides these staple ports appointed abroad, there were others appointed at home, whither all the staple commodities were carried in order to their exportation, such as *London*, *Westminster*, *Hull*, &c. These were found to be of great use and consequence to the prince in particular, and to the interest and credit of the nation in general; for at these staple ports were the king's customs easily collected, and by the officers of the staple, at two several payments, returned into the exchequer. Besides, at these staples, all merchants' goods were carefully viewed and marked by the proper officer of the staple; and this necessarily avoided the exportation of decayed goods, or ill-wrought manufactures, and, consequently, fixed a stamp of credit on the merchandizes exported, which, upon the view, always answered the expectation of the buyer.

(a) 4 Inst.
238. (b) Ma-
line's Lex
Merc. 237.
27 E. 3. c. 8.

The staple merchandizes, according to Lord (a) *Coke*, are only, wool, woofels, leather, lead, and tin; (b) others add butter, cheese, and clothes; but whatever they were, the mayor and constables had not only consueance of all contracts and debts relating to them, but they had likewise jurisdiction over the people and all manner of things touching the staple. This power was given them, lest the merchants should be diverted and drawn from their business and trade, by applying to the common law, and running through the tedious forms of it, for a determination of their differences, and for the greater encouragement of merchants, that they might have all imaginable security in their contracts and dealings, and the most expeditious method of recovering their debts, without going out of the bounds of the staple.

Co. Litt. 290.

By this it appears, that this security was only designed for the merchants of the staple, and for debts only on the sale of merchandizes brought thither: yet in time others began to apply it to their own ends, and the mayor and constable would take recognizances from strangers, surmising it was made for the payment of money for merchandizes brought to the staple. To prevent this mischief, the parliament in 23 H. 8. c. 6. § 11. reduced the statute staple to its former channel, and laid a penalty of 40% on the mayor and constables, who should extend the

the benefit of the statute to any but those of the staple. But, though the statute of 23 H. 8. c. 6. deprived them of this benefit; yet it framed a new sort of security, to be used *ad libitum* by all men, known by the name of a Recognizance on 23 H. 8. c. 6. or a recognizance in the nature of a statute staple, so called, because this act limits and appoints the same process, execution, and advantage in every particular, as is set down in the statute staple.

A recognizance therefore in nature of a statute staple, as the words of the act declare, is the same with the former, only acknowledged under other persons; for as the statute runs, the chief justices of the King's Bench and Common Pleas, or in their absence, out of term, the mayor of the staple at *Westminster*, and the recorder of *London*, jointly together, shall have power to take recognizances for payment of debts in the form set down in the statute. In this, as in the former cases, the king appoints a seal to attest the contract, which such of the said justices shall have the keeping of, and the said mayor and recorder another of the same print and fashion; and every obligation made and acknowledged before either of the justices, or the mayor or recorder, must be sealed with the seal of the consor, with the king's seal, and with the seal of the chief justice, or the mayor and recorder before whom it is taken, who are likewise obliged to subscribe their names: besides this, the clerk of the recognizance, (who is to be appointed for this purpose by the king,) or his deputy, shall make and write all obligations thus acknowledged, and enrol them in two several rolls indented, one whereof shall remain with such of the said justices, or with the mayor and recorder that take the recognizance, and the other with the clerk, who is farther obliged, at the request of the consor, his executors, or administrators, to certify such obligations into Chancery under his seal.

Co.Litt. 290. a.

4 Inst. 238.

2 Ro. Abr.

466. Co.

Ent. 12.

But now by stat. 8 G. 1. c. 25. § 1. the clerk of the recognizances, or his deputy, shall prepare three parchment rolls, and shall, at the times of acknowledging every such recognizance, fairly write or engross, instead of the heads or contents thereof, on the said rolls, the full tenor, *in hæc verba*, of every such recognizance; and one of the rolls shall contain all the recognizances taken before the Chief Justice of the King's Bench; another the recognizances taken before the Chief Justice of the Common Pleas; and the other the recognizances before the mayor of the staple at *Westminster*, and recorder of *London*; and the persons before whom such recognizances shall be taken, as well as the parties acknowledging the same, are to sign their names to the roll of every recognizance under the enrolment thereof, as well as sign and seal the recognizance; and all rolls so signed shall, at the end of every year, be fixed together, and made one roll of, and are to remain in the custody of the clerk, who is to keep a docket for searches.

2. *Of the several Processes on these Securities when forfeited, in order to a full Execution.*

3 Lev. 312.
Stephens and
Hanham, Salk.
563. S. C.
4 Mod. 48. S. C.
1 Show. 290.
S. C. Skin. 300.
S. C.

But before we enter into a particular inquiry concerning these processes, it is proper to take notice, that the interest gained upon an execution of a statute or recognizance is to be followed by an actual entry of the conusee to perfect his security, and till such entry the conusee hath only a possession in law, which he cannot assign or transfer over to any other person; therefore where the administrator of a conusee in a statute after his death sued forth an extent, and upon that a *liberate*, which was returned, and before any actual entry or recovery of the possession in ejectment, or without executing the deed upon the land, did by indenture assign over all his interest to the lessor of the plaintiff, who thereupon brought his ejectment; it was adjudged, that the assignment was void; for by the return of the *liberate* he had accepted the possession, and was estopped to say the contrary; then when the owner still continues in possession, this turns the possession which the administrator had accepted by the *liberate* to a right, and such right is by no means assignable; nor is this like an *interesse termini*, which, it is true, the lessee may assign over before actual entry, because in that case the lessor is the principal agent, and hath done all on his part to transfer over an interest to the lessee, which he may execute at pleasure; and as the person who sues the *liberate* in this case is estopped to say, that he hath not the possession; so is the lessor in the other case estopped to say, that he hath the possession, against his own lease.

See *post*, D.

1. *Of the Manner of Execution on the Recognizance at Common Law, and wherein it differs from the Statutes, &c. and they from each other.*

13 Ed. 1. stat. 3.

If the conusor be within the jurisdiction of the mayor, or other officer, before whom the statute merchant was acknowledged, and be found there, then upon the conusee's bringing the statute, &c. to the mayor, &c. and clerk, and their finding the record of it, and the day of payment lapsed, the mayor may apprehend and imprison the conusor (if he be lay), there to remain till he satisfies his creditor.

Winch. 82.
Jon. 52.

And although there be no day of judgment expressed in the statute, yet this omission of the clerk does not vitiate the statute; for in this, as in obligations, where no actual day is appointed for payment, the legal day is presently, or when the conusee pleases to demand it.

Winch. 83. 85.

But there may be a day of payment fixed in the statute, and yet the statute void; as, if it be payable at *Michaelmas*, after *J. S.* goes to *Paul's*, or returns from *Rome*; these are void statutes, because it does not appear judicially to the mayor when to award execution; but, if the statute be payable the first return of *Michaelmas* term, or before *Michaelmas*, there is sufficient

cient certainty in these, and the mayor ought to take notice of them.

But, if the conusor be out of the jurisdiction of the mayor, ^{2 Roll. Abr. 473.} then shall he send the recognizance under the king's seal into Chancery, after which certificate the first process is a *capias* to take his body only; and if upon this the sheriff returns a *cepi corpus*, the debtor shall remain in prison a quarter of a year, in which time he may dispose of his goods and lands to the best advantage to pay his debts. But, if the conusor either omits to satisfy his creditor in that time, or, if the sheriff returns on the *capias non est inventus*, or the conusor dead, then shall the execution be granted against lands, goods, and chattels, and they be delivered to the conusee by a reasonable extent till the debt be levied; which writ of execution the sheriff is to return into one of the benches, and how he hath performed the service.

And here we must take notice, that the process on a statute merchant differs from that on the statute staple, and the recognizance in nature of a statute staple, in four particulars:

1. If the conusor cannot be found within the staple, nor his goods, to the value of the debt, the first process, after the certificate under the seal in Chancery, is to take body, lands, and goods, all in one writ, in which respect it is preferable to the statute merchant, as being a much speedier remedy. ^{Bro. Statute Merchant, 16.}

2. They differ in respect of the place of the return; for, as is before observed, the writ of execution on the statute merchant is returnable in either bench; but upon the statute staple the writ is returnable into Chancery; and ^{4 Inst. 79. Co. Litt. 290.} 23 H. 8. c. 6. which first brought in the recognizance in nature of a statute staple, referring in this to the same process and execution established by 27 E. 3. st. 2. c. 9. on the staple, the law must be the same in both cases.

3. They differ in the substance of the writ of execution, for ^{2 Roll. Abr. 475.} upon the statute merchant the sheriff may deliver the lands, &c. to the conusee, upon a reasonable extent, without the delay or charge of a *liberate*; but upon the statute staple, or recognizance in nature of it, the sheriff, after the extent, cannot deliver the lands, &c. to the conusee, but must seize into the King's hands, and the conusee must have a *liberate* to get the lands, &c. into his hands; and in this respect the statute merchant is preferable to the statute staple, or recognizance in nature of it.

4. A fourth difference is, that the statute merchant having the seal of the conusor besides the king's seal, the conusee may waive the execution given by the statute, and use it as an obligation, and bring an action of debt on it: so, for the same reason may the conusee, on the 23 H. 8. c. 6. the recognizance having the seal of the conusor to it: *secus* of a statute staple, because the king's seal only, without that of the party is affixed to it, which is absolutely necessary in all obligations at common law. ^{Bro. Statute Merchant, 16. Moore, pl. 1097. Cro. liz. 44.}

2. At what Time Execution may be granted on each of them.

Co. Litt. 291.
2 Inst. 469.
F. N. B. 296.
Bro. Recog.
17.

(a) By Westm.
2. 13. E. 1.
st. 1. c. 45.

For the time of execution we must distinguish between recognizances at common law and statutes merchant, &c. for upon the former, if the conusee did not take out execution within a year after the day of payment assigned in the recognizance, he was obliged to commence the suit again by original; the law presuming the debt might have been paid, if he did not sue execution within the year after the money became payable. But this law was (a) altered in *Edward the First's* time, and the conusee had a *scire facias* given him to revive the judgment, and put it in execution if the conusor cannot stop it by pleading such matters as the law judges sufficient for that end, such as a release, &c. but the conusee of a statute merchant, &c. may at any time sue execution on them without the delay or charge of a *scire facias*.

2 Ro. Abr.
468. Bro.
Execut. 142.
Co. Litt. 292.
2 Inst. 395.
471. Reg.
147. 5 Co.
81.

If *A.* enters into a recognizance or statute, &c. to *B.* and but one day of payment is appointed for the whole debt, *B.* may have execution upon failure of payment in the method before set down; but, if the sum be payable at three several days, as 20*l.* at each day, the whole debt being 60*l.* when the first day of payment is lapsed, the conusee may have execution for 20*l.* immediately, and so for the rest as it becomes due, without waiting for the last day of payment, as he must have done if the debt had been due by bond. And this holds as well on recognizances at common law as upon statutes; and the reason is, because these are in nature of three several judgments.

3. Who shall have Execution on them, as the Person alters.

2 Inst. 395.
471. Bro.
Stat. Merch.
16. 43. 50.

Here we must again distinguish between recognizances at common law, and statutes and recognizances introduced by statute law: for, in the first case, if the conusee dies before execution sued, his executor shall not sue it even within the year, without bringing a *scire facias* against the conusor: the reason is, because the law presumes the debt might have been paid to the testator, and therefore would not suffer the debtor to be molested, unless it appeared he had omitted to perform the judgment; and this was to be done by *scire facias* brought by the executor, for the alteration of the person altered the process at common law. But the statute merchant, &c. being designed to encourage strangers to trade with us, in this, as in many other instances, they have the advantage of any security known in the common law; and this dilatory process is taken away in these cases by the several acts of parliament that first introduced them; and therefore upon the death of the conusee of a statute merchant, &c. his executors may come into Chancery, and, upon their producing the testament and the statute, shall have execution without *scire facias*, as the testator himself might.

But the difficulty in settling this point will be, either when there are two conusees, and one of them dies after process of

execution is begun; or where there is but one conusee, and he dies after process begun. In order to clear these points, it is to be observed, that that which is certified into Chancery is a transcript of the record lodged with the mayor and clerk, and upon such certificate the Chancery views the pocket security, and then proceeds to issue the process according to the statute 13 E. 1. st. 3. *de mercatoribus*; and if there be any disagreement between the pocket judgments and the certificate, there is a new *certiorari* awarded to the mayor to inspect the rolls, and make a re-certificate, as appears in the (a) register.

(a) Reg. 148. b.

When the Chancery hath issued process in either bench, if the death of the conusor, or *non est inventus* is returned, so that it appears, that the person is not to be found to give satisfaction, the benches direct all other process, in order to give the party satisfaction. And the reason of this is, from the direction of the statute to return the process into these courts, which was upon this original policy, that all parties in interest might come in and have an opportunity to litigate where every man's property is determined.

Dyer, 180.

But, if the conusee dies after process returned into *C. B.* his executors cannot carry on the process there, because the statute directs a certificate of such sort of recognizance into the Chancery, and the benches have no power to proceed, but according to the authority derived from that court; and whenever that authority ceases, as by the death of the party, the process is at an end; and therefore the Court of Common Pleas cannot carry it into execution, as they could on a judgment obtained in their own court; but the suitor must go back into Chancery, as in all cases where process thence issuing is determined by the death of any of the parties. When the executor comes back into Chancery, there is a new *certiorari* awarded to the mayor to certify the record, both because the statute directs, that the Chancery shall issue process upon the recognizance returned, as also that it may appear to the court, that the security is still in being upon which the process is directed.

If the conusee of a statute merchant sues a *capias* returnable in *B.*, and upon a *non est inventus*, an *extendi facias* is awarded by the court, and before execution executed the conusee dies, his executors cannot carry on the execution in *banco*, because that process out of Chancery which gave the court an authority to proceed, being in the testator's name, is now determined. But, when the executor comes back into Chancery, he is not put to a new *capias*, but may have a special writ upon his case, to continue the process where it determined, because the *capias* would be nugatory and contrary to the record in *banco*, by which it appears that the personal satisfaction failed, and the execution was awarded on his effects. But, if the conusee of a statute merchant sues a *capias*, and upon a *non est inventus* an *alias* is awarded, before the return of which he dies, his executor, when he comes back into Chancery, must be put to a new *capias*, because the testator died in pursuit of the personal satisfaction, and

Ro. Abr. 467.

Dyer, 180. b.
Reg. 148.

2 Roll. 467.
25 E. 3. 58.

2 Roll. Abr.
467. Cro. Car.
450. 457.
Jones, 385.

2 Roll. Abr.
467.

and there is no record in this case, whereby it appears deficient; and therefore the executor is put to a new *capias*, that the deficiency of the personal satisfaction may appear on the return of it, according to the direction of the statute. But it seems in both cases, by *Dyer* and the *register*, that there ought to be a new *certiorari* and re-certificate thereon, that the existence of the security may appear at the time when the process issues.

If two conusees of a statute merchant sue execution, and the sheriff returns the conusor dead, upon which an *extendi facias* is awarded, and one of the conusees declares in court, that the other died since the suit commenced, and therefore prays execution for himself; in this case he must have a re-certificate of the record from the mayor, and then a writ upon his case directed to the bank to continue the process where it ended at the death of the other conusee; for it would be nugatory to put him to his *capias* again, since, it appeared by the return of the sheriff, that the conusor was dead.

If conusee of a statute staple dies, and *B.* his executor sues an extent in Chancery, but before execution executed *B.* dies, and administration *de bonis non* is granted to *C.* who continues the process, and after the extent returned sues out a *liberate* of the conusor's lands, which were taken in execution upon the *extendi facias* brought by *B.* and has them delivered to him; this is a void extent, and the conusor may recover his land in ejectment; for the *extendi facias* being sued in *B.*'s name, must by his death abate, and, consequently, all the proceedings continued after by *C.* must fall, having no foundation to subsist on. Besides, *C.* comes in paramount the writ of *B.* not as privy to himself, but as the immediate representative of *A.* So, if in this case *B.* had sued an extent, and after execution and a seizure into the King's hands, had died, *C.* shall have no *liberate*, because he, coming in paramount the extent, cannot continue the process, which abated by the death of *B.*

If a conusee of a recognizance in nature of a statute staple sue execution, and after the extent and seizure into the King's hands die, his executor shall have no *liberate*, for that were to continue the process which the testator begun, and abated by his death.

4. Against whom Execution may be granted.

Bro. Stat.
Merch. 33.
Co. Litt. 290.
Moor, pl. 121.
203. Dyer, 239.
Co. Ent. 12.
* Where execution shall go against the heir after an alienation of

If the conusor of a statute dies, the body of the heir * is protected by the statute from execution, but the lands and goods of the conusor are extendible in his hands; for it would be most unreasonable to subject the heir to payment of his father's debts, any farther than to the value of the assets descended; nor are these extendible in his hands, if he be an infant at the death of the conusor, till he comes of age. The statute in this particular is founded on the reason, and follows the course of the common law, by which, if judgment had been given against a man for debt

debt or damages, and the defendant died before execution sued, his heir within age was not liable to execution during his minority; but the parol demurred till he came of age. And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as, if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution.

lands descended, *vide* 3 W. & M. c. 14. § 5, 6. *infra*, vol. 3.

So, if the conusor of a statute merchant dies, and his heir within age endows his mother, the land in dower shall not be extended during the minority of the heir.

Co. Litt. 290.
Bro. Stat.
Merch. 33.

In the next place, let us see how the law directs the execution, where the conusor conveys the land to several persons after the statute acknowledged. It would be very unreasonable to load one feoffee with the whole debt, when the burden ought to be on the whole land, into whose hands soever it comes after the recognizance acknowledged; and therefore the law allows of contribution against the other purchasers, by which we must not understand that they are to allow the purchaser, whose land is extended, any thing by way of contribution to the extraordinary charge, which he ought not to bear alone; but the person grieved must relieve himself by *audita querela*, which sets aside the execution, and restores him to the mesne profits, and obliges the conusee to sue execution of all the lands.

3 Co. 14.

And here we must consider by what rules the law has governed itself in such executions. By the words of the statute *de mercatoribus*, all the lands of the conusor are liable, and therefore the conusee may extend the execution to them all; but, if, while they continue in the hands of the conusor, he takes but part, it is a merciful execution to the conusor, because it leaves him the rest of the land for his subsistence in the mean time, and therefore he cannot set aside the execution as for partiality, since it is plainly made for his advantage. But, if the conusor aliens part of his land, then the case is very much altered; for if the conusee sues out execution of the land of the alienee, that were apparent partiality in him, and contrary to the intent of the conusor, which makes all the land equally liable; and therefore such execution may be set aside by *audita querela*, for the apparent partiality and injustice of it. And it is the same law where there are several feoffees, and execution is sued against one of them only, and this for the same reason. But, if the lands of the conusor only, after such alienation, had been taken in execution by the conusee, this execution had been good; for such conusor could not charge him with any partiality since the debt was his own, and his person and effects still liable after such alienation, and he is supposed to receive the purchase-money from the alienee; and therefore there is no reason to bring him into the payment of the debts which such conusor had previously contracted.

Plow. 72.
Pope and Ross,
3 Co. 12.

Bro. Stat.
 Merch. 49.
 2 Inst. 396.
 3 Co. 13. n.
 7 Co. 39. a.
 Ro. Abr. 311.
 2 Ro. Abr.
 472. Plow.
 72.

If *A.* seised of three acres in fee, acknowledges a statute to *J. S.* and enfeoffs *B.* of one acre, and *C.* of another, if *J. S.* sues out execution against *B.* he may have an *audita querela* to oblige the conusee to charge the lands of *A.* and *C.* equally; for 13 E. 1. says, that all the lands of the conusor shall be extended into whosoever hands they come; and therefore the acre of *B.* shall not be liable to the whole debt, when the statute in this case subjects the other two: but, if *J. S.* had sued execution against *A.* the conusor only, he should have no *audita querela* to avoid it: so, if in this case the conusor had died, and execution had been sued against the heir, he should have no contribution against *B.* and *C.* because the heir comes to the land without any consideration, and the conusor might bind his heir, as far as the land descended would answer his debts. And yet in some cases the heir shall have contribution; as, if the ancestor acknowledge a statute, and die, leaving issue two daughters; or, if the land which descends be of the nature of Borough-English or gavelkind, the heir at law shall make the special heirs contribute, because all of them come in as heirs to the land descended, and are equally charged with his debts.

Hob. 25.
 Co. Litt. 376.

2 Bulst. 14, 15.

But, if *A.* in the principal case had conveyed his three acres to *B.*, *C.*, and *D.*, and the conusee extended the acre of *B.* who after the extent conveys by fine his acre to *J. N.*, in this case *J. N.* cannot avoid the extent by *audita querela*, and have contribution against *C.* and *D.*; for though the feoffee of a feoffee may have contribution where the conveyance is before the extent; yet in this case *J. N.* claiming under a fine levied after the land was actually extended, must hold it under the incumbrance, for *transit terra cum onere*; and it is no way unreasonable that he should hold it as he purchased, since he is supposed to pay a consideration accordingly: besides, the judgment in the *audita querela* is, that the plaintiff shall be restored to all the mesne profits, which *J. N.* cannot have in this case, because the extent was sued before he purchased, and he can have no title to them but from the fine levied.

3 Co. 13. a.
 2 Co. 25. b.

If *A.* binds himself to a recognizance or statute, and after his death some of his lands descend to the heir of the part of the father, and some to the heir of the part of the mother, both heirs shall be equally charged; and if the conusee loads one only, he shall have contribution.

2 Ro. Abr.
 468.

If *A.*, *B.*, and *C.* bind themselves jointly and severally in a statute, the conusee may have execution against one of them alone, or against altogether; but he cannot have execution against two only; for the execution must pursue the statute, which is joint or several; but execution against two is neither one nor the other.

3. *What Things are bound by them, and are liable to be extended for the Satisfaction of them.*

Hob. 60.

The statute of 13 E. 1. *de mercatoribus*, which, as appears in the

the preamble, was for the security of merchants and encouragement of trade, subjected not only the goods and person, but the lands likewise of the debtor into whose hands soever they came, after the statute acknowledged: therefore, if the person of the conusor only be taken in execution in a statute, and die, his goods and lands are still liable to the extent, because being all due at first to satisfy the conusee, he may, at discretion, take them all at one time, or at several.

So, if a conusor sell all or part of his lands, after he has bound himself, the conusee may still extend it by the words of the statute; otherwise it would be in the power of the conusor to frustrate the security intended by the law: so, if the conusor purchase after he has bound himself, such lands are subject to execution; for the statute says, "All his lands shall be extended;" which still must be understood of those only which he has a power over, and may charge; and, consequently, those which he disposed of for valuable consideration before his entering into the statute are not liable in the hands of the purchaser, for they really in no sense can be called his lands.

If the conusor has two manors, the conusee may sue execution in which of the manors he pleases, for he may dispense with any part of the provision the statute has made for him.

If tenant in tail acknowledge a statute and die, and the conusor sue execution against the issue, the issue may avoid it, either by assise or *audita querela*; for no charge of the conusor's can affect the land in tail longer than his own life, by virtue of the statute *de donis*, which as to such lands repeals the other.

If in this case, tenant in tail, after he had bound himself, had enfeoffed *J. S.*, and for his further assurance had levied a fine to him, the conusee may extend the land in the hands of *J. S.*, and neither he nor the issue in tail can avoid the execution, for the issue is totally barred by the fine, and *J. S.* purchased the land under the charge, and, consequently, must hold it so.

But, if tenant in tail bind himself in such recognizance or statute, and die, and his issue enfeoff *J. S.*, it seems, the conusee may extend the lands in the possession of *J. S.*

law, nor consistent with the case next but one.* *Supra.*

If a reversioner upon a lease for years acknowledge a statute, both the reversion and rent are extendible, and the conusee may have an action of debt for the rent. So, a rent upon an estate for life may be extended for satisfaction of a statute: but the conusee in this case can have no action of debt for the rent, any more than the reversioner himself could have; because during the continuance of the freehold, no action of debt lies for the rent.

If a reversioner in fee upon an estate for life acknowledge a statute, and after grant the reversion upon the death of tenant for life, the conusee may extend the land, for the reversion being a tenement is bound by the statute.

So,

2 Ro. Abr.
475.

3 Co. 12.
2 Ro. Abr.
472. Winch.
84.

Bro. Execut-
tion, 85.
Cro. Ja. 85.

2 Ro. Abr.
473.

Bro. Execut.
76. Qu.* As
this does not
seem to be

2 Ro. Abr.
472.

Moor, pl. 118.
2 Roll. Abr.
473.

Moore, pl. 104.
Co. Litt. 135.
By stat. 27 E. 3.
st. 2. c. 9. the
conusee hath
an estate of
freehold. *Vide*
post.

So, if *A.* seised of a rent-charge bind himself in a statute merchant, this rent is extendible; for the word *land*, which the statute subjects to the execution, includes all hereditaments extendible, and the conusee in this case may distrain and avow for the rent, though the tenant never attorned; for the law creating his estate gives him all means necessary for the enjoyment of it.

7 Co. 39.
Lillingston's
case.

If the grantee of a rent-charge, after the acknowledgment of the statute, release to the tenant, by which the rent is extinguished, yet upon failure of payment the conusee may extend it; for to this purpose it has still a continuance, the statute *de mercatoribus* binding all the land (which includes all hereditaments extendible) the conusor had at the time of entering into the statute; consequently, this must be liable into whose hands soever it comes.

5 Co. 105.
Moore, pl. 351.
2 Inst. 397.
2 Roll. Abr.
472. Hob. 47.
but Dyer, 372.
cont.

If the conusor has lands in ancient demesne, they shall be extended on forfeiture of the statute; for though disputed titles to these lands are not determinable in courts of common law (and therefore ejectment does not lie of them) lest the tenants should be brought from the service of the plough; yet they are extendible in this case; for the extent is performed by the sheriff *in pais*, and the title of the land is not directly put in plea or dispute in the King's courts, by which the tenant might be brought from his business.

Co. Litt. 222.
2 Co. 59.
Julius Win-
nington's case.

If a feoffment be made to *A.* upon condition to re-infeoff the feoffor, and *A.* bind himself in a statute; if *A.* continue seised of the land, or re-infeoff the feoffor, the land in either case may be extended by the conusee: for whoever comes to the land under the feoffment of *A.*, takes it chargeable with the statute, and, consequently, is liable to the execution. But, if the feoffor had entered, as he well might, because the feoffee had disabled himself to perform the condition, inasmuch as he cannot return it in the same plight it was given him, then he should not be charged; for this being a lawful entry, like an eviction in a court of record, sets aside all incumbrances. But, if in this case *A.* had been disseised, and then bound himself in a statute, this had not charged the land during the disseisin, and, consequently, there is no disability to perform the condition; for a disseisee can no more charge his right, as such, than he can transfer it; nor is the land extendible in the hands of the disseisor; because, though his entry is tortious, yet he held it free during the disseisin, as the disseisee enjoyed it: but, if the disseisee enter or recover by action, then the land becomes chargeable with the statute.

Co. Litt. 184.b.
2 Roll. Abr. 88.
6 Co. 79. Lord
Abergavenny's
case, Co. Litt.
185. a. 6 Co.
78, 79.

If *A.* and *B.* be jointenants in fee, and *A.* enter into a statute, and die before execution sued, the land is not extendible in the hands of *B.* because he claims the land as survivor from the first feoffment which conveyed it to him free from any charge. But, if the conusee had sued execution before the death of *A.* the survivor *B.* should hold it charged; for execution is equivalent to a sale, and, like a lease for years, shall bind the survivor. So,

if *A.* in this case had, after the acknowledgment of the statute, released to *B.*, then the land would be chargeable with the statute, though *A.* should die before execution, because the acceptance of the release prevents him from claiming by survivorship; for by the release *B.* had the land before his companion died.

But the law is otherwise in the case of parceners; for if one of them charge the land, the other shall hold it under the incumbrance of the statute, for he comes in as heir by descent under the charge; whereas the jointenant surviving claims from the first feoffment, which is prior to the charge. Co. Litt. 183. a.

If a conusor, at the time of acknowledging a statute, has goods and chattels to a great value, they are all liable to satisfy the conusee, if they be found in his hands when execution is sued: but, if the conusor disposes of them, they shall not be extended in the hands of a purchaser, as lands may be; for since there is no solemnity established or required, it is impossible to find in whose possession they lie, in order to extend them: besides, it must necessarily put a stop to trade and commerce, if execution was to pursue the goods wherever they were found. 2 Roll. Abr. 472.

If a husband, possessed of a term in right of his wife, acknowledge a statute, and die, the lease shall not be extended in the hands of the wife; for though the law gives him an absolute power over the term, so as to dispose of it, yet, if he does not make use of that power during the coverture, the wife shall enjoy it free as she brought it to him. But, if the execution be sued in his life, and the term extended, this will bind the wife; for the extent is a disposition in law to answer the conusee's debt, and therefore shall affect the wife as much as if he had sold the term, or granted it for years. Roll. Abr. 346. 444. Co. Litt. 46.

If the husband be seised of lands of inheritance in the right of his wife, and acknowledge a statute, upon which execution is sued, the heir upon the death of the feme may enter and avoid the extent: but this must be understood of lands of which he cannot be tenant by the curtesy; for such he may as well charge as convey during his life, to bind the heir. Bro. Stat. Merch. 18. Co. Litt. 30. a.

By what has been said, it appears what things are extendible and liable to execution for the satisfaction of statutes merchant, of the staple, and recognizances in the nature of the statute staple; and the same are also liable to satisfy all debts due on recognizances at common law, only with this difference, that in the former cases both body, goods, and lands, being all due, the conusee may take all at once, or different times; so that if he extends the lands first, he may afterwards take the body; whereas upon the recognizance at common law, if the conusee sues an *elegit*, he can have no *capias* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land. 2 Roll. Abr. 475. 2 Inst. 395. Hob. 60.

4. *What Provision the Law has made for Tenant by Statute Merchant, &c. in case of Eviction.*

32 H. 8. c. 5.

By the common law, after a full and perfect execution had by extent, returned and entered on record, the conusee could have no new re-extent on the effects of the conusor, because there was once satisfaction given to the creditor on record, though the lands had been recovered from him before he had levied the debt out of them. The severity of this law was laid aside in *Henry VIII.*'s time; for in the 32d year of his reign it was enacted, That if lands delivered in execution on just cause be recovered from the tenant by execution before he hath received his whole debt, the conusee (and by a favourable construction of the statute, his (a) executors,) may have a *scire facias* out of that court where execution is first awarded, or out of any court where the record shall be moved by writ of error and affirmed. But this statute is to be construed under these restrictions, that where the conusee hath remedy for part of his debt *in presenti*, or *in futuro*, for the whole or for part, there he can have no aid nor benefit of this statute.

(a) 8 Co. Litt.
290.

Co. Litt. 289.

As, if all the lands extended but one acre be recovered from the conusee, he shall have no advantage of this statute, because the act relieves those conusees only who are clearly without remedy, which the conusee cannot be said to be in this case, where he has one acre left him, though it be but a poor remedy.

Co. Litt. 289. b.
4 Co. 67.

If *A.* be bound to *B.* in one statute, and to *C.* in another, and *C.* first sue execution, and extend the lands, and afterwards *B.* extend and take the lands from *C.* as by law he may, because his statute is prior, *C.* shall have no benefit of this statute, though he has not one acre left him, because he hath a remedy *in futuro*; for after the extent of *B.* is ended, he shall re-enjoy the lands by force of the former execution: so, for the same reason, if the wife of the conusor recover dower against the tenant by execution, he hath no relief from this statute.

Co. Litt. 289.

If a lessor oust his lessee for years, or disseise his tenant for life, and then acknowledge a statute, and the conusee sue execution; if the lessee in either case re-enter, the conusee is not relieved by this act, because he has a remedy *in futuro*, viz. after the death of the lessee, or the lease ended by holding over.

2 Inst. 396.

Co. Litt. 43. b.

If tenant in execution, by recognizance at common law, or by statute merchant, &c. be disseised, he may, by the express words of the statute, have an assise of novel disseisin also; and if there be no assignment by the conusee in his lifetime, they shall go to the executor, (being really but chattels,) who in case of a disseisin shall have the same remedy the testator might have had by an equitable construction of the statute.

Before we consider in what cases these tenants by statute merchant, &c. can hold over the time of their extent, it is first to be observed, that the sheriff is to make a reasonable extent of the land; so that computing the debt and value of the land,

it will be easily known how long the extent is to continue, and when the conusor is to have his land again.

Here we must distinguish between the act of a stranger and the act of the conusor; for in case of a disseisin or any interruption by a stranger, the conusee shall not hold over the time of the extent, but is to have satisfaction for the injury done by action against the stranger: but, if the conusor himself had given the tenant by execution any interruption, or hindered him from taking the profits, there, the tenant might either hold over, or have an action against the conusor; for, as in the first case it would be unreasonable to punish the conusor for the act of a stranger, by keeping him out of his lands; so, in the last case, it would be equally unreasonable to permit the conusor, by any act of his, to turn the conusee out of the land before he has levied the debt.

If land of a lessee for life, or years, be extended upon a statute, and afterwards part be recovered in an action of waste, for waste done by the conusor before the extent, the conusee shall hold the residue over the time of the extent, because no act of the conusor's shall prejudice the conusee, or hinder him from levying his just debt out of the lands. But, if the land had been recovered for what was done by the conusee, there, he should not take advantage of his own wrong, and hold over to the prejudice of the conusor.

So, if tenant in execution either suffers the land to lie waste, or neglects to levy the debt out of it; or, if he makes a conditional surrender of the land to him in the reversion, and enters for the condition broken; these are all his own wilful acts; and it is but reasonable he should suffer for them, and not hold over the land to the prejudice of the conusor.

But, on the other hand, where there is no default or negligence in the conusee, but he is prevented from making the usual profits of the land by the act of God, as, where the land is surrounded by water, or rendered unprofitable by wild-fire, there, the conusee shall hold over the time of the extent; for it would be unreasonable to punish him for what he could by no industry or possibility prevent.

7. *The several Ways of vacating and discharging these Statutes, and this either before or after Execution.*

As we find that both body, goods, and lands are liable to execution, and the conusee may, at pleasure, take one or all by one writ of execution, or all at different times by several writs of execution, we shall consider,

1st, What acts of the conusee will discharge the land, or suspend the execution of it for a time; and this either before or after execution sued.

2dly, What acts of the conusee will vacate the statute, &c. by discharging both body, goods, and lands; and this either by cancelling the statute, or by defeasance, or release, which are

equivalent to it; and herein of the *audita querela*, which is the proper remedy for the conusor, if execution be sued after such acts are done by the conusee.

3dly, In what cases the conusor may avoid and destroy the statute by entry or plea, and in what cases he is put to his *scire facias*.

2 Ro. Abr.
470.
Cro. Ja. 424.
477. *Infra*.

As to the first point; if *A.* acknowledges a statute to *B.*, and afterwards another to *C.*, in this case *B.* is first to be satisfied, his statute being prior in time to *C.*'s; yet, if *B.* accepts a lease for years from *A.* then may *C.* sue execution first, because *B.* by his acceptance of the lease has suspended the execution of his statute during the term.

Plow. 72.
2 Ro. 471.
Bro. Statute
Merch. 42.
F. N. B. 104.
Cro. Eliz. 736.

But, if a conusee accepts a feoffment of parcel of the land from the conusor, the residue in his hands is still liable; for his body being still liable, whatever remains in his hands must be so too: But, if the conusor had enfeoffed a stranger of the residue, then the conusee by his purchase of part had discharged the whole land: for the conusee, by his purchase, has discharged that part of the land from being liable to the debt, since his own lands cannot in any manner be liable to his own securities; and having discharged a part of the land by his own act, it is a discharge of the whole, since such act of his has prevented the legal execution on the whole lands, in the manner the statutes have directed, and therefore to execute it on the other alienees is partial, and to execute it on himself, together with the other purchasers, is impracticable.

Savil, 69.

Thus, if a conusee extends a rent-charge, and after purchases parcel of the land out of which it issued; this frees the whole rent from the statute; for, besides that the rent-charge is extinguished, and, consequently, can be no longer in extent, the conusee, by his purchase, though it had continued, has discharged it, for the whole rent was extended to answer the statute; and part of it being discharged by the conusee's own act, the remainder must be liable to the whole debt, which would be contrary to the extent, or else must be discharged.

2 Ro. Abr. 47.

If the conusor enfeoffs the father of the conusee of part of his land, and a stranger of the remainder of it, and, upon the death of the father, that part descends to the conusee; this descent, though before execution, discharges the whole land, and the stranger shall enjoy his purchase free from that statute; for since the lands are made liable, which were not so, to any executions at common law, the conusee must take the execution according to the statute, which in this case cannot be had, since he cannot lay any part of the debt upon the land, which he is owner of: therefore, not being able to take execution on the whole land, according to the statute, his remedy fails; and there can be, in this case, no provision of the common law in his favour.

Bro. Statute
Merch. 25.
2 Ro. Abr.
470.

If the conusor enfeoffs the conusee of all his lands, by this purchase the conusee has discharged the lands from the extent, because it would be most absurd to extend his own land to pay

his own debt: but, if the conusor repurchases the lands, he has revived the extent against them; for the first feoffment only discharged, or rather suspended, the execution against the land, and left the body and goods still liable; and whilst the conusor is subject to execution, so long will all lands he purchases after the acknowledgment of this statute be subject.

So, if the conusor, after the repurchase, had aliened to a stranger, the conusee might sue execution against him; for he purchased the lands subject to the incumbrance of the statute, since they were chargeable in the hands of the conusor. Plow. 72.

But all these acts of the conusee, which discharge the land only, must be understood to be done before the execution sued. Let us see in the next place, how far such acts will affect him after execution is sued, and we shall find them not only to discharge the land, but the body and goods also, as will appear by the following instances:

For where the body and lands of the conusor are in execution, and the conusee purchases the whole or parcel of the land; this discharges not only the land, as in the precedent cases, but the body also; for the lands are taken in execution as a real satisfaction for the debt, and therefore, as in all other cases of execution, are a discharge of the body, which is but a pledge for satisfaction: but these debts being presumed to be mercantile, are therefore to be satisfied as soon as possible, that the merchant may attend his business; for which reason the statute allows, that, where the real satisfaction is had by the extent of the lands, yet the body shall be a pledge, in order for a more sudden satisfaction, if the money can be raised: but yet if the real satisfaction by the purchase or descent of the land be discharged, as it must be when the conusee cannot have it in the manner it was extended, (as the conusee cannot have in this case, since he cannot have the term and fee-simple in the land together,) it follows of course, that the body, which is only a pledge, cannot continue in execution, when that which was the real execution is discharged in the hands of the conusee. So, if the conusee surrenders part, or the whole land, this discharges both land and body; for the body being only in execution in order to oblige him the sooner to satisfy the conusee, when he by any act acknowledges himself satisfied, as he does by the surrender, the body must consequently be set at liberty. 2 Ro. Abr. 477. Plow. 72. Bro. Stat. Merch. 42.

Thus, if the bodies of *A.*, *B.*, and *C.* be in execution, and the conusee come into court, and say, that he will discharge one of them from the execution; if this be entered of record, it shall discharge every one of them: the reason is, the debt being entire and chargeable on each of them, his acknowledgment of satisfaction by this act of one of them, shall, like a release, extend to all. 2 Ro. Abr. 477.

If *A.* and *B.* acknowledge a statute to *C.*, who takes their bodies, and the lands of *B.* in execution; if afterwards *B.* die, and his land in execution descend to *C.* the conusee; this discharges the body of *A.* Bro. Statute Merch. 15. 2 Ro. Abr. 477.

Bro. Statute
Merch. 15.
2 Ro. Abr.
477.

If a conusor be lessee for life, and his body and lands be taken in execution, and the conusee, being in by the extent, commit waste, for which the reversioner recovers the land (as he well may, because the estate of the lessee, which was extended, was subject to the punishment of waste); this shall discharge the body of the conusor: *secus*, if the land had been recovered for waste done by the conusor; for then the body should not be discharged, lest the conusor by his act and wrong should free himself from the execution.

The next thing considerable is, what acts of the conusee will vacate the statutes, by discharging body, goods, and lands. And this may be done,

1st, By cancelling the statute, as tearing off the seals, which are so essentially necessary, that without them the statute, like common specialties, is wholly void and useless.

2dly, By defeasance, which may vacate the statute absolutely, or upon condition.

3dly, By release, which is a solemn renunciation of a man's right by deed. But it may be demanded how these statutes, which have the force and solemnity of a judgment, can be avoided by acts of less notoriety than themselves, as these acts *in pais* must be confessed to be, which overthrows the established rule, *unumquodque solvi eo ligamine quo ligatur*? The answer to this is, that notwithstanding the release, &c. from the conusee, the statute still continues in force; but the law, with reason, construing all men's deeds most strongly against themselves, by these acts, precludes the conusees from execution.

F. N. B. 104.
2 Sid. 108, 109.
Co. Litt. 290.
Moore, pl. 693.

But, if the court, at the instance of the conusee, grants him execution, as they really ought, since nothing appears to them destructive of the statute, what remedy has the conusor? For after such release or defeasance he cannot stop the execution, because he has no day in court to plead this in bar; but his proper remedy in such case is by *audita querela*, which is a writ to set aside an unjust judgment, for some injustice which could not be pleaded in bar; for if it might, then it was the party's own fault not to plead it in bar of such unjust demand which is not relieved by this writ, that proceedings may not be endless.

2 Ro. Abr.
306. Cro. Eliz.
4. 25. Sid. 55.

And if, upon a *scire facias* on a recognizance at common law, the conusor is returned summoned, he shall never avoid it by *audita querela*, because the recognizance was upon condition, which he hath performed: for by the summons he had a day in court given him to plead the performance of the condition, which would have been sufficient to stop the execution; but, if the sheriff had returned, that he found nothing whereby to summons the conusor, on which execution had been granted, then the conusor might have an *audita querela*, and then the release of the conusee, or the performance of the condition, might well be suggested therein, because he had no day in court to plead them in bar of the execution.

If *A.* be tenant for life, remainder to *B.* his son in tail; *A.* enter into a recognizance, and die, *C.* bring a *scire facias*, and *B.* be returned heir and terretenant, and warned, but make default, he can have no *audita querela* to avoid this execution, because he had a day given in court to set aside the recognizance; and it was his folly not to appear when warned.

Sid. 54. Sir
T. Raym. 19.

If *A.* enters into a statute to *B.*, and pays the money at the day assigned, upon which the statute is cancelled, and after *B.* forges a new statute in the name of *A.*, in this case *A.* may relieve himself by *audita querela*; for the forged statute having all the essentials of a true one, the court was obliged to look on it as such, till the contrary appeared, which the conusor could not set forth before execution, having no day to appear judicially in court, and therefore is put to this writ to avoid the execution founded on the injustice of the pretended conusee.

F. N. B. 104.

If the conusee of a statute, upon agreement with the conusor, delivers up the statute in lieu of an acquittance, and after sues execution, and the conusor prays a re-extent, because that the land was extended too low, and has it granted to him, he shall never avoid the extent by *audita querela*, because by his praying the re-extent he admits the statute good and executory.

Ro. Abr. 313.

If a conusee of a statute gives a deed of defeasance to the conusor, and afterwards sues execution contrary to the form of the defeasance, the conusor may have an *audita querela*, because the defeasance precludes the execution, if the terms or condition of it be performed by the conusor; and the conusor may have the *audita querela*, though the condition be not performed according to the defeasance, if execution was sued before the condition broken, because the conusee extended before his time; and therefore the execution being unjustly sued must, consequently, be an injury to the conusor.

F. N. B. 105.
2 Ro. Abr.
307.

In an *audita querela*, the case was this: the conusee gave a defeasance, that if he sued execution of the lands the conusor had in *Kent*, the statute should be void; the conusee, contrary to this defeasance, extended the land in that county; and it was adjudged this writ well lay, to avoid the execution and vacate the statute; for the defeasance was no way repugnant to the statute, because the conusee might still extend the lands of the conusor in any other county, and take his body and goods.

Moore, 811.
Trot and
Spurling.

If the conusee releases to the terretenant all right, interest, and demands, together with all suits and executions, and afterward sues execution, the terretenant shall have an *audita querela* to set aside this execution; and this differs from the case of *Burrows* and *Gray* in *Cro. Eliz.*, for there the conusee released only all his right, interest, and demand to the terretenant, which was held not to be sufficient, because he had only a possibility, and no interest in the land before execution, and, consequently, could not release what he had not: but in the former case, though the conusee had no right to the land before execution,

Cro. Eliz. 40.
531. And. 133
Ro. Abr. 313.
Co. Litt. 265.
291. 10 Co.
47. b. 2 Ro.
Abr. 470.

yet there are words sufficient to discharge the execution, since it is released by express words: and in the first case, the words of the release refer to the executions, suits, and demands upon the statute, which statute, since it was in being, the executions and demands upon it may be released at any time; but in the other case the words *right, title, and interest* relate to the land, which the conusee had no interest in till execution sued, and therefore cannot release or transfer over what he had not: besides, in the first case, the conusee has released all suits, by which, says my Lord *Coke*, the execution is gone, because no common person can have execution without prayer and suit to the court.

2 Ro. Abr. 480. Another method of avoiding executions is by *scire facias ad rehabendam terram*: and this writ differs from the *audita querela*, for that avoids an execution unjustly obtained at first: but the *scire facias* allows the execution just at first; but shews, that the end for which it was granted being obtained, it ought of consequence to cease.

2 Ro. Abr. 479, 480. 4 Co. 67. 2 Inst. 398. If the conusor, after his land is extended, tender the money to the conusee, who refuses it; or if the debt, with all costs and damages which the statute *de mercatoribus* allows, be satisfied from any casual profit arising from the land; in these cases, the conusor is put to his *scire facias*, and cannot enter: but in case of an *elegit* on a recognizance at common law, when the conusee is answered his debt, by the perception of the certain and usual profits of the land, the debtor may enter, and is not put to his *scire facias*: yet in this case, if the creditor be satisfied by an accidental perquisite, there, the debtor cannot enter, but must have a *scire facias ad rehabendam terram*. And the reason of these distinctions is, because, in the first case, the execution issues according to the direction of the statute, not only till the principal debt be levied, but all costs and damages arising by reason thereof; and therefore, since the damages are not ascertained, the record will always oppose an entry, which is but an act *in pais*, and cannot be turned to the defeatance of a matter of record, till such damages are settled on record in the *scire facias*: but in the second case, when the debt is certain, and the value of the land ascertained in the extent, there, when such debt is paid by perception of such settled profits, there is no act on record to oppose an entry, and therefore an entry is lawful. But, where the satisfaction arises from accidental profits, which do not appear in the extent, this then is still matter of record, in opposition to the entry, since such accidental profits do not appear in the valuation of the land settled by the extent on record.

4 Co. 67. 2 Ro. Abr. 479. If lands be extended on a statute, and the time of the extent expired, the conusor is to be put to his *scire facias*, because the conusee may have cause to hold the land longer than the time of extent, for he may retain it till he has received his costs of suit and reasonable expences, which the chancellour shall assess.

2 Ro. Abr. 483. No *scire facias* lies upon a general averment, that the conusee has

has levied the debt before the time of the extent expired, because this may happen by the conusee's industry in improving the land, which the debtor can take no advantage of. So, if the land taken in execution be really worth 20*l.* *per annum*, but it is extended only at 10*l.* though by this computation it is evident the conusee might levy the debt before the time of the extent is ended; yet the conusor, upon an averment that the debt is levied, shall have no *scire facias* (a), because that would be contrary to the record, and the court is to judge of the value according to the extent, by which it appears the debt is not yet levied. But, if the conusee has levied part by cutting wood, and has received the residue, as appears by an acquittance produced by him, in this case, he shall have a *scire facias*: the reason is, because the end of the extent being only to satisfy the conusee his reasonable demands, whenever it appears to the court that they are answered, whether it be by perception of the profits, or otherwise, they grant a *scire facias* to avoid the extent, and reinstate the conusor in his former possession, since the end for which it was given is answered.

(a) [But, if the conusee be satisfied by perception of the profits, though not by the extended value, the conusor may be aided in equity, and may compel the conusee to account according to the real value by him received.

2 Ventr. 338.

Hardr. 136.]

2 Ro. Abr.

482.

If the conusee has levied part of the debt, according to the extent, the conusor, upon tender of the residue *in court*, shall have a *scire facias* to recover the lands within the time of the extent: for here, it appears on record how much was due at first, how much was paid, and what remains due and in arrear; and the end of the extent being to satisfy the conusee of his just debt, whenever that appears to the court, the extent shall cease. But, if the conusor had tendered the remainder of the debt out of court, or if in court he had only offered to come to an agreement with the conusee; in neither of these cases should the *scire facias* be granted, because it does not appear on record that the debt is paid.

If the conusee of a statute for 100*l.* apportiones the statute, and sues execution for the body and land, for several parts of it, in several counties, as for 20*l.* in *Kent*, 20*l.* in *Surry*, and the body is taken in *London* for 20*l.*, upon tender of this 20*l.* in court, the conusor shall have a writ to the sheriff of *London* to set him at liberty; for this writ of extent was to take his body, &c. till 20*l.* not the 100*l.* was paid, and, consequently, upon tender of the 20*l.* the sheriff has no power to keep him in prison. *Secus*, if the body had been taken before apportionment, for then it could not be discharged upon payment of 20*l.*, it being taken at first for the whole debt.

2 Ro. Abr.

482.

If *A.* leases *Black-acre* for years to *B.*, and then acknowledges a statute to *C.*, and afterwards another to *D.*, then *C.* takes a lease of the reversion, and the rent from *A.*, by which he has suspended the execution of the statute during the term, and, consequently, laid the land open to the extent of *D.*, the second conusee, who sues execution; if therefore *C.* should extend the reversion and rent during his own lease, *B.* the lessee is not obliged to pay him the rent, but may avoid the extent by plea without *audita querela*, because *C.* hath suspended the execution

Ro. Abr. 304.

Cro. Ja. 424.

477. *Supra.*

of his statute, the first in date, by the acceptance of the lease from the conusor.

Ro. Abr. 304.

If tenant in tail acknowledges a statute, and dies, and the conusor sues execution against the heir, he may avoid it by assise, without being put to his *audita querela*. So, if a disseisor acknowledges a statute, and the disseisee enters, and the conusee extends the land, the disseisee is not put to his *audita querela* to avoid the extent, because there is not the appearance of justice in this extent; the conusor having only a tortious and unlawful seisin of the land, and, consequently, no power to charge it.

Oates v. Robinson,
1 Str. 461.
Fort. 373. S. C.
2 P. Wms. 91.
S. C. in Chancery, where Lord Macclesfield gave the conusee leave to enter the prayer *nunc pro tunc*.

[After an extent of a statute in one county, and a *liberate* returned and filed, the conusee may have an extent into another county, if the prayer for the second extent was entered at the time the first extent was taken out; otherwise not. Yet in this last case, a court of equity will relieve him; for the intention and agreement of the conusor is, that all his lands (be they in never so many counties) shall be bound by the statute; and, consequently, it would be most unreasonable to confine the conusee to the lands of the conusor in any one county; for this would be to defeat that security which the party himself had agreed to give, and had actually given.]

¶ By 8 Geo. 1. c. 23. § 4. “ in case it shall at any time or
“ times before or after the filing or returning of any *liberate* or
“ *liberates* sued out on any extent or extents upon a recognizance
“ in the nature of a statute staple, be made appear to the Court
“ of Chancery, that sufficient has not been extended and levied,
“ or sufficiently extended and levied to satisfy such recognizance;
“ or that any omission, error, or mistake has happened in making,
“ suing out, executing, or returning any of the said writs, or
“ any process thereupon; or it should happen that any lands,
“ tenements, or hereditaments shall be evicted from any person
“ or persons, who shall have extended the same by virtue of any
“ such writ or process as aforesaid; that then, and in every such
“ case, the said Court of Chancery shall and may award one or
“ more re-extent or re-extents for the satisfying the same as
“ aforesaid, and that writs of *liberate* may be sued out there
“ upon.”

(C) Of the several Kinds of judicial Writs which lie after Judgment: And herein,

1. Of the Form, Teste, and Return of such Writs.

Walker v. Riches, Cro. Car. 162.

THE form of judicial writs must be according to the approved precedents in those cases; and therefore, where on a writ of *elegit*, which was *ideo tibi præcipimus quod bona & catalla* of the defendant, *quæ habuit die judicii prædicti redditi, deliberari facias*, omitting & *medietatem terrarum & tenementorum prædictorum*, the sheriff extended the lands and goods, and delivered the moiety of the lands, &c.; on motion, the Court refused to amend the writ,

writ, and held, that the party must take out a new *elegit*, the inquisition herein being without warrant, the sheriff having no authority by this writ to extend the lands.

|| But writs of execution, if informal, may be amended, as by adding or altering the teste or return, &c.||

Browne v. Hammond, Barnes, 10.
Newnham v. Law, 5 T.R. 577. Atkinson v. Newton, 2 B. & P. 336. Meyor v. Ring, 1 H. Bl. 541. Simon v. Gurney, 5 Taunt. 605. 1 Marsh. 237. S. C. R. v. Sheriff of Monmouth, Id. 344.

Every writ of execution, in case of a common person, must bear teste in term-time, for being the process of that Court in which judgment is given, they have no authority to award it at any other time: but original writs issuing out of Chancery may bear teste at any time, because that court is always open.

Co. Litt. 161.
 2 Inst. 40.
 Latch. 11.
 Sir T. Jones, 150. Vent. 362. — But, if a writ of execution bear teste out of term, the sheriff is justifiable in executing it, for he is not judge of the validity of the process, provided the court, out of which it issues, has jurisdiction of the matter. But, though he is justifiable in executing such process, yet, if he lets a person escape whom he arrested on a *capias ad satisfaciendum* which bore teste out of term, no action lies against him, for the writ was void. 2 Salk. 700. 7 Mod. 29. *Per Holt, C. J.*

But, if judgment be entered as of *Hilary* term, the party may take out execution in the vacation following, by a writ teste the last day of the precedent term; for having run through the whole course of a judicial proceeding, and his cause being ripe for execution at that time, it would be unreasonable to oblige him to wait till the ensuing term, by which he might be disappointed of the effect of his judgment.

Whether it can be averred that the writ did not issue till a day subsequent to the teste, *vide* Lev. 173. 1 Sid. 271.
Lutw. 332. 2 Keb. 33. 2 Burr. 966. — Where it appeared that an execution was levied before the judgment was signed, though after the first day of the term to which it related, and after the teste of the *feri facias*, yet held naught. 2 Show. 494.

All writs of execution which are to be executed by the sole authority of the sheriff, such as a *capias ad (a) satisfaciendum, habere facias seisinam* or *possessionem, fieri facias, liberate, &c.* are good when duly executed, though (b) never returned by the sheriff; for the plaintiff has the effect of his suit, and there is nothing farther to be done on his part; and hence it is said, that an execution executed is the end of the law. 5 Co. 90. Hoe's case. 4 Co. 67. || The sheriff may sell a leasehold estate, which he has seized under a *feri facias*, after the return of the writ, and without any writ of *venditioni exponas*. For the property of the sheriff continues till the execution is completed, which cannot be till sale of the things taken in execution, and payment of the money to the plaintiff. This, indeed, is shewn by the common course of proceeding; the sheriff not being bound to make a return of the writ of execution, unless the party requires it. And as to the writ of *venditioni exponas*, that writ, though a proper writ, yet is not of necessity, being rather to compel the sheriff, when guilty of laches, to do what he has authority to do, than to give him any new authority. *Per Lord Hardwicke. Jeanes v. Wilkins, 1 Ves. 195. But see Ayer v. Aden, Yelv. 44. Langdon v. Wallis, 1 Lutw. 589.* || (a) But a *capias* in mesne process must be returned, for the end thereof is to compel the defendant to appear, and therefore, if the writ be not returned, the arrest is tortious. 5 Co. 90. a. Cro. Car. 447. (b) But, if the party apprehends himself injured by an erroneous writ of execution, he may apply to the sheriff to return it, and if he refuses, an action on the case lies against him. Keb. 551.

But in case of an *elegit*, although it be a judicial writ, yet the sheriff must return it; for this is not to be executed by his sole authority, but by an inquest taken by him, according to the statute 5 Co. 90. a. 4 Co. 74. 2 Inst. 396. Cro. Ja. 569. Cro. Eliz. 584.

statute of *Westm. 2.* therefore he must return the writ, that it may appear that he hath pursued the directions of the statute.

2 Salk. 700.
Shirly v.
Wright, 2 Ld.
Raym. 775.
7 Mod. 29.

On this distinction it hath been held, that a *capias ad satisfaciendum* may be taken out, returnable the term next but one after the teste; for in this case the intervening term makes no discontinuance, it not being necessary, as in case of a *capias* in mesne process, that the defendant should have a day in court; for his cause is at an end, and he must be in prison, whether the writ be returned or not; whereas on a *capias* in mesne process, the party may be at great prejudice, by reason of the imprisonment in the mean time.

Sir T. Jon. 200.

So, if a *fieri facias* issues to the sheriff of S. returnable on a common return day, and he at the day returns *nulla bona*, a *fieri facias testatum* may issue the day following, to the sheriff of Kent, and execution by him shall be good; for though on mesne process there can be no *testatum* till the *quarto die post*, yet it is otherwise in writs of execution, for on these the party has no day in court.

2. Of the Elegit.

(a) Viz. By
Westm. 2. or
13 E. 1. c. 18.
2 Inst. 394.

An *elegit* is a judicial writ given by (a) statute, either upon a recovery of any debt or damages, or upon a recognizance in any court which had authority to take the same. The words of this law are, *Cum debitum fuerit recuperatum, vel in curia regis recognitum, vel damna adjudicata, sit de cætero in electione illius qui sequitur pro hujusmodi debito aut damnis sequi breve, quod vicecomes fieri faciat de terris & catallis debitoris, vel quod vicecomes liberet ei omnia catalla debitoris (exceptis bobus & affris caruæ) & medietatem terræ suæ quousque debitum fuerit levatum per rationabile pretium vel extentam; & si ejiciatur de illo tenemento, habeat recuperare per breve novæ disseisinæ, & postea per breve redisseisinæ, si necesse fuerit.* *

* Tenant by
elegit has but
a chattel. 2 Inst. 396.

Yet he shall hold *ut liberum tenementum*; and he, his executor or administrator, shall have an assise. *Id. Co. Litt. 436. 1 Mer. 124.*

2 Inst. 395.
Reg. 299. Co.
Litt. 189. b.

When a person has judgment in an action of debt, or any other action in which he has damages, and he chooses to take out execution by *elegit*, the entry is, *Quod elegit sibi executionem fieri de omnibus catallis & medietate terræ*, and from this election either to have a *fieri facias*, or this writ, it is called an *elegit*, the form of which, being first given by this statute, (for, as has been before observed, there was no execution against the lands of a debtor at common law,) is, *Ac cum idem J. S. juxta statutum inde editum elegerit sibi liberari pro prædict. 20 libris omnia catalla & medietatem terræ ipsius J. D.*

2 Inst. 395.

But, though by this statute the lands of a debtor are made liable, as well as his personal estate; yet, if the creditor takes out an *elegit*, and it appears to the sheriff that there are goods and

and chattels (a) sufficient of the debtor's to satisfy the debt, he ought not to extend the lands. (a) But an *elegit* executed upon goods

only, is not a *fiery facias*: for a *fiery facias* is executed by sale by the sheriff, but the *elegit* by the appraisement of the goods by a jury, and delivery to the party. Sid. 184. Lev. 92. Keb. 105. 261. 465. 566. 692. 1 Ld. Raym. 346.

Upon this writ the sheriff is to impanel a (b) jury who are to make inquiry of all the goods and chattels of the debtor, and to appraise the same, and also to inquire as to his lands and tenements; and upon such inquisition the sheriff is to deliver all the goods and chattels (except the beasts of the plough) and a moiety of the lands to the party, and must return his writ, in order to record such inquisition in that court out of which the *elegit* issued. (b) That it cannot be done by the sheriff without an inquest, for the words of the statute are *per rationabile premium & exten-tam*, which

must be found such by the oaths of twelve men, is laid down and admitted in all the books which treat of this matter, as 2 Inst. 396. Co. Litt. 389. b. Dyer, 100. 5 Co. 74. a. b. & c. [If the sheriff returns on the *elegit* that there are no lands, he need not return any inquisition. Stonehouse v. Ewen, 2 Str. 874.]

When the jury have found the seisin and value of the land, the sheriff, and not the jury, is to set out and deliver a moiety (c) thereof to the plaintiff by (d) metes and bounds. Cro. Car. 319. Sparrow v. Mattersock, so resolved,

and that all the precedents were so. (c) [If he deliver more than a moiety, the execution is void. Patten v. Purbeck, 2 Salk. 563. 12 Mod. 355. S. C.] (d) If upon an *elegit* the sheriff deliver a moiety of an house without metes and bounds, such return is ill, and shall be quashed for uncertainty. Carth. 453. *per Holt C. J.* [If the defendant be joint-tenant, or tenant in common, it ought to be specially alleged in the return. Hutt. 16.] [If the inquisition be void for uncertainty, or because more than a moiety has been delivered, or for any other defect appearing on the face of it, as the plaintiff can never obtain possession of the land under it, the court, on a suggestion thereof, or on a *scire facias*, will order the writ to be vacated, and grant another, and amerce the sheriff. See the form in 1 Towns. Judgm. 129. So, where fraud, deceit, or partiality has been practised, if the writ be not filed, the court will stay the filing of it, and grant another writ. 2 Inst. 396. And (according to the opinion of Lord Hale, which seems to be well founded) they will grant another writ in either of the above-mentioned instances, whether of defect or fraud, after the first has been filed. 2 Wms.'s Saund. 69. c. Anon. 1 Ventr. 259. Pullen v. Birbeck, 1 Ld. Raym. 718. 12 Mod. 355. S. C.]

[[If the execution were laid upon lands which did not belong to the conusor, or had been sold before the judgment, antiently, the *elegit* would have put the party out of possession, and driven him to his assise or ejectment; because, being a stranger to the judgment and execution, he could not traverse the execution. But, as it was thought hard on such executions to turn strangers out of possession, the practice was altered, and the sheriff, instead of *actual*, delivers only *legal* possession of the moiety of the lands; and if the plaintiff do not enter, as, it seems, he may by virtue of the *elegit*, he must proceed by ejectment, in which an examined copy of the judgment-roll (e), containing the award of the *elegit* and the return of the inquisition is evidence of his title, without proving a copy of the *elegit*, and of the inquisition.]] Gilb. Execut. 44. Tidd's Pr. 1075. 2 Eq. Ca. Abr. 381. 3 T. R. 295. 6 Taunt. 202. Marsh. 542. (e) Ramsbottom v. Buckhurst, 2 M. & S.

567. But see Gilb. Ev. by Loft, 10, 11. Running. Eject. 117. Lill. Pr. Reg. 689. *contra*.

If the sheriff, on an inquisition upon an *elegit*, returns the defendant to have twenty acres in *Dale*, and twenty acres in *Sale*, Lev. 16c. *per Curiam*, Earl of Stamford v.

Needham; but *Sale*, and delivers the twenty acres in *Sale* for the moiety of the whole, all is void, for he ought to deliver a moiety of the twenty acres in each vill, and this may be avoided in evidence in ejectment brought for the lands.

vide Sid. 239. 1 Keb. 858. S. C. but not S. P. [And it hath been adjudged that the sheriff is not bound to deliver a moiety of each particular tenement and farm, but only certain tenements, &c., making in value a moiety of the whole] *Denn. v. Earl of Abingdon*, Dougl. 473. 1 Burt. Pr. Exch. 289.]

Cro. Eliz. 482. Huyt v. Cogan. If *A.* and *B.* recover severally against *C.*, and *A.* sues out execution, and has a moiety of *C.*'s land delivered to him on an *elegit*, and then *B.* sues out an *elegit*, he can only have a moiety of the lands which remained with *C.* after the first extent, and not the whole delivered to him.

Hard. 23. &c. And. 27. The Attorney-General v. Andrews. But, if *A.* acknowledges two judgments to *B.* and in the same term he takes out two *elegits*; on the one he may have one moiety of *A.*'s lands delivered to him, and on the other the other moiety, and he is not restrained to a moiety of a moiety, for in judgment of law the whole term is but one day.

Gilb. Execut. 56. [On lending money, therefore, if the lender take two several bonds and warrants of attorney, one for a part, and the other for the residue of the money, and enter up two several judgments thereon, of the same term, he may take the whole of the defendant's lands under them.]

Cro. Eliz. 584. Palmer v. Humphry. 4 Co. 74. S. C. If, upon an inquest taken upon an *elegit*, the jury find that the party was possessed of a term, which commenced the 2 & 3 Ph. & Mar., when in truth it commenced the 3 & 4 Ph. & Mar., and the sheriff sells the term according to the value found by the jury, the execution is void, for the sheriff has only authority to sell or extend such things as are found to be the party's; but in this case the inquest finding one thing, and the sheriff selling another, the inquest does not warrant the sale.

Cro. Eliz. 584. See Gilb. Execut. 35. But, if the inquest had found, that he was possessed of such land for terms of divers years *adhuc vent.* which they had appraised at so much, without shewing the certain beginning or determination thereof, it had been well enough; for they shall not be compelled to find a certainty, not having means to be informed thereof.

2 Inst. 395. 8 Co. 171. Dalt. Sh. 137. Upon an *elegit* the sheriff may either extend a term for years, that is, may deliver a moiety thereof to the plaintiff as part of the lands and tenements of the defendants, or may sell it absolutely as part of his personal estate.

Gilb. Execut. 33. ¶ If a term for years be extended, and valued at a certain value in gross, and delivered to the plaintiff, and the debt be more than levied out of the profits of other lands and of the term, yet he shall not account for the profits of the term, nor deliver up the same, because he had it at a stated price by the *elegit*, and the lands and the tenements were only for the remainder of the debt, and therefore the profits of them will only go towards satisfying such remainder, and for these last profits only the plaintiff shall be answerable. Therefore some of the books say, that a chattel or term for years may be sold; which

Cro. Eliz. 584. is

is true in one sense, viz. that it may be sold to the plaintiff for the price settled by the jury; and if the defendant tenders the money to the sheriff, or to the court, before actual delivery by the sheriff, such goods are saved, and if afterwards delivered, he shall be entitled to his *audita querela*: but, if there is no tender made, the property of the goods is altered by the delivery of the sheriff, and the plaintiff may dispose of them under the judgment.

Comyn v. Brandlyn, Moore, 873.

But, if a writ of error be brought, and the judgment reversed, the goods in specie shall be restored, and not the value; but upon a *fieri facias*, the value and not the goods in specie. And the reason of the difference is, that on the *fieri facias* the sheriff is to sell to any buyer, but in the *elegit* he is only to deliver to the plaintiff; therefore when the writ of error has reversed the judgment, in the one case the defendant is to be paid the money, in the other to be restored to the goods themselves; for he is to have what he has lost by the writ as it was awarded, which in the case of a *fieri facias* was the money, but in the *elegit*, the goods themselves delivered over to the plaintiff.

Gilb. Execut. 34.

Anon. Moore, 573. Goodyer, v. Junce, Yelv. 185. Cro. Ja. 246. S. C. Anon. Dy. 363. Bathurst's case, Ibid. in marg. Jenk. Cent. 264.

Palmer's case, 4 Co. 74. Amner and Luddington's case, 2 Leon. 92. Hoe's case, 5 Co. 90. b.

But, if a term be delivered *per rationabile extentum*, at an annual value, and not at a value in gross, then the plaintiff is accountable for all the profits he receives out of the term upon such extent; and if he receives the debt out of such term before it expires, the defendant shall be restored to the term itself. ||

Gilb. Execut. 35.

Also, it seems that a (a) rent-charge may be extended on an *elegit*, for the word *land*, which is made subject to the execution, includes (b) all hereditaments extendible; and in this case the party may distrain and avow for the rent, though the tenant never attorned; for the law creating his estate gives him all means necessary for the enjoyment of it.

Moore, 32. (a) But a rent-seck cannot be delivered on an *elegit* as *liberum tenementum*. Cro. Eliz. 656.

(b) But the office of filazer cannot be extended, for a man shall not have execution of that which he cannot assign, though he may have of this an assize, *ut de libero tenemento*. Dyer, 7. pl. 10.

|| So of a reversion; for though the words of the *elegit* are *medietatem omnium terrarum et tenementorum prædictorum de quibus prædicto die anno regni nostri primo, quo die iudicium prædictum redditum fuit, vel unquam postea fuit seisitus prædictus B. sine dilatione liberari facias*; yet the intent of the writ extends to whatever lands and tenements were actually vested in the defendant; because the statute is *medietatem terræ*, which extends to reversions, and these are comprized under the name *terræ*, since they are lands returning to the defendant, when the particular estate ceases; and therefore, though this was formerly disputed, the latter resolutions have settled the law to be so. ||

Gilb. Execut. 38, 39. 2 Ro. Abr. 473. Sav. 34, 35.

Land in ancient demesne upon an *elegit* may, by the sheriff, be delivered in execution, because the title of the land is not directly put in plea in the king's court.

Hob. 47. 4 Inst. 270. 2 Inst. 397. Moore, 211.

|| By Brownl. 234.

|| By 29 Car. 2. c. 3. § 10. it is enacted, that "it shall be lawful for every sheriff or other officer, to whom any writ or precept is directed, at the suit of any person or persons, of, for, and upon any judgment, statute, or recognizance, to do, make, and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, as any other person or persons are in any manner seised or possessed in *trust* for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party, against whom execution is so sued had been seised (a) of such lands, &c., of such estate as they are seised of, in trust for him at the time of the said execution sued; (b) which lands, &c., by force and virtue of such execution shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued. And if any *cestui que trust* shall die, leaving a trust in fee simple (c) to descend to his heir, then and in every such case such trust shall be deemed and taken, and is hereby declared to be assets by descent; and the heir shall be liable to and chargeable with the obligation of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession, in like manner as the trust descended."||

(a) An equity of redemption therefore, though legal assets, cannot be taken in execution on this statute. *Lyster v. Doland*, 3 Br. Ch. Rep. 478. 1 Ves. Jun. 431. *S. C.* *Burdon v. Kennedy*, 3 Atk. 739. (b) These words, "at the time of

the said execution sued," are holden to refer to the seisin of the trustee; and therefore if he has conveyed the lands by the direction of the *cestui que trust* before execution, though seised in trust at the time of the judgment, the lands cannot be taken in execution. As, where a judgment was obtained against a *cestui que trust*, who afterwards borrowed a sum of money, and the trustee by his direction mortgaged the estate to the lenders, and an *elegit* being taken out upon the judgment, and a moiety of the estate mortgaged being extended and delivered to the plaintiff, he brought an ejectment, and the question was, whether he had any title by virtue of this statute; and after argument it was determined by Mr. Justice Tracey, that the execution was not good; and Sir *Edward Northey* said, that ever since the act such construction had been thought agreeable to it, though he did not know it had ever been judicially determined; and a case was mentioned by Mr. Justice Tracey from Mr. Serjt. *Cheshire's* notes, where this opinion seemed to have been allowed by Lord *Trevor*, and was not contradicted by the court. *Hunt v. Coles*, Com. Rep. 226. The same point is recognised by *Comyns* C. B. Dig. tit. Execution (C. 14.). (c) An equitable interest in a term of years is not assets within this statute, which extends only to a trust of lands in fee, and it of course cannot be taken in execution under a *fieri facias*. *Scott v. Scholey*, 8 East, 467. *Metcalf v. Scholey*, 2 N. R. 461.

3 Co. 9. Co. Cop. 149.

But the statute which gives the *elegit*, extends not to copyhold lands, for then the lord would have a tenant brought in upon him without his admittance or consent.

Gilb. Exec. 39. But *q^u* and see *Wms.* 401. and *Cro. El.*

[An advowson in gross cannot be extended on an *elegit*, because a moiety cannot be set out by the sheriff, nor can it be valued at any certain rent towards payment of the debt.]

359. Gilb. Execut. 40. *Jenk.* 207. pl. 36. 3 Bos. & Pull. 327.

Neither doth an *elegit* lie of the glebe belonging to an ecclesiastical benefice, or of the church-yard, for these are each *solum deo consecratum*.]

|| But

¶ But it is said, that the lands of a bishop may be extended on an *elegit*. Dalt. Sher. 136.

So may the wife's lands, which the husband has during the coverture.¶ Id. ibid.

[A question having arisen in the Court of Chancery, whether, upon an *elegit*, the plaintiff could be allowed interest beyond the penalty of a judgment, Lord *Hardwicke* was of opinion, that at law, upon a judgment entered up, the penalty is the *debitum recuperatum*, and the stated damages between the parties; but, if the creditor does not take out execution against the person of the debtor, or his personal estate, but extends the lands by *elegit*, which the sheriff does only at the annual value, and much below the real, the creditor holds *quousque debitum satisfactum fuerit*, and at law, the debtor cannot upon a writ *ad computandum* insist upon the creditor's doing more than account for the extended value; but, if the debtor comes into a court of equity for relief, that court will give it him by obliging the creditor to account for the whole he has received, and, as a person who comes for equity must do equity, will direct the debtor to pay interest to the creditor, even though it should exceed the principal. And he said, he remembered very well, upon Serjeant *Whitaker's* insisting before Lord Chancellour *Cowper*, that this would be repealing the statute of *Westminster*; his Lordship said, he would not repeal the statute, but he would do complete justice, by letting the creditor carry on the interest upon his debt, as he was to account for the whole he had received.] 3 Atk. 517. Ambl. 520. 1 East, 403. 436.

3. Of the *Capias ad Satisfaciendum*.

This writ lay only at common law, in case of the king (*a*), who by his prerogative might have execution of the body, goods, and lands of his debtor; but, by the statute of *Marlbridge*, c. 23. it is enacted, that if bailiffs, who ought to make account to their lords, do withdraw themselves, and have no lands nor tenements whereby they may be distrained; then they shall be attached by their bodies, so that the sheriff in whose bailiwick they be found, shall cause them to come to make their account. ¶ But the *capias* in execution is not given by this statute; it respects only mesne process, and no *capias* at all is given by it: it only ordains an attachment *per corpus* of the absconding bailiff to compel him to make his account. But by a later accomptant act, St. W. 2. or 13 E. 1. c. 11., in all cases of servants, bailiffs, chamberlains, and all manner of receivers, who were bound *ad compotum reddendum*, it is ordained, that when the lord of servants of that kind shall assign them *auditores compoti*, and they are found in arrear; their bodies shall be arrested, and they shall be sent on testimony of such auditors, and delivered to the next gaol of the king in those parts, there to be kept by the sheriff or gaoler *in ferris et sub bonâ custodiâ* at their own expence until they shall have satisfied all arrears, *quousque dominis suis de arreragiis plenariè satisfecerint*. If any one so delivered to custody complain ¶ (*a*) It has been said that it lay at common law for the subject in trespass *vi et armis*, Hob. 56. But, though this was by very high authority, one cannot help doubting whether the *capias*, which then issued in this species of action, was any other than the *capias pro fine*, which was imposed for the breach of the king's peace, whether the *capias ad satisfaciendum*, eo nomine, was then known.

I am not aware that there is any trace of this writ in our early writers, and it would seem not improbable that the course of proceeding was, upon the prayer of the plaintiff, to detain the defendant in execution under the *capias pro fine* until he had satisfied the plaintiff for the damage; the king in this case so far indulging the subject, as not to take his fine for the breach of his peace, until the subject had been satisfied for the damage which he had suffered by the act. See Gilb. Execut. 76, 77. The instance referred to by Lord Coke from an old record of 14 E. 3. where a defendant was discharged by an order of court from a *capias* in execution, because he was of so advanced an age, *quod pœnam imprisonmenti subire non potuit*, gives some countenance to this conjecture.

complain that the auditors have charged him with receipts which never came to his hands, and have not allowed him reasonable disbursements, and can find friends who will become manucaptors for him, and undertake to bring him before the barons of the exchequer, he is to be delivered to them; and the sheriff, in whose prison he shall be, is in that case to give notice to the lord to appear at some certain day before the barons of the exchequer with his rolls and tallies by which he made his account, and in the presence of the barons, or auditors whom they shall assign, the account is to be rehearsed, and justice done between the parties, so that if the receiver be found in arrear, he is to be sent to the Fleet-prison. If he fly, *si diffugerit*, and will not come to account, he is, *sicut in aliis statutis continetur*, that is, according to the statute of Marlbridge, to be distrained, if he have any thing whereof distress can be made, *ad veniendum coram justitiariis ad compotum suum reddendum*; and if upon appearing, he be found in arrear, and cannot immediately pay, he is to be committed to gaol as before is mentioned. If he fly, and it be certified by the sheriff that he is *non inventus*, he is to be demanded from county to county till he be outlawed. The person imprisoned for such matter is to be irreplevisable, and the sheriff is enjoined not to permit him to go at large either upon a writ of *replegiare* or otherwise, without the assent of the lord, on pain of answering to him for the damages he has sustained by such servant, according to the amount he can make out *per patriam*, to be recovered in an action of debt. *

* In an intemperate pamphlet entitled "Liberty vindicated against Slavery," originally published in 1646, and re-published by Wilkie in 1771, it is insisted, that imprisonment for debt is unlawful, for that the act of 13 E. 1. c. 11. is contrary to Magna Charta, and therefore repealed by the 42 E. 3. which confirms the Great Charter in all points, and declares, that *if any statute be made to the contrary, it shall be null*; and the act of 13 E. 1. being void, the subsequent acts which give the *capias*, as referring to it, and founding themselves upon it, must be void also. But as a repeal of any former acts this clause in the 42 E. 3. is wholly inoperative; the statutes intended to be repealed not being particularly set forth.

The question was raised again in the year 1770, and a Mr. James Stephen, who was in execution for debt in the King's Bench prison, was brought up into the Court of King's Bench by *habeas corpus*, in order that the legality of his imprisonment might be inquired into: but he had retained no counsel; and though Lord Mansfield intimated to the bar, that if any gentleman had a doubt on the subject, or thought it at all arguable, the court were ready to hear him, yet no one offered to speak: the case was considered as too desperate for gratuitous services, and Mr. Stephen was remanded without any argument. He afterwards procured a writ of *habeas corpus* returnable in the Court of Common Pleas, where he was heard, he says, with great indulgence, but that the judges declined giving any reason why he should be confined, or any relief, because he was not charged with any action in their court. The fate of these applications produced an angry and ill-digested pamphlet by Mr. Stephen, taking much the same course of reasoning with that of 1646.

The action in which he had been taken in execution was trespass *vi et armis*, and not debt, as *Croke* erroneously states it, (*Cro. Ja.* 356.) and the authority assumed by the court, and the expression *paua imprisonmenti*, would seem to shew that the writ under which he was in execution was merely the *capias pro fine*. See also 22 Ass. 24. b. pl. 43.

Although the statute of *Acton-Burnel*, 11 E. 1. (which was enforced by 13 E. 1. st. 3.) had given the *capias* in a statute merchant, yet it is on this last accomptant act that all the subsequent statutes, which extend the use of the *capias*, in actions merely civil, are grounded; for they all refer to it either mediately or immediately.

The statute of 25 E. 3. c. 17. refers expressly to it, directing that such process shall be made in a writ of debt and detinue of chattels, and taking of beasts, by writ of *capias*, and by process of exigent by the sheriff's return, as is used in a writ of accompt, *si come est usde en brief d'accompt*: the statute of 19 H. 7. (a) c. 9. enacts, that like process be had in actions upon the case as well sued and hanging, as to be sued in the King's Bench or Common Pleas, as in actions of trespass or debt: and by the statute of 23 H. 8. c. 14., like process is to be had in actions of trespass upon the 5th R. 2. as in a common action of trespass at the common law, and like process is to be had in every writ of annuity and covenant, as in an action of debt.

was consequently extended, and upon outlawry the goods of the defendant became the property of the crown, 4 Comm. 429. But, with all deference to the learned Judge, it would seem rather to have been the natural consequence of the great extension about this time of the action on the case. — Where the *capias* lies in mesne process, there after judgment the writ of *capias ad satisfaciendum* lies, 3 Co. 12.; for the above statute in accompt having given it generally "*si diffugerit*," which is as well in mesne process as after judgment, and the other statutes having given it in the same manner as it was in accompt; if there be a *capias* in mesne process, there will also be one after judgment. *Gilb. Execut.* 69, 70. Properly speaking, then, the writ of *capias ad satisfaciendum* cannot be sued out against any but such as were liable to be taken upon the former *capias*. 3 Comm. 414. 49 E. 3. 2. Br. tit. *Exigent & Capias*, pl. 54.; and therefore it lies not in actions real. 2 H. 6. Br. tit. *Executions*, pl. 22. *Fitzh. tit. Execution*, 164. And the *capias* in mesne process not issuing in debt till after summons, attachment, and three distringases, if the defendant appeared on the *distringas*, *si non diffugerit*, so as to make the *capias* necessary, he was not liable to a *capias ad satisfaciendum* on the judgment. 49 E. 3. 2. O. N. B. 39. And the reason why a *capias* was not allowed against an archbishop, bishop, abbot or prior, nor against an earl or baron, was, that it was presumed that such persons must have sufficient whereby they might be distrained. O. N. B. 39. 11 H. 4. 15. 26 H. 8. 7. Br. tit. *Executions*, pl. 1.

(a) This statute was made, Sir William Blackstone says, for a rapacious purpose; for by extending the *capias*, process of outlawry

By 23 H. 8. c. 15., 4 Ja. 1. c. 3., and 8 & 9 W. 3. c. 11., this writ, as well as all other executory process, is given to defendants for the recovery of their costs, where the plaintiffs are nonsuited, or have a verdict or judgment on demurrer against them.||

On this writ the sheriff cannot take bail, nor can he return, that the party was rescued, for he may take the *posse comitatus*; and therefore if he returns, that the party was rescued, an action lies against him for the escape, or a new *capias* against the party, for an ineffectual execution is as none.

|| So, if before the return-day of the writ, he receives the money due from his prisoner, and thereupon liberates him before he has paid it over in satisfaction to the plaintiff, he is answer-

Ro. Abr. 904.
Cro. Car. 240.
Gilb. C. P. 23.

Slackford
v. Austen,
14 East, 468.

able as for an escape; and his return under the common rule of *cepi corpus*, and that he detained the prisoner until he satisfied him (the sheriff), the levy money indorsed on the writ, which he had ready, as commanded, &c. is of no avail.

(a) Philpot v.
Muller, T. 23
G. 3. K. B.
Tidd's Pr.
1064. 6th edit.

In point of form, this writ must pursue the judgment (a) therefore on a judgment against several defendants, it must include them all. (b)

(b) Clark v. Clement, 6 T. R. 526.

Tidd's Pr.
1064. 6th edit.

The writ must be signed, as well as sealed; and must be tested and returnable in term-time, in like manner as the *fieri facias*.

By 13 Car. 2. st. 2. c. 2. § 6. "in all actions of debt, and other personal actions, and also in all actions of ejectment, depending by original writ in the Courts of King's Bench and Common Pleas, after any judgment obtained therein, there need not be fifteen days between the teste and return of any writ of *fieri facias* or *capias ad satisfaciendum*; nor shall the warrant thereof be assigned for error."

By § 7. "this act is not to extend to any writ of *capias ad satisfaciendum* whereon a writ of *exigent* after judgment is to be awarded, nor to a *capias ad satisfaciendum* against the defendant in order to make any bail liable."

Campbell v.
Cumming,
2 Burr. 1188.

But a *capias ad satisfaciendum* in B. R. returnable out of term is not void as against the bail, though it may be set aside by the principal on motion for irregularity.

Perrot v.
Hele, 3 Wils.
58.

Though the writ should regularly be returnable on a general return-day, or on a day certain, in like manner as the former proceedings; yet, where an attorney, having sued by attachment of privilege, was nonsuited, and afterwards taken upon a *capias ad satisfaciendum* returnable on a general return, the Court of Common Pleas held it to be well enough; for that the suit was quite at an end, the attorney had no day in Court, and had lost his privilege to have the process returnable on a day certain.

Gilb. Exec.
68, 69. R.
Abr. tit. Exec.
(H.) 2 Taunt.
113. 2 Marsh.
186.

If a man enter into a recognizance in the Chancery, or Common Pleas, or into a recognizance on a writ of error from the King's Bench to the Exchequer Chamber, no *capias* will lie. The reason is, from the tenor of the recognizance, which is only to run by way of execution on the lands and chattels, and the *scire facias* revives the obligation according to the tenor of it; and though the statute of 25 E. 3. gave a *capias* in debt, yet it did not give a new execution on that recognizance, and therefore the execution continues as it was at common law.

But in the King's Bench, a *capias* lies; because the persons there are supposed to be committed on some criminal prosecution, and therefore when they are bailed out, the undertaker is liable in the same manner the prisoner was, and therefore since the *capias* lies against the prisoner, it lies against the person who undertakes to bail him.

Gilb. Exec. &
R. Abr. ubi

On a recognizance taken by virtue of the statute of 3 Ja. c. 8 made perpetual by 3 Car. c. 4. § 4. on bringing writs of error.

it seems, no *capias* lies, though taken in the King's Bench; for *supra*. Moore, this is not bailing a prisoner in their own Court, but by virtue 274. of the statute, which gives no *capias*.||

Of the *Fieri facias* and *Levari facias*.

The *fieri facias* and *levari facias* are judicial writs which lay at the common law. (a) The *fieri facias*, on which the goods and chattels of the debtor only could be taken in execution, took its name, as my Lord Coke (b) observes, from the words of the writ, *quod fieri facias de bonis et catallis*, &c.; but on the *levari facias* the sheriff was commanded *quod de* (c) *terris et catallis ipsius A. levari facias*, &c.

(a) || This is certainly the common language of our law-books; and as Glanville and Bracton are wholly silent about execution in personal actions, there is no direct authority either to contradict or support this opinion. It seems, however, doubtful, whether these writs *eo nomine* are of such ancient date; and it is not improbable, that the latter might have obtained both its name and existence from the words of the statute of W. 2. 13 E. 1. c. 18. by which it was enacted, that when a debt was recovered or acknowledged, or damages adjudged in the king's court, the plaintiff should have his election either to have a writ *quod vicecomes FIERI FACIAT de terris et catallis*; or one commanding *quod vicecomes liberet ei omnia catalla debitoris (exceptis bobus, et affris caruca) et MEDIETATEM TERRÆ SUÆ, quousque debitum fuerit levatum per rationabile premium vel extantum*. From the mere penning of this statute, the *fieri facias* appears as much a new regulation as the *medietatem terræ*. It is probable, that the *distringas per terras et catalla*, which was the mesne process in personal actions, was the process of execution likewise. The legislature seem to have an eye to this process in the terms *de terris et catallis*. But the writ of *fieri facias*, properly so called, never contained any thing *de terris*. This defect is supplied by the *levari facias*. Thus these two writs reach all the objects that could be touched by the old process of *distringas*; and were with that view, perhaps, framed after this act, if not upon the authority of it. 2 Reeves's Hist. of the Law, vol. 2. 187||. (b) Co. Litt. 290. b. 3 Co. 11. (c) But the sheriff cannot, by force hereof, meddle with the debtor's lands, so as to sell or deliver them to the creditor in satisfaction of the debt, but may collect the debt out of the profits of the land, as the corn or grass growing thereon, or out of the rents payable to the debtor. Godb. 290. Plow. 441. a. Finch, 101. Comb. 470. And vide 2 Inst. 453. what shall be counted the issues of the land. || It should seem, that a *levari facias* ought not to issue for a fee-farm rent, but that the proper remedy is by distress. Lupton v. Barker, Bunb 348.||

The sheriff, on these writs, cannot deliver a furnace annexed to a freehold in execution; for though the writs give the sheriff authority to levy the debt upon the goods and chattels of the debtor, and this is indeed a chattel; yet they do not give the sheriff any authority to break or disunite any thing from the freehold, which he cannot do unless particularly empowered by writ.

2 H. 7. 13. Office of Ex-ecutor, 87. Owen, 70. || But it hath been holden, that if a soap-boiler or other trader, being an under-tenant, for the convenience of his trade puts up vats, coppers, partitions, and paves the backside, &c.; upon a *fieri facias* against him, the sheriff may take them in execution in like manner as the lessee himself might have removed them during the term. *Secus*, where such trader makes hearths and chimney-pieces to complete the house, and not for the convenience of his trade. 1 Salk. 368. Per Holt C. J. at Nisi Prius.||

Nor has the sheriff, by force hereof, any authority to sell an estate for (d) life, which being a freehold can no more be affected by these writs than any other estate of inheritance; but he may dispose of (e) leases for years, which are but chattels, be they of ever so long a continuance.

Dalt. Sh. 145. 3 Co. 13. (d) But in Comb. 391. it is said to have been admitted, that since the statute 29 Car. 2. c. 3. an estate *pur auter vie* may be sold by the sheriff on a *fieri facias*. (e) But

(c) But if the sheriff on a *feri facias* sells a lease or term of a house, he cannot turn the lessee out of possession, but the vendee, in such case, must bring his ejectment. 2 Show. Rep. 85. *per Cur.* [This must be understood of a forcible expulsion; for it hath been determined, that under a *feri facias*, the sheriff may justify expelling the defendant peaceably, in other words, if the defendant will consent to go out, the sheriff may put the vendee in possession. Taylor v. Cole, 2 T. R. 292.]

Cro. Eliz. 584. If the sheriff, reciting that the defendant hath a term for 4 Co. 74. years, sells it by virtue of a *fi. fa.*, this sale is good; for it cannot be intended that the sheriff should certainly know the beginning and end of the term. Palmer's case.

4 Co. 74. a. But, if undertaking to recite it, he mistakes, and sells the term, it is a void sale, unless there be general words, all the interest, &c. of the defendant therein.

4 Co. 74. a. But a term cannot be extended without shewing the certainty thereof, because after the debt paid the party is to have his term again if any part thereof remains.

Taylor v. Cole, [In pleading the taking of a term under a *feri facias*, it is 3 T. R. 292. sufficient to state, that the party was possessed of a certain interest in the residue of a certain term of years.]

Salk. 368. If one be tenant for years without impeachment of waste, and a *feri facias* come out against him, the sheriff cannot cut down and sell timber; for the tenant had only a power so to do, and no interest, as he hath in standing corn, which, upon a *feri facias* against him, the sheriff may sell.

York v. Twine, A person had an annuity for twenty-one years granted by Cro. Ja. 78. Queen Elizabeth, payable by her receiver of her court of wards, which upon a *fi. fa.* upon a judgment against the grantee was extended and sold; and it was resolved the extent and sale was good; for being an annuity certain for years certain, and payable by the receiver, it is in nature of a rent-charge for twenty-one years, and is grantable over and vendible, and not like an annuity which chargeth the person only.

3 Co. 12. Also, on these writs the whole personal estate is liable to execution, except wearing apparel; but it hath been (a) said, that, (a) Comb. 356. per Holt C. J. if the party hath two gowns, the sheriff may sell one of them.

Francis v. [But nothing can be taken in execution which cannot be sold, Nash, Ca. as deeds, writings, money, bank-notes, &c. The courts have temp. Hardw. therefore refused to order the sheriff to retain in satisfaction of a 53. Knight v. present writ of *feri facias* money or bank-notes which he had Criddle, 9 East, before received for the use of the defendant in discharge of an 48. execution levied by the defendant against another person, and which the sheriff had not paid over. So, they have refused to

Fieldhouse v. retain in the sheriff's hands the surplus of a former execution Croft, 4 East, against the defendant at the suit of the same plaintiff, for the 510. An order purpose of satisfying a new execution.] to this effect was made in Arnistead v.

Philpot, Dougl. 231., but it was by consent.

Gilb. Execut. The absolute property of the goods must be in the debtor; 21. Keilw. 119. and therefore, if the sheriff takes the goods of a stranger, though 120. Bro. tit. the plaintiff assures him they are the defendant's, he is a trespasser; 99. Trespass, 99.

passer; for he is obliged, at his peril, to take notice whose the goods are, and for that purpose may impanel a jury to inquire in whom the property of the goods is vested. || And this may be given in evidence to shew that the sheriff has not acted maliciously (a), and will mitigate damages in an action of trespass against him for taking the goods of a third person (b): and as it is not a proceeding immediately from the court, but merely to indemnify the sheriff in making his return to the writ, the court will not set aside the inquisition of a jury summoned by the sheriff to inquire in whom the property of goods seized by him under a *feri facias* is vested. (c) But this proceeding is not conclusive in any case; for inquests of office are always traversable; and therefore an inquisition by the sheriff's jury to ascertain to whom the property of goods taken under a *feri facias* belonged, though found in favour of A., is not admissible evidence in an action of trover for the goods brought by A. against the sheriff (d): nor is such an inquisition admissible for the sheriff (e) in an action on the case against him for a false return of *nulla bona*. ||

Nor can the sheriff take in execution goods pawned or gaged for debt, nor goods demised or letten for years, nor goods distrained (f), || nor goods before seized upon an execution (g), unless the first execution were fraudulent (h), or the goods were not legally seized under it. || (i)

in 4 T. R. 640. (g) Backhurst v. Clinkard, 1 Show. 173. (h) Rice v. Serjeant, 7 Mod. 37.
(i) 4 T. R. 651.

In trespass the sheriff justified, that by virtue of (k) a *feri facias* out of the Exchequer for the queen's debt, he took the plaintiff's beasts, being *levant* and *couchant* upon the land of the debtor, and sold them for the queen's debt; and adjudged, that it was not lawful, for they were not to be sold as the goods of the debtor (l), but they might have been distrained for the queen's debt.

stranger being *levant* and *couchant* upon the land of a person outlawed, may be taken by virtue of a *levari facias* for the king; for this writ commands the sheriff to levy this duty out of the issues and profits of the land, and these cattle being *levant* and *couchant* are issues; and were it otherwise, it would be in the power of the party, by agisting his lands, to defeat the king of the benefit of the outlawry; but for this *vide* Salk. 395. Skin. 618. Comb. 469. Ld. Raym. 305. Salk. 408. pl. 4. 5 Mod. 109. Carth. 441. Comyns, 51. 12 Mod. 178. Raym. 17. Hard. 101. (l) That as to this point it must be a mistake of the printer; for that the beasts may be taken, and not sold, is a contradiction. Skin. 619. But, as to the principal point, the case is good law, being on a *feri facias*, which gives the sheriff power to dispose of the goods and chattels of the debtor only. Comb. 470.

[And as the sheriff cannot take the goods of a third person, so, if the defendant becomes bankrupt before the delivery of the writ to the sheriff, or, as it seems, before it is actually executed, the sheriff cannot legally take or dispose of them, after notice of the act of bankruptcy, and of a commission sued out or docket struck: for by Holt C. J. if a writ of execution be delivered to the sheriff against A., who becomes bankrupt before it is executed, the execution is superseded; consequently, the property

Farr v. New-
man, 4 T. R.
633. 641.
6 T. R. 88.
(a) Glossop v.
Pole, 3 M. & S.
175.
(b) Gilb. Exec.
21.
(c) Roberts v.
Thomas, 6 T. R.
88.
(d) Latkow v.
Eamer, 2 H. Bl.
437.
(e) Glossop v.
Pole, 3 M. & S.
175.

Bro. tit.
Pledges, 28.
Dyer, 67. b.
in margina
(f) Tully v.
Peachey, H.
23 G. 3. cited
Mod. 37.

Cro. Eliz. 431.
Hil. 37 Eliz.
2 Roll. Abr.
359. S: C.
Show. Rep.
174. 4 T. R.
640.
(k) But the
cattle of a

Tidd's Pr.
1046. 1 Lex.
173. 1 Ld.
Raym. 252.
and see 2 Eq.
Ca. Abr. 381

of the goods is not absolutely bound by the delivery of the writ to the sheriff.

- (a) 1 Bl. Rep. 205. 2 Bl. Rep. 829.
 (b) 1 Burr. 20. 1 Bl. Rep. 65.
 (c) 1 T.R. 475.

Cullen v. Meyrick, 1 T.R. 361. and see 1 Bl. Rep. 400.

Neatly v. Eagleton, E. 24 G. 3. K. B. Tidd's Pr. 1047.

¶ And where a defendant was taken in execution under similar circumstances, and paid the debt and costs to the sheriff, the Court on application refused to relieve him.

Lister v. Muntell, 1 B.& P. 427.

But, if a *feri facias*, issued against a bankrupt before, be not executed till after his certificate obtained, the court will order the goods to be restored, even though he has not pleaded the certificate; and if any thing be alleged to invalidate the effect of the certificate, it will direct a trial on a plea of bankruptcy.¶

Cadogan v. Kenmet, Cowp. 432. Jarman v. Wolloton, 3 T.R. 618. See Underwood v. Mordant, 2 Vern. 239.

1 E. Ca. Abr. 148. 8 T.R. 531. and see 6 East, 257. 3 T.R. 618. 8 T.R. 82.

¶ Nor, it seems, where so vested by settlement after marriage, if made in pursuance of a prior agreement, or for a good and valuable consideration, and without fraud. But, if the settlement is fraudulent, or the husband is suffered to carry on the trade intended for his wife, and his possession is not consistent with the deed, the goods are not protected.

4 T.R. 638, 639.

A term vested in the wife before marriage, to which the husband is entitled in her right, may be taken in execution for his debt.

Smith v. Plomer, 15 East, 607.

If a tradesman supply a married woman, living apart from her husband, with furniture upon hire, he does not thereby divest himself of the present right of property in such goods, the married woman being legally incapable of acquiring it by any contract; and therefore if the sheriff take those goods in execution at the suit of the husband's creditor, trover lies by the tradesman.

Scott v. Scholey, 8 East, 467.

A mere equitable interest can in no case be taken in execution.

Metcalf v. Scholey, 2 N.R. 461. Burdon v. Kennedy, 3 Atk. 739. Lyster v. Dolland, 3 Br. Ch. Rep. 480. 1 Ves. Jun. 431. S. C.

Dawson v. Wood, 3 Taunt. 256.

Where the plaintiff, who had purchased a public house, for which he could not himself obtain a licence, because he resided in another tavern, put B., an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to

to pay for the licence, which was granted to *B.*; it was holden by three Judges against *Mansfield C. J.* that the sheriff was not entitled to take, under an execution against *B.*, the plaintiff's liquors and chattels in the house committed to *B.*'s custody.||

[In an action against an executor for his own debt, the goods of the testator, in the hands of the defendant, cannot be taken in execution.] *Farr v. Newman*, 4 T. R. 621.

|| But, where an executrix used the goods of her testator as her own, and afterwards married, and then treated them as the goods of her husband, she was not permitted to object to their being taken in execution for her husband's debt.|| *Quick v. Staines*, 1 B. & P. 293. 2 Esp. N. P. C. 651. S. C.

[If there are two co-parceners of goods, and a judgment is given against one of them, the sheriff, on a *fieri facias* on this judgment, must seize all, because their moieties are undivided; for if he seize but a moiety, and sells that, the other co-parcener will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided; so that the vendee will be tenant in common with the other partner.] *Heydon v. Heydon*, 1 Salk. 392. [See *Jacky v. Butler*, 2 Ld. Raym. 871. *Pope v. Harman*, Comb. 217. *Marriott*

v. Shaw, Comb. Rep. 277. *Fox v. Hanbury*, Cowp. 449. *Eddie v. Davidson*, Dougl. 650. *Parker v. Pistor*, 3 B. & P. 288. *Chapman v. Kooops*, Id. 289.]

Upon a writ of *fi. fa.* the sheriff cannot (a) deliver the goods of the defendant to the plaintiff in satisfaction of his debt, but the goods are to be sold, and the money in strictness is to be (b) brought into court. *Cro. Eliz.* 504. *Thomson v. Clerk*, adjudged. *Lutw.* 589. S. P.—

It is otherwise on an *elegit*. *Sir T. Raym.* 346. Where a sheriff after a *fi. fa.* delivered to him pays the plaintiff out of his own money, it is made a question by *Hobart*, whether the sheriff may levy the money on the defendant. *Hob.* 207. (a) Though they cannot be delivered to the plaintiff, they may be sold to him. Comb. 452. Admitted to be the practice to make a bill of sale of the goods to the plaintiff. *Carth.* 419. [But, though such be the practice, it is not part of the duty of the sheriff to execute a bill of sale to the plaintiff at an appraised value, nor is he compellable to do so, though he even promise it. For this might be very inconvenient and highly injurious if it were allowed. The legal and proper mode of compelling a sale by the sheriff, where he makes delay or refuses, is by writ of *venditioni exponas*; upon which he must return the money into court. *Cameron v. Reynolds*, Cowp. 406.] || For by *Holt C. J.* if the sheriff seize goods to the value, and return it, he is bound to find buyers. *Clark v. Withers*, 6 Mod. 293. 2 Ld. Raym. 1075. S. C. But, where the sheriff returned to a writ of *venditioni exponas*, that part of the goods levied remained in his hands for want of buyers, the Court of C. B. refused an attachment against him. *Leader v. Danvers*, 1 Bos. & Pull. 359. Qu. || — But the sheriff, though he pays the plaintiff out of his own money, cannot keep the goods to his own use, for the authority by which he acted was to sell the goods. *Noy*, 107. *Lutw.* 589. (b) For it is not of record without. *Godb.* 147. — But the law seems otherwise; for though the writ be *ita quod habeas*, &c. yet the sheriff may return that he hath paid the money to the plaintiff. 2 Show. Rep. 87. 3 Lev. 204.

If the defendant die after the execution awarded, and before it be served, yet it may be served upon his goods in the hands of his executor or administrator (c); for by the execution awarded the goods are bound, and the sheriff need not take notice of his death. *Cro. Eliz.* 181. *Mod.* 188. S. P. adjudged. (c) That this was clearly so before the

when the goods were bound from the *teste* of the writ; but by this statute they are bound only from the time of delivery of the writ to the sheriff: but even since the statute, the execution seems good in this case, for the statute was made for the benefit of strangers, who might have a title to the goods between the *teste* of the writ of execution and time of the delivery thereof to the sheriff, and not for the benefit of the party, or his executors or admini-

administrators. || *Houghton v. Rushby*, Skin. 257. Comb. 33. S. C. Anon. 2 Ventr. 218. *Springer v. Somerville*, Bunb. 271. Dr. Needham's case, cited *ibid.* in the note, and also *Gill v. Parsons*, cited *ibid.*, and in 1 B. & P. 572. notes, and 7 T. R. 21. notes; *Robinson v. Tonge*, 3 P. Wms. 399. 3d Res. and Lord Winchelsea's case, *ibid.* note. Hence, if a *fieri facias* be tested before the defendant's death, though not delivered to the sheriff and executed till after, the execution is regular. *Waghorne v. Langmead*, 1 B. & P. 571. *Bragner v. Langmead*, 7 T. R. 20. The case of *Walker v. Drawater*, 3 Anstr. 680. *contr.* was decided on a misconception of what passed in B. R. in the case of *Heapy v. Purvis*, 6 T. R. 368.; for there the plaintiff did not sue out execution on a day prior to the death of the defendant, so that it might have legal relation back, but the execution sued out after the death bore teste on a day posterior to the defendant's death, and, consequently, was irregular.||

Salk. 322. *per Cur.*

So, if the plaintiff die, the execution does not abate, and the sheriff may, notwithstanding, proceed in it, because the sheriff has nothing more to do with the plaintiff; for the writ commands him to levy and bring the money into court, which the plaintiff's death does no way hinder: besides, an execution is an entire thing, and cannot be superseded after it is begun.

5. Of the Habere facias Seisinam and Possessionem.

Bro. Seisin, 7. 14. 30. Dalt. Sheriff, 254, 255. Perk. 42. (a) But where-
ever the writ demands land, rent, or other things in certain, the demandant, after judgment, may enter or distrain before any seisin delivered to him by the sheriff, upon a writ of *habere facias seisinam*. Co. Litt. 34. b. || Upon a recovery of a reversion, common, &c. that lie in grant, the recoveror is not in possession until execution, entry, or claim. Co. 94. b. 97. b. 106. b. Moore, 141. Keilw. 108. || (b) For the recovery of the possession in ejectment, *vide tit.*

6 Co. 52. a.

To a writ of *habere facias seisinam*, the sheriff cannot return, that another is tenant of the land by right, for of this there can be no issue taken between them, and the sheriff has nothing to do but to execute the king's writ.

Ro. Abr. 663.

A man recovers several houses in an assise, and after the tenant reverses the judgment in a writ of error, and a writ issues thereupon to the sheriff, to put him in possession of those houses: in this case, though the terretenants are strangers to the recovery, and therefore ought not to be ousted without a *scire facias*; yet, if the sheriff executes the writ, and so puts them out of possession by virtue of it, he is no disseisor; for he acts under the authority of the Court, which he is sworn to obey, under the penalty of being fined, if he does not.

Ro. Abr. 664.
Floyd and
Bethel.

The same law in all cases, where execution is of a judgment wherein the demand is made of a thing certain; but, if an execution is to be executed without mentioning any thing in particular, there, the sheriff, at his peril, ought to make execution

of the thing in demand, otherwise he will be a disseisor, for he is obliged to take notice of the thing in demand.

(D) Where the Party shall be concluded by the Election of one of them, and what further Remedy he has when he has not received entire Satisfaction on his first Writ, and this, either against the Party or Sheriff.

WHEN the plaintiff has judgment, he has it in his election to sue out what kind of execution he pleases; but he cannot regularly take out two different executions on the same judgment (a), nor a second of the same nature, unless upon failure of satisfaction on the first.

2 Ro. Abr.
475. Hob. 60.
2 Inst. 395.
1 Taunt. 55.
(a)|| A plaintiff
may take out
two different

writs of execution upon the same judgment at the same time, and execute which he pleases; but, if he has once begun to execute one of them, he is bound by such inceptive execution, and cannot sue out another, until the first has been returned; although he may have withdrawn his execution under that writ. Miller v. Parnell, 2 Marsh. 78.||

Therefore, if the plaintiff, upon a judgment or (b) recognizance at common law, sues out an *elegit*, he can have no *capias ad satisfaciendum* afterwards to take the body, because he hath determined his choice by that writ to the goods and chattels, and a moiety of the land, which being entered upon the record, he is thereby estopped; and though he takes but an acre of land in execution, yet it is held a satisfaction of the debt, be it never so great, because in time it may come out of it.

Bro. Elegg.
15. Ro. Abr.
896. Hob. 2.
57. 2 Bulst.
97. 5 Co. 87.
Cro. Ja. 338.
S. C. 6 Co. 46.
Godb. 181.
Lev. 92.
Comb. 232.
(b) But on

statutes merchant, staple, and recognizances in nature of statutes staple, body, goods and lands, being all liable by the several acts of parliament that create these securities, the consumer may take all at once or at different times; so that if he extends the lands first, he may afterwards take the body. Hob. 60. 2 Ro. Abr. 475.

But, though the plaintiff cannot take out a second *elegit* after the first is returned, executed, and filed; yet, if, upon the first, the sheriff returns *nihil*, the plaintiff may sue out a second.

Hob 2. Cro.
Ja. 339. || And
so it has been
determined in
Raym. 1451.||

Beacon v. Peck, 1 Str. 226. and Lancaster v. Fielder, 2 Ld.

So, where in debt on a judgment of 2000*l.* the defendant pleaded that the plaintiff had sued three several *elegits* on the said judgment into several counties, on one of which the sheriff returned, that he had levied of the defendant's goods 500*l.*; on demurrer it was adjudged, 1st, That this *elegit* being executed on the goods of the party only, the plaintiff was not precluded by his election thereof from any benefit he had at the common law, by any nice construction of the word *elegit* of the statute of Westm. 2. which intended to give a farther remedy than there was at common law, and that the action well lay, otherwise the statute would be a trap to catch persons, and not a remedy to help them to their debts. 2dly, That if, as objected, any lands were extended on the other two *elegits* which were not returned, the defendant

Glascok v.
Morgan, ad-
judged, Lev.
92. Keb.
465. 496. 556.
692. Sid. 184.
S. C. and
same points
adjudged; but
there said,
that the court
was divided,
whether the
plaintiff could
take out any
new execu-
tion. || The

same point has been since holden on the authority of this case in *Hesse v. Stevenson*, 1 N. R. 133. and that the defendant may be holden to bail. ||—But it is held by my Lord *Hobart*, that if upon an *elegit* the execution be on the goods only, without any lands, and they appear not to be sufficient, the party may have a *capias*, for it is in effect but a *feri facias*, though the word be *elegit*. Hob. 58.

Gillb. Exec. 50. || It was formerly holden, that the praying of an *elegit* on the roll was a bar to all other executions, because they looked upon that writ as a remedy, and if the party once elected it, they thought that coming by the statute instead of the *feri facias*, he could never afterwards make a new election, and recur to the *feri facias*. And this continued even to my Lord *Coke's* time, who says, that the good clerk never enters the *elegit* on the roll until he has the effect of his execution; for he thought, that though an ineffectual remedy was chosen, yet it barred the party of the other writ. But they then held, that, if there was a judgment in C. B. and an election on the roll, if it were removed by error into the King's Bench, and there affirmed, he might have a new election, because it was a new judgment of another Court where the debt was recovered, and on that *debitum in curia regis recuperatum* he had never made any election before. But afterwards, on a nearer consideration of the statute, they came to a resolution, that it was not the election of the *elegit* on the roll, but it was the return of the lands delivered by the sheriff, that was a bar to a new execution; and therefore if *nihil* was returned, that was no bar, which is plainly according to the very words of the statute. So, if the sheriff returns an extent of the goods, and *nihil* as to the lands, this is no bar to a new execution; because the words of the statute are *omnia catalla debitoris & medietatem terræ sue*; so that if he has not the *medietatem terræ*, which is the new thing that was to be delivered on the *elegit*, he has not that which the statute designed should be the bar to the *feri facias*; for the delivery of the goods is of the same nature with the *feri facias*, and therefore was not designed to come in place of it: but, if lands are delivered, though of never so little value, that will be a bar, because the sheriff has delivered the moiety according to the statute. If the sheriff returns that he has taken inquest of the land, but he could not deliver it to the plaintiff, because it was already extended, this is no bar to a new execution, for he does not deliver the lands, which are the only bar given by the statute.

Knowles v.
Palmer, Cro.
El. 160. 1 Leon.
176. S. C. R.
Abr. tit. Exec.
(Y.) pl. 10. S. C.

Crawley v.
Lydeat, Cro.
Ja. 338.

If there are several judgments against two upon a joint and several obligation, and the plaintiff has the lands of one of them extended, and the extent returned of record, he cannot now have a *capias*, or any execution against the other; because he has satisfaction according to the statute by the sheriff's delivery of the lands. So far was this carried formerly, that if the lands delivered to him under the *elegit* were afterwards evicted, he could not have a re-extent. All that he was entitled to was a writ of *novel disseisin*, or re-disseisin, given him by the statute

of Westminster. But he has now by the statute of 32 H. 8. c. 5. *Supra*, 368. a *scire facias*, in which there must be forty days between the teste and return, to revive the judgment, and to have a new execution. But this must be where all the lands are evicted; for if part only is evicted, or the whole but a for time, as by a prior judgment, so that the extent is still continuing, there is no remedy by this statute. Gilb. Exec. 57, 58.

If a man has an *elegit* for lands, which is served, and the sheriff delivers them to the plaintiff, it was long doubted, whether he should have an *elegit* into another county, or for other lands in the same county. The reason of this doubt was, that anciently they looked upon the *elegit* as the election of a remedy, and therefore when it was once executed with effect, they esteemed the plaintiff to have a term in the lands for satisfaction of his judgment, and therefore he could not afterwards sue another execution. But on better consideration of the statute, they have allowed him to have an *elegit* either in a new county, or in the same for a moiety of the land in whatever county it lies. So, on a suggestion that the defendant has more lands in the same county, the sheriff can extend goods, because by the *elegit* he is to deliver *omnia bona*, as well as *medietatem terræ*. Gilb. Exec. 53. Hunger v. Frey, Moore, 341. R. Abr. tit. Audita Querela (A.) pl. 6. S. C. Cro. El. 310. S. C. Strowd v. Keckwith, Styl. 454. Foster v. Jackson, Hob. 57.

If an *elegit* be returned *nihil* in one county, the plaintiff may have a *testatum writ* of *elegit* into another county. But it is said, that a writ of *elegit* must be actually sued out and returned *nihil* by the sheriff in order to warrant a *testatum elegit* into another county; for if several writs of *elegit* be awarded on the roll to different counties, and a *testatum elegit* is taken out to one of them, grounded on a supposed *elegit* issued to the county where the venue is laid, and returned *nihil*, when in truth no such writ was ever sued out, the *testatum elegit* is erroneous; therefore where there are several writs of *elegit* awarded on the roll, care must be taken that writs of *elegit* only, and not *testatum* writs be issued. Br. Exec. 72. *Elegit*, 11. Goodyere v. Ince, Cro. Ja. 246. Yelv. 179. S. C.

Though a *fieri facias* ought not to be taken out during the existence of a *capias ad satisfaciendum*, and whilst the person is in custody under it; yet, if it be so taken out, it is not void; though the Court would, probably, set it aside on motion, without putting the party to his *audita querela*. The sheriff may therefore justify a seizure of a leasehold estate under it, and convey a good title to such estate to a purchaser. Jeanes v. Wilkins, 1 Ves. 195.

So, if the sheriff sell a term under a writ of *fieri facias*, which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the latter cannot maintain an ejectment to recover his term against the vendee under the sheriff. Doe v. Thorr, 1 M. & S. 425.

It was formerly held (a), that, if a person taken on a *capias ad satisfaciendum* died in execution, the plaintiff had no further remedy, because he determined the choice by this kind of execution, which affecting a man's liberty, is esteemed the highest and most rigid in the law. Foster v. Jackson, Hob. 52. Williams v. Cutteris, Cro. Ja. 136. 143. Ro. Abr. 903. *Sed contr.*

Blumfield's case, 5 Rep. 86. b. (a) || The statute of James (which see in the next paragraph) treats this however only as a doubt; for the body is merely a pledge for the debt; it is taken not in satisfaction, but *ad satisfaciendum*. The debtor is presumed solvent, and is therefore coerced

coerced of his liberty until he makes payment. His imprisonment is not a punishment, but merely a means of getting at that property which he is supposed to possess, and fraudulently withhold. If he dies in prison without having surrendered his property, it is perfectly consistent with this proceeding that a new writ should issue attaching immediately upon the property. The judgment of the court, that he shall pay, is still unexecuted.]]

But now by the 21 Ja. 1. c. 24. "Forasmuch as heretofore it hath been much doubted and questioned, if any person being in prison and charged in execution by reason of any judgment given against him, should afterwards happen to die in execution, whether the party at whose suit, or to whom such person stood charged in execution at the time of his death, be forever after concluded and barred to have execution of the lands and goods of the person so dying: and forasmuch as daily experience doth manifest, that divers persons of sufficiency in real and personal estate, minding to deceive others of their just debt, for which they stood charged in execution, have obstinately and wilfully chosen rather to live and die in prison, than to make any satisfaction according to their abilities; to prevent which deceit, and for the avoiding of such doubts and questions hereafter, be it declared, explained, and enacted, That the party or parties at whose suit, or to whom any person shall stand charged in execution for any debt or damages recovered, his or their executors or administrators, may, after the death of the said person so charged, and dying in execution, lawfully sue forth and have new execution against the lands and tenements, goods and chattels, or any of them, of the person so deceased, in such manner and form, to all intents and purposes, as he or they, or any of them, might have had by the laws and statutes of this realm, if such person so deceased had never been taken or charged in execution."

"Provided, That this act shall not extend to give liberty to any person or persons, their executors or administrators, at whose suit or suits any such party shall be in execution, and die in execution, to have or take any new execution against any the lands, tenements, or hereditaments of such party dying in execution, which shall at any time after the said judgment or judgments be by him sold *bonâ fide*, for the payment of any of his creditors, and the money, which shall be paid for the lands so sold, either paid, or secured to be paid, to any of his creditors, with their privity and consent, in discharge of his or their due debts, or some part thereof."

[If a plaintiff consent to the defendant's being discharged out of execution upon an agreement, he cannot afterwards retake him, although the security given by the defendant on his discharge should be afterwards set aside.

Vigers v. Aldrich, 4 Burr. 2482. Jaques v. Withey, 1 T. R. 557. Thompson v. Bristow, Barnes, 205.

Blackburn v. Stupart, 2 East, 243. Tanner v. Hague, 7 T. R. 420.

Clark v. Clement, 6 T. R. 525. Nadir v. Battie, 5 East, 147.

So, if the plaintiff consent to discharge one of several defendants taken on a joint *capias ad satisfaciendum*, he cannot afterwards retake such defendant, or take any of the others. *Secus*, where the discharge of one is by act of law.]

If A.

If *A.* has judgment against *B.* and he takes out a *capias ad satisfaciendum*, directed to the sheriff of *Middlesex*, who directs his precept to the bailiff of the liberty of the duchy *ad cap.* *B.* *ad respond.* *A.* instead of *ad satisfaciend.* and thereupon the sheriff returns *cepi corpus secundum exigentiam brevis*; though by this return the sheriff makes himself liable to the debt to the plaintiff, by not pursuing his authority, yet *A.* may take out a new writ of execution against *B.*, for he never was in custody by virtue of the *capias ad satisfaciendum*.

Wood v. Harburn, Yelv. 52. adjudged.

So, if a party taken on a *capias ad satisfaciendum* escapes, or is rescued, though the sheriff is hereby liable, because he ought to have taken the *posse comitatús*, yet the plaintiff may take out any new execution, and shall not be compelled to take his remedy against the sheriff, who may be dead or insolvent.

Cro. Car. 40. 455. Vent. 4. But for this *vide tit. Escape.*

If on a *feri facias* all the money is not levied, the plaintiff may take out a new execution; but, as such new execution must be grounded on the first writ, such writ must be returned, and must recite, that all the money was not levied on the first. (a) But, if on the first writ all the money had been levied, it need not be returned, for no further process was necessary.

Oviat v. Vyner, Salk. 318.

afterwards withdrawn, the writ must be returned, before another can be sued out either against the property or person. *Miller v. Parnell*, 2 Marsh. 78.||

(a) || If the execution be once begun, though it be

If on a (b) *feri facias* the defendant pays the money to the sheriff, he is discharged of the execution, and the plaintiff must bring his action against the sheriff.

Cro. Eliz. 208, 209. (b) *Secus*, if on a *capias ad satisfaciend.*

he pays the money to the sheriff, for that writ only empowers him to take the body. 2 Lev. 203. 2 Jon. 97. 2 Mod. 214. Freem. 453. Taylor v. Baker. — 2 Show. 139. S. P. adjudged bad. Slackford v. Austen, 14 East, 468. S. P. Gilb. Execut. 72. S. P. Langdon v. Wallis, 1 Lutw. 582. S. P. — But, if he had paid it to the plaintiff's attorney on record, it would be good. 2 Show. *ibid.* admitted, for that would have been a payment to the plaintiff himself.

So, if the sheriff takes (c) goods in execution by virtue of a *feri facias*, whether he sells them or not, yet, being taken from the party against whom the execution was sued, he may plead that taking in discharge of himself, and shall not be liable to a second execution, though the sheriff hath not returned the writ. And the reason is, because the defendant cannot avoid the execution, and he would therefore be in a very bad condition if he was to be charged the second time; and if the sheriff dies after the goods are taken in execution, his executors are liable to the plaintiff, for they have *quid pro quo*, and it is in nature of a contract raised by law.

2 Mod. 214. (c) So, if the sheriff takes a bond from the party, this is a good execution, and the sheriff shall answer for the money. Keb. 551. — But, if there be an execution against *J. S.*,

and he bring 90*l.* part of the condemnation-money, to the sheriff, who refuses to take it, saying, the plaintiff in the action will not accept it, and thereupon *J. S.* desire the sheriff to keep the money till the plaintiff comes to town; if in this case the sheriff is robbed, *J. S.* must pay the money over again. 2 Show. 172. *vide tit. Bailment.*

As therefore the defendant in these cases is discharged as to the plaintiff, hence it seems to be clearly agreed, that the plaintiff may maintain an action of debt against the sheriff; for though there is no actual contract between the sheriff and the creditor, yet the levying of the money creates a contract in law, which

Hob. 206. 4 Mod. 404. 2 Show. 79. 281.

which lays a lien on the sheriff; for otherwise the party would be without remedy.

2 Show. *ubi supra*.

Also, it has been held, that an action lies even by an executor against an under-sheriff for money levied on a *feri facias*, as money received to the plaintiff's use, though before the return of the writ; for if the sheriff were permitted to stave off the action by his delay in not returning his writ, it would be allowing him to take advantage of his own wrong.

Id. ibid.

Cockram v.

Welbye.

2 Mod. 212.

S. C. adjudged strong relation to it. (a)

by three

judges against *Scroggs* Just., because the action was brought against the defendant as an officer, who acted by virtue of an execution, in which case the law creates no contract; and here was a wrong done, for which the plaintiff had taken a proper remedy, and therefore should not be barred by this statute. Mod. 245. Cro. Car. 297. (a) || But the sheriff's return to a writ of *feri facias*, that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment creditor, so as to charge the latter with the receipt of it in an action for money had and received. *Cator v. Stokes*, 1 M. & S. 599. ||

Wilbraham

and Snow ad-
judged,

2 Saund. 47.

(b) But, if the
sheriff returns
nulla bona, and
there is a re-
covery against

him for his false return, that vests no property of the goods in him, but they remain in the party, and are liable to any subsequent execution for his debt. 2 Vern. 238, 239. — Where the sheriff pleaded, that he levied goods to the value of 16*l.* and they were rescued out of his hands, and held an ill plea on demurrer. 2 Saund. 343, 344. (c) || If after the seizure the sheriff quit the premises, and leave no one in charge of the goods, he cannot maintain trespass against a person distraining, for they no longer remain in *custodiâ legis*. *Blades v. Arundale*, 1 M. & S. 711. ||

Smalcomb v.

Buckingham,

Carth. 419.

Salk. 320. S. C.

Ld. Raym.

251. S. C.

3 Mod. 176.

S. C. Comb.

429. S. C.

Com. Rep. 35.

S. C.

If *A.* and *B.* have two several judgments against *C.* and they take out writs of *feri facias*, which are both delivered to the sheriff on the same day, and the sheriff executes that which was last delivered, it bearing teste before the other; and afterwards apprehending that he ought to have executed that which was first delivered, he takes the same goods and delivers them in execution on the first writ; this second execution is void; for, though the sheriff ought to have executed the writ that was first delivered, yet having executed the last first, the vendee shall keep the goods, and the party must seek his remedy against the sheriff; and the reason hereof is, for the quiet of purchasers under sheriffs upon executions; for otherwise it would be dangerous to make such purchases of sheriffs; which might make writs of execution of no effect.

Carth. 420.
per Car. See
Stat. 29 Car. 2.
c. 3.

So, where a writ of *feri facias* is delivered to the sheriff to-day, and another to-morrow, and the sheriff executes the last first, by making sale of the goods, such sale will stand good; and the vendee shall hold the goods against him who first delivered the writ to the sheriff; and his remedy is only by action against

against the sheriff, a remedy to which he is not entitled, if the non-execution has proceeded from his own laches.

¶ So, where a party at whose prayer a sequestration had issued out of the Court of Chancery for the performance of a decree, had taken no measure to compel the execution of it in due time, and the sequestrators had not in fact possessed themselves of the goods, it was holden to be no excuse to the sheriff, to whom, at a distance of eighteen months, a writ of *feri facias* was directed against the goods of the defendant in the Chancery suit, for not executing such writs and selling the goods, the plaintiff in the sequestration (allowing it even to have the same effect to bind the goods as a *feri facias* at common law) having at all events lost his priority by such laches, and therefore that the sheriff, who had seized under the *feri facias*, and on notice of the sequestration had returned *nulla bona*, was liable to the plaintiff in an action for a false return.¶

[But, where two writs of *feri facias* against the same defendant are delivered to the sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority, even though the seizure were first made under the subsequent execution. (a) And if the person claiming under the last execution pay the sheriff the amount of the debt under the first execution, the court will not, on motion, compel the sheriff to refund that money.

tion, that was holden to bind the sheriff. Rybot v. Peckham, B. R. M. 19 G. 3. cited. *Ibid.* ¶ See Lord Ellenborough's remarks on this case of Hutchinson v. Johnstone, in 4 East, 544. (a) The second writ is to be considered as operating in favour of the first. Jones v. Atherton, 2 Marsh. 375.¶

Payne v. Drewe, 4 East, 523.

Hutchinson v. Johnstone, 1 T. R. 729. But, where the sheriff had given a bill of sale to the person claiming under the second execution,

If a *feri facias* be executed fraudulently, a second *feri facias* at the suit of another person executed afterwards shall have the preference.]

Bradley v. Wyndham, 1 Wils. 44.

(E) Of the Authority and Jurisdiction of the Court out of which the Execution issues : And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a superior Court.

JUDGMENTS must be executed in those courts in which they are given, and by such process and means as the law allows, and are agreeable to the established practice of those courts; and therefore, in case an inferior jurisdiction refuses to execute a judgment, a writ (b) *de executione judicii* lies, which if they disobey, the superior courts grant an attachment.

Cro. Car. 34.

(b) For this vide F. N. B. 20.

If a man recovers in a court-baron, they have not power to make execution to the plaintiff of the goods of the defendant; but they must distrain him, and retain the distress till satisfaction.

4 H. 6. 17. b. 22 Ass. 72. Ro. Abr. 543. S. C. Bro. Court Baron, S. C. but

but a *quære* made, for it is usual for the suitors assigned by the steward to tax the sums, and then to award a *levari facias*. — By Brownl. 81. upon a *levari* out of a court-baron, goods cannot be sold without a custom to sell, &c., and Noy, 17. 20. Gilb. Execut. 27.

Doe v. Parmiter, 2 Lev. 81. But it hath been held, that execution may be in a hundred-court by *levari facias*, and that where the books speak of a *distringas*, they must be intended of a *levari*, for a distress infinite would be endless in an execution. 2 Keb. 117. 126. S. C. — It is held, that, though the process of an hundred-court is a *distringas*, a *levari* may be good by custom. Comb. 124. Show. 47. 3 Danv. 304. (L) pl. 1. 2 Lutw. 1369. Carth. 53. Gilb. Execut. 29. — And in 3 Lev. 203. it is held, that the precept may issue from the sheriff, though the suitors are judges.

Tidd's Pr. 719. [In actions on a policy of assurance, where there is a verdict for the plaintiff against one of several underwriters, and the rest have entered into the consolidation rule, and agreed to be bound by it; or where on a reference to arbitration, it is agreed that a verdict shall be taken for the plaintiff's security, and an award is afterwards made in his favour — in each of these cases, execution cannot be taken out without leave of the court.]
1 Salk. 84.
Barnes, 58.

Jones v. Edwards, 2 Str. 1241. So, where in ejectment the landlord is admitted to defend on the tenant's non-appearance, and judgment is thereupon signed against the casual ejector, with a stay of execution till further order, the lessor of the plaintiff, having succeeded, must apply to the court for leave to take out execution; and in such case, if a writ of error be brought by the landlord, it may be shewn for cause, and will be a sufficient reason against taking out execution. But, if the landlord omit the opportunity of shewing it for cause, the execution is regular, and cannot be set aside. (a)

(a) George v. Wilson, 2 Burr. 757. Where there has been already an execution in an action of debt upon bond for the payment of an annuity, fresh execution may be taken out as subsequent payments become due, without a suggestion or *scire facias* under the statute of 8 & 9 W. 3. c. 11.; but this must be with leave of the court.]

Howell v. Hanforth, 2 Bl. Rep. 843. Ogilvie v. Foley, Id. 1111. Scott v. Whalley, 1 H. Bl. 297. Sir William Rucknall v. Sellwood, Vent. 274. 3 Keb. 522. S. C. If judgment is given in debt in *C. B.* and the record removed in *B. R.* by writ of error, and judgment affirmed (be it after *scire facias*, and appearance upon it, and errors assigned, or otherwise,) and execution awarded by *capias*, the *capias* ought to be special, reciting, that judgment was in *C. B.* and removed in *B. R.* by error, &c. for otherwise the *unde convictus est* in the *capias* shall be intended of a conviction in *B. R.*; and this was said by the clerks to be their course; wherefore a *supersedeas* was awarded of the execution *quia erroneè emanavit*, the writ not being returned.

Coot v. Lynch, Salk. 321. 5 Mod. 421. S. C. Ld. Raym. 427. 12 Mod. 255. Carth. 460. Cowp. 843. If a writ of error be brought here of a judgment in *B. R.* in *Ireland*, and the judgment affirmed, the method is to have a writ, reciting all the proceedings here in *England* directed to the Judges of the King's Bench in *Ireland*, requiring them to issue process of execution; and by this mandatory writ the cause is restored to that court: but no writ of execution of such a judgment can issue here.

[Where

[Where a writ of error determines in the Exchequer-chamber by abatement or discontinuance, the judgment is not again in *B. R.* till there be a *remittitur* entered; for without a *remittitur* it cannot appear to that court, but that the writ of error is still pending in the Exchequer-chamber (a): and therefore, in such case, it is usual for the plaintiff to move the court, on an affidavit of the fact, for leave to enter a *remittitur*, and take out execution. (b)]

So, if the plaintiff recover a judgment against two defendants in *B. R.* and one of them bring a writ of error in the Exchequer-chamber, the plaintiff cannot charge the other defendant in execution till the record be remitted, notwithstanding the writ of error might have been quashed immediately, because not brought by both the defendants.]

(F) *Who are entitled unto, and may sue out Execution.*

NO person is entitled to, or can sue out execution, who is not privy to the judgment, or entitled to the thing recovered, as heir, executor, or administrator to him who has judgment.

But, if an administrator *durante minori etate* of an executor recovers in debt, and, before execution, the executor comes of age, the executor shall have a *scire facias* on this recovery, for he is privy to the judgment.

|| So, if an administrator *pendente lite* obtains a judgment, the executor, on proving the will, which determines the administration, shall take advantage of it in the same manner.||

So, if *J. S.* makes *A.* executor, upon condition, that if *A.* does such an act, that the executorship shall cease, and that then *B.* shall be executor; if *A.* recovers in debt, and then does the act, *B.* shall take out execution.

If a feme, executrix to *J. S.* marries, and her husband and she bring an action of debt on an obligation, as executrix to *J. S.* and have judgment, and the wife dies; in this case the husband, though privy to the judgment, shall not sue out execution, for he is not entitled to the thing recovered, but the same belongs to the succeeding representative of *J. S.*

So, where *A.* sued as administrator to *J. S.* on an obligation entered into by the defendant to the intestate, and had judgment, and afterwards the letters of administration were repealed; though *A.* was privy to this judgment, and took out execution thereupon, yet the court granted a *supersedeas* thereof, and held, that the administration being revoked, the suing out execution afterwards was void; for the administrator had no interest or authority, but as a ministerial officer to the ordinary.

out execution, he would, notwithstanding, be subject to the action of the rightful administrator, which would create a circuitry of action, which the law abhors.

(a) 1 Salk. 261,
319. 1 Ld.
Raym. 244.

(b) 1 Salk. 265,
1 Cr. Pr. 369,
370.

2 T. R. 737.

Ro. Abr. 889.

Margaret
Wright's case,
adjudged,
Ro. Abr. 883,
889.

2 P. Wms. 587.

Walwin v.
Herbert, by
three judges
against one,
Ro. Abr. 889.

Beaumont and
Long, ad-
judged, Ro.
Abr. 889. Cro.
Car. 208. 227.
464. S. C.

Barnehurst v.
Sir Charles
Yelverton,
Yelv. 83.

2 Saund. 148,
149. S. P. ad-
judged be-
tween Turner
and Davis, for
if he were per-
mitted to sue

Cro. Ja. 4.
Yate v. Gough,
adjudged by
three judges
against
Gaudy J.
Yelv. 83, 84.
S. P. per Cur.

Harrison v.
Bowden, Sid.
29.

Also, it was formerly held, that if an administrator had judgment in right of his intestate, and died before execution, that the administrator *de bonis non* could not have a *scire facias*, so as to take out execution on this judgment, not being privy to the record.

But, where an executor had judgment, and sued out an *elegit*, but died intestate before the debt was levied; yet it was held that the administrator *de bonis non* should take advantage thereof, and that the *elegit* being sued out made it an interest vested, though it would have been otherwise if execution had not been sued out.

And now by the 17 Car. 2. c. 8. § 2. it is enacted, " That (a) For this " where any judgment, after a (a) verdict shall be had, by or *vide* 6 Mod. " in the name of any executor or administrator; in such case 290. and Salk. " an administrator *de bonis non* may sue forth a *scire facias*, and 323. where it " take execution upon such judgment." is said *per Curiam* to be but reasonable, and within the equity of this act, that an administrator *de bonis non* should be permitted to perfect an execution begun by an executor or administrator, though the judgment was by default, &c. See 2 Ld. Raym. 1072. 11 Mod. 34. pl. 6. *Vide infra*, tit. *Executors and Administrators*. (B. 2.)

Cleeve v. Vere,
Cro. Eliz. 450.
457. Sir W.
Jon. 385.

[But in case of an extent, and an inquisition had, the execution is not complete till a *liberate* is awarded; and if the plaintiff in the execution die before the *liberate* is awarded, the writ of *extendi facias* is abated by his death; and his representative cannot have any fruit thereof, because no right was vested by the extent.]

46 E. 3. 25. b.
Ro. Abr. 889.
S. C.

If a man has judgment for the arrearages of rent, and dies, his executor shall sue out execution, and not the heir; for by the recovery it becomes a chattel vested, to which the executor is entitled.

19 E. 4. 5. b.
43 E. 3. 2.
Ro. Abr. 889.

(b) So, of a recovery in waste, the heir shall have execution of the land, and the executor of damages. 43 E. 3. 2 Ro. Abr. 889. S. C.

So, if the demandant in a writ of cosinage, or (b) other real action, in which land and damages are recovered, has judgment, and dies, the heir shall take out execution as to the land, and the executor as to the damages.

48 E. 3. 12. b.
Ro. Abr. 889.
S. C.

If a statute be entered into to husband and wife, and the husband die, the wife shall take out execution.

Ro. Abr. 342.
889, 890.

So, if husband and wife recover lands and damages, and the husband die, the wife shall have execution of the damages, and not the executors of the husband.

Hob. 61. By the opinion of Colsmore, 7 H. 6. 6.

If there are two executors who have judgment, and the one prays a *capias*, and the other a *feri facias*, it is said the *capias* shall be awarded, as being best for the testator.

Doctor Atkins v. Gardener, adjudged without argument, Cro. Ja. 159.

If the president of the college of physicians brings an action against one for practising physick in London without licence, pursuant to the statute 14 & 15 H. 8. c. 5. and has judgment, and

and dies before execution; the successor, and not the executor of him who recovered, shall sue out execution; for this action is given to the president by an act of parliament, and the proceedings and judgment thereupon obtained by him were in his corporate capacity; and therefore the successor, on whom the law transfers the duty, shall take out execution.

(G) Of the Persons against whom Execution may be sued out: And herein,

1. Of suing Execution where there are several Parties concerned.

IF a man has judgment in an assise against any three for lands and damages, he cannot sue execution by *capias* against one only, for the damages; but the *capias* ought to be against all, for the execution ought to ensue the nature of the original.

one, on a joint judgment against two, is bad, hath been lately adjudged. Clerk v. Clement, 6 T. R. 525.]

So, if a man has judgment in debt against two, he must take out joint execution against both, and (a) cannot have a *capias* against one, and an *elegit* against the other.

Cro. Eliz. 573, 574. 5 Co. 86, 87. S. P. (a) Vide Hob. 2. 59.

But, if a man have judgment for damages against two, and he sue out a *scire facias* against both; if one be returned summoned, and he make default, and it be returned, that the other hath (b) nothing, the plaintiff may have execution against him who made default for the whole.

execution for the whole against the other. 1 E. 3. 13. b. Ro.

So, if two become bail for J. S., and he be condemned, and there be judgment on *scire facias* against the bail, the plaintiff may take out execution against either of them, being severally as well as jointly bound.

If there be judgment in debt against two, and one die, a *scire facias* lies against the other alone, reciting the death, and he cannot plead, that the heir of him that is dead has assets by descent, and demand judgment, if he ought to be charged alone; for at (c) common law, the charge upon a judgment being (d) personal survived, and the statute of Westm. 2. c. 18. that gives the *elegit*, does not take away the remedy of the plaintiff at the common law; and therefore the party may take out his execution which way he pleases, for the words of the statute are, *Sit in electione*: but, if he should, after the allowance of this writ and revival of the judgment, take out an *elegit* to charge the land, the party may have remedy by (e) suggestion, or else by *audita querela*.

execution, and that a personal execution will survive, though a real one will

15 H. 7. 6.
Ro. Abr. 888.
[That a separate *capias* ad satisfaciendum against

Ro. Abr. 888.
Beverley v. Beverley.
For this vide Cro. Car. 75.

1 E. 3. 13.
Ro. Abr. 890.
S. C. (b) So, if it be returned that one of them is dead, he shall have Abr. 890. S. C

Dixon v. Adams,
Ro. Abr. 883.

Edsar v. Smart, Raym. 26. Lev. 30. S. C. Keb. 92. 123. S. C. (c) So adjudged. 1 E. 3. 13. pl. 41. 3 E. 3. pl. 37. & vide 29 Ass. pl. 37. 29 E. 3. 29. (d) For the difference between real and personal not, vide 3 Co. 14. Yelv,

14. Yelv. 209. Raym. 153. 2 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 2. Show. 402. Holt, 1. pl. 2. Carth. 236. Salk. 261. pl. 1. (e) For this *vide* F. N. B. 166. 44 E. 3. 10. See Comb. 441. 5 Mod. 338. Carth. 404. Show. 405. Ld. Raym. 244.

2. Of suing out Execution against the Heir and Executor.

But for this *vide* tit. *Heir and Ancestor*, & *vide* Dyer, 81. 207. 344. Moore, 74. Co. Litt. 103. 290.—* See

the stat. 3 W. & M. c. 14. § 5, 6. where execution shall go against the heir, after an alienation of lands descended.

For this *vide* head of *Executors and Administrators*, & *vide* Mod. 188. 2 Vent. 218. Skin. 257. 2 Show. 485. 1056. 6 T. R. 368. 7 T. R. 24.

If there be judgment against one who has lands in fee-simple or, if such a one acknowledge a statute, and die, and his lands descend to his heir, * execution may be taken out against the heir, but his body is protected; for it would be most unreasonable to subject the heir to the payment of his ancestor's debts, any farther than to the value of the assets descended.

So, if there be judgment against J. S. and he die intestate, or having made his executor, a *fieri facias*, if vested before his death, may be executed of his goods in the hands of the executor or administrator, without a *scire facias*. || But, if the defendant die after final judgment and before execution, a *scire facias* is necessary. ||

1 Cr. Pr. 346. [Neither an *elegit*, nor a *capias ad satisfaciendum*, will lie against executors, unless a *devastavit* be returned.] 3 Bl. Com. 414.

3. Of suing out Execution against Infants.

Co. Litt. 290. a. Ro. Abr. 140. (a) But, though upon a judgment in debt, or upon a statute or recognizance, there can be no proceeding against an infant at common law during his minority, yet there may in Chancery, and a sequestration may issue against his lands. 2 Chan. Ca. 163, 164.—That the lands of one who enters into a statute merchant, staple, or recognizance, are not extendible in the hands of his heir, until he comes of age, *vide* Bro. Stat. Merch. 33. Co. Litt. 290. Moore, pl. 121. 203. Dyer, 239. Co. Ent. 12. *Vide ante*.

By the (a) common law, if judgment be given against a man for debt or damages, and the defendant die before execution sued, his heir within age is not liable to execution during his minority; but the parol must demur in such case till he comes of age.

Co. Litt. 290. a.

And this privilege of infancy does not only protect the infant, but all others who are affected by the judgment; as, if there be father and two daughters, and judgment be given for debt against the father, who dies, one of the daughters being within age, partition being made, the eldest shall not be charged alone, but shall have the benefit of her sister's minority, which puts a stop to the execution.

Co. Litt. 290. a. Bro. Stat. Merch. 33.

So, if the consor of a statute merchant die, and his heir within age endow his mother, the land in dower shall not be extended during the minority of the heir.

2 Str. 1217.

[But an infant seems to be liable to a *capias ad satisfaciendum*.]

4. *Of suing out Execution against a Feme Covert.*

If a person recovers in trespass against baron and feme, execution may be sued out against the feme after the death of her husband.

Ro. Abr. 89c.
but for this
*vide tit. Baron
and Feme,*

and Cro. Car. 518. 526. 3 Keb. 205.

So, if a recovery be in an assise against them upon a disseisin, execution shall be against the feme after the death of her husband, as well for the damages as for the principal.

39 H. 6. 45.
Ro. Abr. 346.
S. C.

So, if in a *quare impedit*, damages be recovered against baron and feme to the amount of two years, and the husband die, the damages may be recovered against the wife.

46 E. 3. 23.
Ro. Abr. 89c.
S. C.

¶ After interlocutory judgment against a feme upon a contract she married: and the court held, that the plaintiff might proceed to judgment and execution against her without joining the husband by *scire facias*; and that a *capias ad satisfaciendum* against her following the judgment, was at all events regular, though the plaintiff had notice of the marriage before.

Cooper v.
Hunchin,
4 East, 521.
Doyley v.
White, Cro.
Ja. 323.

In ejectment against a feme sole, who married before trial, and afterwards verdict and judgment were had against her by her original name; the Court of King's Bench held, that it was regular to issue an *habere facias possessionem* and *feri facias* against her by the same name, though the *feri facias* was wholly inoperative.

3 M. & S. 557.

In an action against husband and wife, they may both be taken in execution; and it was formerly holden, that the wife should not be discharged, unless it appeared that there was fraud and collusion between the plaintiff and her husband, to keep her in prison: but it is now the practice to discharge her when taken in execution, as well as on mesne process.¶

2 Str. 1167.
1237. 1 Wils.
149. Say. Rep.
149.

5. *Of suing out Execution against privileged Persons.*

There can be no execution taken out against a member of parliament during privilege of parliament. *

But for this
*vide tit. Privi-
lege. * For*

preventing delays of justice, by reason of privilege of parliament, see 10 Geo. 3. c. 50. which enacts, that suits may at any time be prosecuted in courts of record, equity, or admiralty, and courts having cognizance of causes matrimonial and testamentary against peers, and members of the House of Commons, and their servants. But the persons of members of the House of Commons are not to be arrested or imprisoned.

Also, no *capias* can issue against a peer; for even in the case of a private person, at common law, the body was not liable to a man's creditors; and the statute of E. 3. which subjects the body, does not extend to peers, because of the sacredness of their persons. Also, the law supposes, that persons thus distinguished by the king have wherewithal otherwise to satisfy their creditors.

6 Co. 52.
Hob. 61. Cro.
Car. 205.
Trinder v.
Shirley,
Doug. 45.

6. *Of suing out Execution against a Clerk, or one in Holy Orders.*

2 Ro. Abr.

474. Ro. Abr.

891. 2 Inst.

472. Jenk.

307.

(a) That the writ in this case is like a

feri facias, and the bishop is in nature of a temporal officer or ecclesiastical sheriff, and may, as the sheriff in other cases, seize ecclesiastical things and sell them, and must return *feri feci*, and not *sequestrari feci*, upon this writ. Mod. 257. 2 Mod. 258. [He may also be called upon by rule to return the writ; and if he make a false return, will be liable to an action. Gilb. Exec. 26. 1 Salk. 320. 1 Ld. Raym. 265.]

3 Burn's E. L.
tit. Sequestra-
tion.

Legassicke v.
Bishop of
Exeter, E.
22 Geo. 3.
K. B. Tidd's
Pr. 1060.

2 Ro. Abr.

468. Reg.

Jud. 8. Bro.

Stat. Merch.

38. Co. Entr.

13.

Salk. 320.

Moseley v.

Warburton.

Ld. Raym.

265. S. C.

If a writ of execution be taken out against a clerk in holy orders on a judgment obtained against him, or upon a statute staple, or recognizance in nature of it, which he has entered into; and the sheriff return, that he is a clerk, he ought to extend his lay fee and chattels, or return that he hath neither; but, if he return, *quod clericus est beneficiatus nullum habens laicum feodum, sed quod beneficiatus est* in such a diocese, then a writ (a) of sequestration shall issue to the bishop to sequester the living.

[Upon this writ, the bishop or his officer makes out a sequestration directed to the churchwardens, or, upon a proper security, to persons of the plaintiff's own appointment, requiring them to sequester the tithes, and other profits of the benefice; which sequestration should be forthwith duly published, by reading it in church during divine service, and afterwards at the church door, and fixing a copy thereon: for where a sequestration was made out, and not published whilst the writ was in force, but was stayed in the registrar's hands, by desire of the plaintiff's attorney, the court held, that it had no priority, as against other sequestrations, afterwards made out and duly published; but that if it had been published, the execution would have taken effect, and must have been first satisfied, notwithstanding it was then returnable.]

If the conusor of a statute merchant be a clerk within orders, by the statute 13 E. 1. the sheriff cannot take the body in execution; and if he return, that he is a clerk, no execution shall be granted to the sheriff to levy the debt *de bonis ecclesiasticis*, for his person is protected by the letter of the statute, and the statute doth not subject the *bona ecclesiastica* to the execution; but in this case the conusee may have execution granted out of his lay fee.

On a *feri facias* against a fellow of Winchester college, the sheriff returned *clericus beneficiatus nullum habens laicum feodum*, whereupon a *feri facias de bonis ecclesiasticis* issued to the bishop, who sent his mandate to the warden and fellows of the college to sequester his salary, and they refused; and it being moved in B. R. to know, whether the bishop might not compel them by ecclesiastical censures, the court thought that this was not an ecclesiastical constitution, the universities being only societies *ad studendum & orandum*, but said that a prebend is an ecclesiastical benefice; and in such case, if the prebendary have a sole distinct corps, it may be sequestered; but where he is only a member of the body aggregate, and the inheritance is in the dean

clean and chapter, there cannot be a sequestration, and therefore they left the bishop to do as he ought by law.

[It is said, that the writ of sequestration must be renewed every term: (a) but it seems, that if the writ be laid on and executed, before the day of the return, the mesne profits may be taken under it, after the writ is returnable, otherwise not.] (a) 1 Cr. Pr. 345. (b) 3 Burn's E. L. tit. Sequestration. Tidd's Pr. 746. || It is clearly a continuing execution, and a levy under it may be made from time to time after it is returnable, until the sum indorsed be satisfied; but not after it is *actually* returned, for then the authority of the bishop is at an end. Marsh v. Fawcett, 2 H. Bl. 582.||

(H) *At what Time Execution may be sued out: And herein of the Necessity of a Scire Facias.*

AT common law, in real actions, where land was recovered, the demandant, after the year, might take out a *scire facias* to revive his judgment, because the judgment being particular in the real action, *quoad* the lands with a certain description, the law required, that the execution of that judgment should be entered upon the roll, that it might be seen, whether execution was delivered of the same thing of which judgment was given; and therefore if there was no execution appearing on the roll, a *scire facias* issued to shew cause why execution should not be. 2 Inst. 471. 5 Co. 88. Cro. Eliz. 416. 6 Mod. 288.

But, if the plaintiff, after he had obtained judgment in any personal action, had lain quiet, and had taken no process of execution within the year, he was put to a new original upon his judgment, and no *scire facias* was issuable by law on the judgment, because there was not a judgment for any particular thing in the personal action, with which the execution could be compared: therefore, after a reasonable time, which was a year and a day, it was presumed to be executed, and therefore the law allowed him no *scire facias* to shew cause why there should not be execution. But, if the party had slipped his time, he was put to his action on the judgment, and the defendant was obliged to shew how that debt, of which the judgment was an evidence, was discharged. 2 Inst. 469. Carth. 30, 31. Sid. 351.

To remedy this, and make the forms of proceeding more uniform in both actions, the statute of Westm. 2. 13 E. 1. st. 1. c. 45. gave the *scire facias* to the plaintiff to revive the judgment, where he had omitted to sue execution within the year after judgment was obtained. The words of the act are, *Quod ea quæ inveniuntur irrotulata coram hiis qui recordum habent, vel in finibus contenta, sive sint contractus, sive conventiones, sive obligationes, sive servicia, aut consuetudines, recognita, vel alia quæcunque irrotulata quibus curia regis sine juris et consuetudinis offensa auctoritatem potest prestare, talem decetero habeant vigorem, quod non sit necesse de hiis imposterum placitare. Set cum venerint conquerentes ad curiam domini regis, si recens sit cognitio vel finis, videlicet, infra annum in brevi levatus, statim habeant breve de executione illius recognitionis facte. Et si forte a majori tempore*

transacto facta fuerit illa recognitio, vel finis levatus, precipiatur vicecomiti, quod SCIRE FACIAT parti de qua fit querimonia, quod sit ad certum diem ostensura, si quid sciat dicere, quare hujusmodi irrotulata vel in fine contenta executionem habere non debeant. Et si ad diem non venerit, &c.

Okey v. Vickers, Sid. 351.
2 Salk. 600.
Proctor v. Johnson, Ld. Raym. 669.
S.C. || Withers v. Harris, 2 Ld. Raym. 806.
1 Salk. 358.
S.C.
(a) But the court, in the cases in Ld. Raymond and Salkeld, held that the *scire facias* lay at common law.

It hath been doubted whether a *scire facias* lay to revive a judgment in ejectment after a year and a day, either by the common law, or by force of this statute; for at common law this was looked upon as a personal action, and it was thought that the statute extended only to such personal actions in which debt or damages are recovered, and not to provide a remedy in this case, when at the time of making the act the possession was not recovered in this action: but it seems now settled and confirmed by daily practice, that a *scire facias* lies on a judgment in ejectment, for the words of the act (a) are, *Sive servitia sive consuetudines sive alia quæcunque irrotulata*, which comprehend all judgments, and give the like remedy on them by *scire facias*, as the demandant had on a judgment in a real action at common law.

And so it is laid down in Com. Dig. tit. Pleader, (3 L. 1.)||

Co.Litt.291.a.
2 Inst. 469.
F.N.B. 296.
Bro. Recognizance, 17.

Here also it may be proper to distinguish between taking out execution on judgments and recognizances at common law, and on statutes merchant and staple; that on the first a *scire facias* after the year and day is absolutely necessary; but as to statutes merchant, &c. the conusee may at any time sue execution on them, without the delay or charge of a *scire facias*.

2 Inst. 470.
and admitted to be the reason in all the cases on this head.

The reason why the plaintiff is put to his *scire facias* after the year is, because where he lies quiet so long after his judgment, it shall be presumed he hath released the execution, and therefore the defendant shall not be disturbed without being called upon, and having an opportunity in court of pleading the release, or shewing cause, if he can, why the execution should not go.

2 Salk. 598.
pl. 3. per Cur.

Also, it is said in *Salkeld*, that, if a judgment be above ten years' standing, the plaintiff cannot sue a *scire facias* without motion in court; and if it be under ten, but above seven, he cannot have a *scire facias* without a motion at the side-bar; and a note is added, that if after such motion, and judgment revived by *scire facias*, the defendant die before execution, the plaintiff must sue a new *scire facias*, but may have it without motion, for the judgment was revived before.

But, though the general rule be, that the plaintiff cannot take out execution after the year and day without a *scire facias*, yet it must be understood with these restrictions.

Cro. Ja. 364.
Yelv. 7. 15 H. 7.
16. b. Roll.
Abr. 899.
4 Leon. 197.
5 Co. 88.
Carth. 236, 237.
6 Mod. 288.

That if the defendant brings a writ of error, and thereby hinders the plaintiff from taking his execution within the year, and the plaintiff in error is nonsuit, or the judgment affirmed, the defendant in error may proceed to execution after the year without a *scire facias*, because the writ of error was a *supersedeas* to the execution, and the plaintiff must acquiesce till he hears the judgment

judgment above. Besides, while the cause is depending on the writ of error, it is still *sub judice*, whether the plaintiff shall recover or not, and the year for the execution ought to be accounted from the final judgment given.

So, if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the *scire facias*, because the delay is by consent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice.

Also, if the plaintiff enters on the roll of the judgment, an award of an *elegit* of the same term with the judgment, and continues it down with *vicecomes non misit breve*, he may take out that writ at any time afterwards, without suing out any *scire facias*, though, upon debate of this matter, the judges at first inclined that the *elegit* should be actually taken out; otherwise, such an award as this might be entered at any time, paying only for the continuances, and the party thereby tricked out of the benefit which the law gives him of pleading any matter *post factum* upon the *scire facias*: but upon examination of several of the ancient practising clerks then in court, this appeared to have been the constant practice amongst them for many years; and therefore the court, considering the inconveniency of opening a gap to destroy so many executions for this irregularity, and because the practice had prevailed so long, that it was become the law of the court, ordered that the execution should stand good.

But, if the defendant has been tied up by an injunction out of Chancery for a year, he cannot take out execution without a *scire facias*, because the courts of law do not take notice of Chancery injunctions, as they do of writs of error. Besides, in that case, it would be no breach of the injunction to take out the execution within the year, and continue it down by *vicecomes non misit breve*, which cannot be done in the case of a writ of error, because that removes the record out of the court where the judgment was; and therefore there can be no proceedings below till it be affirmed, and returned to the inferior courts.

197. But, where the delay has been occasioned by the defendant himself, later cases have holden that this rule does not apply. *Michell v. Cue*, 2 Burr. 660. *Bosworth v. Philips*, 2 Bl. Rep. 784. S. C. cited by *Nares J. & S. P.* ruled. *Bland v. Darley*, 3 T. R. 530. *Watkins v. Haydon*, 2 Bl. Rep. 762. S. P. || — If a *fieri facias* be sued within the year, and *nulla bona* returned, and continued down several years, a *capias ad satisfaciendum* may issue without a *scire facias*. *Air v. Hardress*, Stra. 100. — If execution is not returned by the sheriff, or not filed, continuances thereon cannot be entered on the roll; and if they are, and thereupon a *ca. sa.* issues after the year, without a *scire facias*, defendant shall be discharged out of custody, and plaintiff pay costs. *Blayer v. Baldwin*. 2 Wils. 82. *Barnes*, 213. S. C. — The year shall be computed from the day of signing judgment to issuing the writ, not by the number of terms, *Barnes*, 197.

6 Mod. 288.
Ro. Rep. 104

Seymour and Grenvill,
Carth. 283,
284. & vide Ro
Rep. 104.
2 Show. 235.
Comb. 346.

Booth v.
Booth, Salk.
322. 6 Mod.
288. S. C.
|| *Winter v.*
Lightband,
1 Str. 301.
S. P. Hodson
v. Earl of Dar-
lington, 3 P.
Wms. 36. S. P.
Sympton v.
Gray, Baraes,

(I) To what Time the Execution shall have Relation,
so as to avoid any Alienation by the Party:
And herein of the Statute of Frauds.

Co. Litt. 102.
a. b. 8 Co. 171.
Sir Gerard
Fleetwood's
case, Ro. Rep.
77, 78.

AS to lands, they are bound from the time of the judgment, so that execution may be of these, though the party aliens *bonâ fide* before execution sued out: so, of statutes merchant, staple, and recognizances, which also bind the lands from the time of entering into them.

Mod. 217.
Chan. Ca. 268.

Therefore, if a man has judgment for debt, or is conusee of a statute, and the debtor, before execution sued, aliens by fine, and five years pass, yet the plaintiff may still sue out execution.

But here it is necessary to observe, that by the 29 Car. 2. c. 3. § 13. reciting, that "it had been found mischievous, that judgments in the king's courts at *Westminster* do many times relate to the first day of the term whereof they are entered; or to the day of the return of the original, or filing the bail, and bind the defendant's lands from that time, although in truth they were acknowledged or suffered and signed in the vacation-time after the said term, whereby purchasers find themselves aggrieved."

[This statute, it hath been resolved, is confined to purchasers, and does not apply as between the parties to the suit. Therefore, if

§ 14. It is enacted, "That any judge or officer of any of His Majesty's courts of *Westminster*, that shall sign any judgments, shall, at the signing of the same, without fee for doing the same, set down the day of the month and year of his so doing, upon the paper-book, docket, or record which he shall sign; which day of the month and year shall be also entered upon the margent of the roll of the record where the said judgment shall be entered."

the defendant die in the vacation, judgment may be still entered after his death, as of the preceding term, when he was living; and it will be a good judgment, at common law, as of that term, though execution cannot be sued out upon it against the representative of the defendant until it is revived by *scire facias*. *Oades v. Woodward*, 1 Salk. 87. 2 Ld. Raym. 766. 849. S. C. 7 Mod. 2. 93. S. C. *Duke of Norfolk's case*, 1 Salk. 401. 7 Mod. 39. S. C. *Parsons v. Gill*, 1 Ld. Raym. 695. Com. Rep. 117. S. C. *Finch v. Earl of Winchelsea*, 3 P. Wms. 399. note [E]. *Fann v. Atkinson*, Willes, 427. *Savil v. Wiltshire*, *Id.* 428. note. *Barnes*, 271. S. C. *Fuller v. Jocelyn*, 2 Str. 882. Ca. temp. Hardw. 158. S. C. 1 Barnardist. B. R. 357. 358. 404. S. C. *Chancy v. Needham*, 2 Str. 1081. Andr. 53. S. C. *Heapy v. Parris*, 6 T. R. 368. *Bragner v. Langmead*, 7 T. R. 20. *Waghorne v. Langmead*, 1 B. & P. 571. *Freckelton v. Kitson*, 2 Lill. Pr. R. 145. *Stamper v. Kinsey*, *Id.* But then the roll ought to be brought in and filed before the *essoign* day of the subsequent term. 1 Salk. 87. 2 Ld. Raym. 850. *Hodges v. Templar*, 6 Mod. 191. And it is said, that if judgment be signed in term time, and in the subsequent vacation the defendant sell lands, and before the *essoign* day of the next term the plaintiff enter his judgment, it shall affect the lands in the hands of the purchaser. 6 Mod. 191. See Sugd. V. & P. 561. 4th Edit.]

And § 15. it is enacted, "That such judgments, as against purchasers *bonâ fide*, for valuable consideration, of lands, tenements, or hereditaments to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be so signed, and shall not relate to the first day of

" the

“ the term whereof they are entered, or the day of the return
“ of the original, or filing the bail.”

And § 18. it is enacted, “ That the day of the month and
“ year of the enrolment of recognizances shall be set down in
“ the margin of the roll where the said recognizances are en-
“ rolled, and that no recognizance shall bind any lands, tene-
“ ments, or hereditaments, in the hands of any purchaser *bond*
“ *fide*, and for valuable consideration, but from the time of such
“ enrolment.”

Also, for the greater security of purchasers, by the 4 & 5 W. & M. c. 20. made perpetual by 7 & 8 W. 3. c. 36., it is enacted, That the clerk of the essoins of the Court of *C. B.*, the clerk of the doggets of the Court of *K. B.*, and the master of the office of Pleas in the Court of Exchequer, shall make and put into an alphabetical dogget, by the defendants' names, a particular of all judgments entered in their respective courts of *Michaelmas* and *Hilary* terms, before the last day of the ensuing term; and of the judgments of *Easter* and *Trinity* terms, before the last day of *Michaelmas* term, under the penalty of 100*l.*; which dogget shall contain the names of the plaintiff and defendant, with the addition of the latter, (if any such be in the record of the judgment,) the debt, damages, and costs recovered, the venue and number of the judgment roll; and shall be fairly put into and kept in books in parchment, to be searched and viewed by all persons, at reasonable times, paying for every term's search 4*d.* and no more: and by § 3. that no judgment not doggetted, and entered in the books as aforesaid, shall affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators, in their administration of their ancestors, testators, or intestates' estates.

[Before this statute the judgment bound the lands, and the docket was nothing more than an index to find it readily. *Gilb. C.P.* 165. But now it is deemed necessary, that the judgment should be docketted in order to bind the lands: and if it be not docketted, *Flower v. Lord Bolingbroke*, 1 Str. 639.; or not docketted within the time pre-

scribed by the act, *Wait v. Garth*, *Barnes*, 261. *Forshall v. Coles*, *Sugd. V. & P. App. No. 18.*; or if there be a false docket, which is as none, *Gilb. C. P.* 165. 1 *Wils.* 61. 2 *Str.* 1209. *S. C.* though a right judgment, the purchaser or mortgagee will be safe; and in the latter case, the party must take his remedy against the attorney or officer for not docketting it truly. || But, though a judgment be not docketted, and therefore void against a purchaser, yet, if the purchaser has notice of it, and has not paid the value of the estate, it will be presumed that he agreed to pay off the judgment, and equity will compel him to pay it. *Thomas v. Pledwell*, tit. *Creditor and Debtor* (*E. pl. 5.*), 2 *Eq. Ca. Abr.* 681. pl. 7. And although no agreement were made, yet, if a purchaser has notice of a judgment, the statute does not in equity extend to him, for he is already in possession of that which it was the object of the legislature to furnish him with, namely, knowledge of the incumbrance. *Davis v. Earl of Strathmore*, 16 *Ves.* 419., which over-ruled the case of *Forshall v. Coles*, *Vin. Abr.* tit. *Creditor and Debtor* (*E. pl. 6.*), and 2 *Eq. Ca. Abr.* 592. pl. 8., but much more fully reported in *Sugd. V. & P. ubi supra.* || [If the judgment against a testator or intestate be not docketted, the debt is put on a level with simple contract debts, and the executor or administrator may, under the plea of *plene administravit* to an action of debt upon such a judgment, give in evidence the payment of bond and other specialty debts. *Hickey v. Hayter*, 6 *T. R.* 384. 1 *Esp. Rep.* 313. *S. C.* *Steele v. Rorke*, 1 *B. & P.* 307.] || And where leave was given to enter up judgment as of a preceding term, *nunc pro tunc*, the Court of *K. B.*, in order that it might not affect purchasers and mortgagees, directed it to be docketted of the term in which the application was made. *Baker v. Baker*, *H.* 35 *G.* 3. 2 *Tidd's Pr.* 967. 6th Edit. ||

[To give effect to a judgment, as against purchasers and mortgagees of lands in *Middlesex* and *Yorkshire*, it is required, that
it

6 Ann. c. 35.
 § 19. 7 Ann.
 c. 20. § 18.
 8 Geo. 2. c. 6.
 § 1 & 18.

it shall be *registered*: for by 5 Ann. c. 18. § 4. and several subsequent statutes, “ No judgment, statute, or recognizance (other than such as shall be entered into in the name and upon the proper account of his majesty) shall affect or bind any manors, lands, tenements, or hereditaments in those counties, but only from the time that a memorandum of such judgment, statute, or recognizance, shall be entered at the register-office, in such manner as therein is directed.”]

Sugd. V. & P.
 578—580.

|| But none of these acts extend to copyhold estates, or to leases at rack-rent, or not exceeding twenty-one years, where the actual possession and occupation go along with the lease. Nor does the act for the county of *Middlesex* extend to any of the chambers in Serjeants’ Inn, the Inns of Court, or Inns of Chancery.||

Co.Litt.102. a.

Here also we must observe a difference as to judgments which affect the lands of an ancestor, and those which affect the heir; for as to the first, the plaintiff shall not have execution, but only of that land which the defendant had at the time of the judgment, because the action was brought in respect of the person, and not in respect of the land.

Co.Litt.102. b.
 (a) That filing
 a bill in *B. R.*
 is as effectual
 for this pur-

But, if an action of debt be brought against the heir, and he alien, pending the writ; yet shall the land he had at the time of the (a) original purchased, be charged, for the action was brought against the heir in (b) respect of the land.

pose as an original writ. Carth. 245. (b) And therefore, if the ancestor devised away the lands, creditors, whose securities were inferior to judgments, had no remedy at common law, either against the heir or devisee. Abr. Eq. 149. But now by the 3 & 4 W. & M. c. 14. it is enacted, that all wills concerning lands, or any rents, profits, term, or charge out of the same, whereof the devisor shall be seised in fee simple, in possession, reversion, or remainder, shall be deemed to be fraudulent and void against creditors upon bonds or other specialties, their executors, administrators, &c. and such creditors shall have their actions of debt against the heir at law and the devisees jointly.

Gree v. Oliver,
 Carth. 245.

Hence it hath been adjudged, that where there were two creditors, *viz.* *A.* and *B.* of *J. S.*, whose heir was bound, and who had lands by descent, and *A.* filed an original in *C. B.*, and had judgment thereon in *Trinity* term 2 Ja. 2. by default, and thereupon a general *elegit* issued against all the lands of the heir, and a moiety thereof was delivered to *A.*, and *B.* on a bill filed in *B. R.*, 1 & 2 Ja. 2., had a special judgment against the assets confessed by the heir in *Trinity* term 3 Ja. 2., though *B.*’s judgment were subsequent to *A.*’s, yet as it appeared that his bill or original was filed before *A.*’s, the judgment should have relation thereto, and therefore he was to be first satisfied.

Carth. 181.
 246.

Also, in the above case it seems, that though *A.*’s judgment had been on an original actually filed before *B.*’s, that *B.* must have been preferred, because his judgment was general against the heir, and the execution a general and common execution by *elegit*, and not against the assets only by way of extent; and therefore such a general judgment will not operate by way of relation to the original, but binds only in common cases from the time of the judgment given.

As to goods and chattels, the execution at common law had relation to the time of the awarding thereof, and therefore, if after the *teste* of the writ of execution, the defendant had sold the goods, though *bonâ fide*, and for valuable consideration, yet were they still liable to be taken in execution, into whose hands soever they came.

8 Co. 171.
Cro. Eliz. 174.
440. 2 Vent.
218.

But as this created some inconveniency with respect to trade, in making the goods still subject to execution, though in the hands of a person who came by them for valuable consideration, and without notice of any such execution; and as there was a farther inconveniency in making a writ of execution taken out in vacation, to have relation to the last day of the precedent term; for remedy thereof,

Mod. 188.
Sid. 271.

By the 29 Car. 2. c. 3. § 16. it is enacted, "That no writ of *feri facias*, or other writ of execution, shall bind the property of the goods against which such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coroners, to be executed; and, for the better manifestation of the said time, the sheriff, under-sheriff, and coroners, their deputies and agents, shall, upon the receipt of any such writ (without fee for doing the same) indorse upon the back thereof the day of the month or year whereon he or they receive the same."

[But neither before this statute, nor since, is the property of goods altered, but continues in the defendant, till the execution executed. The meaning of the words,

that no writ of execution shall bind the property but from the delivery of the writ to the sheriff, is, that after the writ is so delivered, if the defendant make an assignment of his goods, unless in market overt, the sheriff may take them in execution. 2 Eq. Ca. Abr. 381.]

[This statute protects only goods in the hands of *purchasers* where the goods are sold *bonâ fide*; for if the party die after the *teste*, but before the delivery of the writ to the sheriff, the goods are bound in the hands of his executors; for this is not a change of property by sale, or for a valuable consideration.

Comb. 145.

So, if a writ of execution be delivered to the sheriff, and the defendant become bankrupt before it is executed, the execution is thereby superseded, and the goods are not bound by the delivery, for the property ceases to be in the bankrupt from the time of the act of bankruptcy committed.

1 Ld. Raym. 252. But in such case, the sheriff shall not be made a trespasser by relation for
Milles, 1 T. R.

any subsequent disposal of them; though he would be liable in trover. *Smith v.* 475.

The sheriff deriving his authority from the writ, it hath been holden, that if the plaintiff die after a *feri facias* sued out, it may be executed notwithstanding; and his executor or administrator shall have the money. And if the plaintiff (*a*) has made no executor, or administration is not yet committed, the money must be brought into court, and there deposited until, &c.]

Cro. Car. 459.
1 Sid. 29.
2 Ld. Raym. 1073. 1 Salk. 322. (*a*) Noy, 73. 2 Ld. Raym. 1073.

(K) Of the King's Precedency in Executions.

Hob. 60.
2 Inst. 19.
2 Ro. Abr. 472.

IT hath been already observed, that the king, by his prerogative, may have execution of the body, lands, or goods of his debtor, at his election.

8 Co. 171.
2 Ro. Abr.
156, 157.

And here we must observe, that the king's execution relates as to land to the time of becoming in debt to the king; for as to debts that were of record, they always bound the lands and tenements; for all lands being held mediately or immediately from the king, when any debt was returned of any person, it laid the estate as liable to such debt, as if it had been a reservation on the first grant.

And as to debts not of record, they bind the lands from the time they are entered into; but this is by force of the statute 33 H. 8. c. 39. § 74. by which it is enacted, "That if any suit be commenced or taken, or any process hereafter be awarded for the king, for the recovery of any of the king's debts, that then the same suit and process shall be preferred before any person or persons; and that our said sovereign lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for the said debts, before any other person or persons; so always, that the king's said suit be taken and commenced, or process awarded for the said debt, at the suit of our said sovereign lord the king, his heirs or successors, before judgment given for the said other person or persons."

[Rex v. Cotton, Parker, 112. 2 Ves. 288. But the above statute of 33 H. 8. extends to executions against personal property as well as against land, and restrains the prerogative within the limitation there prescribed. Parker, 261, 262.]

As to the king's execution of goods, the same relates to the time of the awarding thereof, which is the *teste* of the writ, as it was in the case of a common person at common law; for though by the 29 Car. 2. c. 3. "no execution shall bind the property of the goods, but from the time of the delivery of the writ to the sheriff;" yet as this act does not extend to the king, an extent of a later *teste* supersedes an execution of the goods by a former writ; because by the king's prerogative at common law, if there had been an execution at the subject's suit, and afterward's an extent, the execution was superseded till the extent was executed, because the publick ought to be preferred to the private property, and the rather, because the king is supposed by publick business not to be able to take care of every private affair relating to his revenue, and therefore no time occurs to (or runs against) the king; and if he was to be prevented of his execution, by another person's coming in before him, laches must be imputed to him, which the law does not.

But for this
vide 2 Ro. Abr.
156, 157.
Moore, 126.
3 Leon. 239.
240. 4 Leon.
10.

If the king's debt be prior on record, it binds the lands of the debtor, into whose hands soever they come, because, as has been observed, it is in the nature of an original charge upon the land itself, and therefore must subject every body that claims under it; but, if the lands were alienated in whole or in part,

as by granting a jointure before the debt contracted, such alienee claims prior to the charge, and in such case the land is not subject.

[This statute of 33 H. 8. it hath been resolved, is not confined to bond debts only, but extends to all debts and executions at the suit of the king. But it is restrictive upon the old prerogative, and introductive of a new law, for *ita quod*, so *always that the king's suit*, &c. makes a condition precedent and a limitation. Hence, therefore, a judgment and execution, executed by *elegit*, shall be preferred to the extent of the king, issuing on a bond debt, bearing date before the subject's judgment, and assigned to the king before the subject's execution. And, in the case of an execution against personal property, if the king's extent be sued out posterior to a judgment recovered by the subject, and writ of execution thereon delivered to the sheriff, though not executed, the king shall be postponed. Besides, in this case, the property of the goods is changed by the subject's execution, and no longer remains in the king's debtor. It will indeed be otherwise, if an extent come after a distress, or before a provisional assignment under a commission of bankrupt, for in neither of those cases is the property of the goods divested out of the owner.]

See further on this subject tit. PREROGATIVE (E).

(L) Of the proper Officer to do Execution: And herein of the preceding and succeeding Sheriff.

THE sheriff or officer, who has proper authority to begin an execution, is compellable to proceed in the same.

Hence it hath been adjudged, that if a sheriff on a *feri facias* seizes goods in his hands to the value of the debt, and pays part of the debt, and is discharged, without having sold the rest of the goods, or having returned his writ, that notwithstanding such discharge, and without any writ of *venditioni exponas*, he may sell the goods remaining in his hands, and such sale and execution shall be good by force of the writ of *feri facias*.

contrary to the resolution in all the other books, that the sale was void, and that his authority ceased with his office; but *qu. & vide* 2 Saund. 47. Latch. 117.

If a *feri facias* be delivered to an under-sheriff, 9 Nov. 34 Eliz. on which he levies part of the debt; and on the same day a writ of discharge be delivered to him, dated 6 Nov.; yet if it be not proved, that he had notice of this discharge prior to his commencing the execution, he still remains under-sheriff, and liable to the plaintiff's action for the money levied by him.

As the authority of the old sheriff continues, so the law has provided a remedy to oblige him to proceed in the execution, which is by (a) *distringas nuper vicecomitem*, either to distrain him to sell and bring in the money, or to sell and deliver the money to the new sheriff to bring into court.

7 Co. 18. b.

Attorney General v. Andrews, Hardr. 23.

Lechmere v. Thoroughgood, 3 Mod. 236. Comb. 123. Uppom v. Sumner, 2 Bl. Rep. 1251. 1294. Rorke v. Dayrell, 4 T. R. 493.

Salk. 223. *vide* tit. Sheriff.

Ayre v. Aden, Cro. Ja. 73. Moore, 757. S. C. Ro. Abr. 893. S. C. but in Yelv. 44. the S. C. is reported, and there held

Boucher v. Wiseman, Cro. Eliz. 440.

Salk. 323.

(a) For which *vide* Thes. Brev. 90. 34 H. 6. 36. Rast.

Rast. Ent. 164. — That the *distringas*, which commands the new sheriff to distrain the old one to sell and bring in the money, is the most usual. 6 Mod. 299.

(M) Of the Manner of compelling him to do Execution: And herein of the Party's Remedy against him for Neglect of his Duty.

Vide tit. Attachment and Sheriff.

Salk. 323.

7 Mod. 118.

6 Mod. 229.

Salk. 323.

IF the sheriff refuses to execute any judicial writ; this is a contempt to the court, for which an attachment will be granted.

So, if he executes the writ, and makes a false return, the party injured may have an action on the case against him.

If a *feri facias* be directed to the sheriff, and he return, that he levied goods to such a value, he must answer goods to that value; and in such case, if he return, that they remain in his hands for want of buyers, then a *venditioni exponas* shall be awarded; upon which, if he refuse to sell the goods, a *distringas* issues to the coroner.

For this *vide*

Cro. Ja. 514.

Godb. 276.

2 Ro. Rep. 57.

Bridgm. 53.

Sly and Finch,

Cro. Ja. 566.

Coryton and

Thomas.

Cro. Car. 53.

2 Saund. 343.

But, if to a *feri facias* the sheriff return, that he seized goods to such a value, and that they were rescued out of his hands; in this case, he makes himself liable to an action of debt, or a *scire facias* may be brought against him by the plaintiff; for the sheriff having levied the goods, he can have no remedy against the defendant: also, in this case, there can be no *venditioni exponas* to the sheriff, because by his own shewing it appears, that he has not the goods in his hands.

(N) Of the Sheriff's Authority in doing Execution: And herein of breaking Doors, &c.

5 Co. 91., &c.

Semaine's

case. 3 Inst.

162. Moore,

668. Yelv. 208.

Cro. Eliz. 908.

Dalt. Sher.

350.

IT is laid down as a general rule in our books, that the sheriff, in executing any judicial writ, cannot break open the door of a dwelling-house. This privilege, which the law allows to a man's habitation, arises from the great regard it has to every man's safety and quiet, and therefore it protects him from those inconveniencies which must necessarily attend an unlimited power in the sheriff and his officers in this respect; and hence it is, that every man's house is called his castle. *

* In Trin. T.

17 G. 3. in the

cause of Yates and others against Delamayne, Esq., the court set aside an execution levied on defendant's goods, in his dwelling-house, because the officer forcibly broke into the house to execute the writ.

But yet, in favour of executions, which are the life of the law, and especially in cases of great necessity, or where the safety of the king and commonwealth are concerned, this general case hath the following exceptions:

5 Co. 91. b.

(a) That upon a *copias utlagatum*, though on mesne process, and at

1. That whenever the process is at the suit of the (a) king, the sheriff, or his officer, may, after request to have the door opened, and refusal, break and enter the house to do execution, either on the party's goods, or take his body, as the case shall be.

the

the suit of the subject, the sheriff may break open any outward doors after demand and refusal. 2 Show. 87. pl. 78.

2. So, in a writ of seisin, or *habere facias possessionem* in ejectment, the sheriff may justify breaking open the door, if he be denied entrance by the tenant; for the end of the writ being to give the party full and actual possession, consequently, the sheriff must have all power necessary for this end: besides, in this case, the law does not, after the judgment, look upon the house as belonging to the tenant, but to him who has recovered. 5 Co. 91.

3. Also, this privilege of a man's house relates only to such executions as affect himself; and therefore if a *fieri facias* be directed to the sheriff to levy the goods of A. and it happen that A.'s goods are in the house of B., if, after request made by the sheriff to B. to deliver these goods, he refuse, the sheriff may well justify the breaking and entering his house. 5 Co. 93. a. Sid. 186. || In entering the house of a stranger, the sheriff is not justified, unless he actually

finds therein goods of the defendant, which are liable to be taken in execution. In entering the defendant's house, his justification does not depend on that event. Cooke v. Birt, 5 Taunt. 765. 1 Marsh. 333. S. C. Johnson v. Leigh, 1 Marsh. 565. Stanhope v. Dawson, 2 Lutw. 1428. ||

4. Also, this privilege extends to a man's dwelling-house or out-house adjoining thereto, and therefore it hath been adjudged, that the sheriff, on a *fieri facias*, may break open the door of a barn, standing at a distance from the dwelling-house, without requesting the owner to open the door, in the same manner as he may enter a close, &c. Sid. 189. Penton and Browne. Keb. 698. S. C.

5. So, on a *fieri facias*, when the sheriff or his officers are once in the house, they may break open any (a) chamber-door or trunks for the completing of the execution. 2 Show. 87. pl. 78. agreed per Cur. Cowp. 1.

(a) Q. Whether this must not be after request and refusal? Palm. 54. || This was not thought to be necessary in a late case, Hutchison v. Birch, 4 Taunt. 619. but the case of Ratcliffe v. Burton, 3 B. & P. 223. seems *contra*. ||

6. So, if the sheriff's bailiffs enter the house, the door being open, and the owner locks them in, the sheriff may justify breaking open the door, for the enlarging and setting at liberty the bailiffs; for if in this case he were obliged to stay till he could procure a *homine replegiando*, it might be highly inconvenient: also, it seems, that, in this case, the locking in the bailiffs is such a disturbance to the execution, that the court will grant an attachment for it. Palm. 52. White and Whitshire. Cro. Ja. 555. S. C. 2 Ro. Rep. 137. S. C.

7. That if the sheriff, in executing a writ, breaks open a door where he has no authority for so doing by law, yet the execution is good, and the party has no other remedy but an action of trespass against the sheriff. 5 Co. 93. a.

[A seizure of part of the goods in a house by virtue of a *fieri facias*, in the name of the whole, is a good seizure of all.] 1 Ld. Raym. 725.

(O) Of the Offence of hindering or obstructing an Execution.

2 Inst. 450.

THERE were anciently castles, fortresses, and liberties, where they resisted the sheriff in executing the king's writs, which creating great inconvenience, the statute of Westm. 2. c. 39. hindered the sheriff from returning rescuers to the king's writ of execution, the words of which statute are, *Multoties etiam falsum dant responsum mandando, quod non potuerunt exequi præceptum regis propter resistentiam potestatis alicujus magnatis, de quo caveant vicecomites de cætero, quia hujusmodi responsio multum redundat in dedecus domini regis. Et quam cito sub-ballivi sui testificantur quod invenerunt hujusmodi resistentiam, statim (omnibus omissis) assumpto secum posse comitatûs sui eat in propria persona ad faciendam executionem.*

The judges construed these words to extend only to executions, and not to writs on mesne process, and that the sheriff was not obliged to carry the *posse comitatûs* where the man was bailable, for they did not presume, that in such cases the king's writ would be disobeyed.

2 Inst. 454.

The original of commitment for contempts seems to be derived from this statute; for since the sheriff was to commit those who resisted the process, the judges who awarded such process must have the same authority to vindicate it. Hence, if any one offers any contempt to his process, either by word or deed, he is subject to imprisonment during pleasure, *viz. a qua non deliberetur sine speciali præcepto domini regis*; so that, notwithstanding the statute of *magna charta*, that none are to be imprisoned *sine judicio parium vel per legem terræ*, this is one part of the law of the land to commit for contempts, and confirmed by this statute.

Kingsdale v.
Mann, 1 Salk.
321. 6 Mod.
27. S. C.

But, though the court will on affidavit grant an attachment against the party, whether he be the defendant or a stranger who disturbs the execution; yet, where the sheriff delivered possession by virtue of an *habere facias possessionem* in the morning, and some hours after the sheriff was gone, and the party in possession, the defendant came and turned him out again; the court held, that if the plaintiff had been turned out immediately after he was put into possession, or while the sheriff and his officers were there, an attachment might have been granted, for this had been a disturbance to the execution, and a contempt, but being several hours after, they doubted: but it was agreed in this case, that the court might grant a new *habere facias possessionem*, if the first was not returned.

Mynn v.
Coughton,
Cro. Car. 109.
vide tit. Ac-
tions on the
case.

Also, though the court will grant an attachment, yet, if *A.* be taken on a *capias ad satisfaciendum* at the suit of *B.*, and rescued by *J. S.*, *B.* may bring an action on the case against *J. S.* for the rescue, or the sheriff may have such action against the rescuer, because he is liable to *B.*, but his being so liable does not prevent *B.* from bringing his action against which of them he pleases.

(P) Of the Party's Remedy when there hath been an irregular Execution, and how the same is to be set aside.

[If the writ of execution be irregular, the defendant may move the court to set it aside, and discharge him out of custody if taken on a *capias ad satisfaciendum*; or that the goods or money levied on a *feri facias* may be restored to him. A third person, whose goods are taken under it, may also move the court to have them restored: But, if the right be not clear, the court will leave him to his action against the sheriff; or they will sometimes direct an issue for trying it, and retain the money in court, to abide the event of the trial.] Tidd's Pr. 1069.

(a) If upon an *elegit* the sheriff delivers all the party's lands, or a third part, or more than a moiety, the extent is void: but in this (b) case, it can only be made void by (c) writ of error or *audita querela*. (d) (a) Sid. 91. (b) Carth. 453. (c) That an irregular execution may be avoided in

evidence in ejectment brought for the lands. Lev. 160. (d) But the court, it seems, would now set it aside on motion.

But, if upon an *elegit* the sheriff deliver a moiety of an house without metes and bounds, such return is ill, and shall be quashed for incertainty on (e) motion, without a writ of error or *audita querela*. Carth. 453. (e) May for this be quashed, though it be filed and entered upon record, because it appears by the record to be void for incertainty, per Hale Ch. Just.; but Wyld Just. held, that it being entered upon the record, there was no avoiding it, but by writ of error. Vent. 259. & vide Vent. 274. 3 Keb. 522.

So, if a *feri facias* be not warranted by the judgment upon which it is awarded, though the sheriff shall be (f) excused, yet it is merely void as to the party. Vent. 259. (f) Upon a *feri facias* to the under-sheriff of the county of Bucks, who sold the goods of a poor man for 22*l.* 13*s.* 4*d.* the goods being well worth 80*l.* it appeared to the court, that the sheriff had prevailed with the jury to prize the goods at an under-value, persuading them it would be better for the poor man; whereupon they appraised them *ut supra*, and he delivered them to the plaintiff for the said sum. The court held, that it was oppression, and inquirable at the assizes by indictment, or punishable in the star-chamber; and commanded that the under-sheriff, being an attorney, should be brought before them. Cro. Ja. 426. Sayer, Sheriff of Buckingham's case.

[If a *feri facias* be tested, or returnable, out of term, or, in an action by bill, if it be returnable on a general return-day, it is void, or at least erroneous, and may be quashed or set aside on motion, together with the proceedings that have been had under it. But a *feri facias* may be amended (g), by adding or altering the teste.] 2 Salk. 700. Davey v. Hollingsworth, Tr. 24 G. 3. B. R. Tidd's Pr. 1036. (g) 1 Wils. 155. Say. Rep. 12.

It has been held, that in trespass against the sheriff, it is enough for his justification, to shew a writ. So it is in the case of his bailiff or officer, with this difference, that the sheriff must shew the writ was returned (h), if returnable; but the bailiff need not, because it is not in his power. But in trespass against

2631. 2 Bl.
Rep. 1104.
Doug. 41.
|| 6 T. R. 35.
(b) But *Qu.*
whether this
be necessary
upon final pro-
cess issuing
out of a superior court; and see Tidd's Pr. 1070. note f.||

against the plaintiff himself, or a mere stranger, they cannot justify themselves, unless they shew there was a judgment as well as an execution, for the judgment may be reversed, and it ought to be at their peril, if they take out execution afterwards. But it seems, that if one comes in aid of the officer, at his request, he may justify as the officer may do: but such request or command of the officer is traversable.

Lev. 95.
Turner v.
Felgate.
Raym. 73.
S.C. (a) Where
an action
will lie for
taking out
execution on
a judgment
which the
plaintiff knows
to be satisfied,
vide Hob. 205. 266.

So, where a man had judgment and execution executed, and afterwards the judgment was vacated for being unduly obtained, and restitution awarded, and afterwards the defendant brought (a) trespass against the plaintiff in the first action for the taking of the goods; it was adjudged, that it well lay against the party, for by the vacating of the judgment it is as if it never had been, and is not like a judgment reversed by error. But in this case it was held, that no action would lie against the sheriff (b), who had the king's writ to warrant what he did.

But for this
vide tit. Error,
letter (H), and
3 Lev. 312.

(b) [But, if the sheriff or officer incautiously joins in the same plea with the party, he forfeits his defence. 1 Str. 509.]

If after a writ of error sued out, and bail put in, the plaintiff takes out execution, the court will grant a *supersedeas quia executio erroneè emanavit*.

(Q) To what the Party shall be restored when such erroneous Execution is set aside.

Ro. Abr. 778.
8 Co. 966.
143. Cro.
Eliz. 278.
Moore, 573.
3 Leon. 89.
Cro. Ja. 246.
Godb. 27.
Gouls. 103.
1 M. & S. 425.

IF upon his judgment the plaintiff takes out a *feri facias*, and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the defendant shall only be restored to the money for which the term was sold, and not the term itself; for by the writ the sheriff had authority to sell; and if the sale might be avoided afterwards, few would be willing to purchase under executions; which would render writs of execution of no effect.

Ro. Abr. 778.
Cro. Ja. 246.
Yelv. 179.
Brownl. 107,
108. (c) That
it would be
otherwise if
sold to a
stranger, vide
Yelv. 108.
Brownl. 107.

But, if the plaintiff takes out an *elegit* on his judgment, and the sheriff, upon this writ, delivers a lease for years, of the defendant's, to the value of 50*l.* to the plaintiff *per rationabile pretium & extentum*, to have as his own term, in full satisfaction of 50*l.* part of the sum recovered, and after the defendant reverses the judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term on this writ, yet here is no sale to (c) a stranger, but a delivery of the term to the party that recovered by way of extent, without any sale, and therefore the owner shall be restored.

Ro. Abr. 778.

And for this reason, if personal goods were on this writ delivered to the party *per rationabile pretium & extentum*, upon the reversal of the judgment he should be restored to the goods themselves.

So, if the goods of an outlawed man are sold by the sheriff on a *capias utlagatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves, because the sheriff was not compellable to sell these goods, but only to keep them to the use of the king.

So, if upon a *fiery facias* on a judgment against *B.* the sheriff takes the goods of *B.* into his hands, but before any sale of them, *B.* delivers to the sheriff a *supersedeas* on a writ of error, *B.* shall have the goods again, for by this seizure no property is altered.

Moore, 542. Style, 159. Vent. 255. Comb. 389. and tit. *Supersedeas* (G)-

5 Co. 90. Ro. Abr. 778. Cro. Eliz. 278.

2 Ro. Abr. 491. Sare and Shelton; but for this vide Ro. Abr. 492. Cro. Eliz. 597.

EXECUTORS AND ADMINISTRATORS.

ACCORDING to the civil and canon law there are three persons who are called executors, and who have to do with the execution of a person's goods after his decease. The first is the ordinary, or bishop of the diocese, and he is called *executor a lege constitutus*. The second is *executor a testatore constitutus*, being appointed by the last testament of the party. The third is *executor ab episcopo constitutus*, who in the civil law is called *executor dativus*, and in our law an *administrator*.

As the manner of appointing executors and administrators, and the nature and duty of their offices, have been matters of great debate and controversy in our law, it will be necessary to branch out this head into several divisions; and therefore we shall consider,

(A) What Persons may be Executors : And herein,

1. *Of appointing the King Executor.*
2. *Whether Corporations may be Executors.*
3. *Who, in respect of their Crimes, are disabled from being Executors.*
4. *Who in respect of their Country.*
5. *Who in respect of their Want of Understanding.*
6. *Who in respect of their Fortune and Circumstances; and therein of obliging an Executor to give Security.*
7. *Of making Infants Executors.*
8. *Of a Feme Covert Executrix.*
9. *Of making Creditors Executors.*
10. *Of making Debtors Executors.*

EXECUTORS AND ADMINISTRATORS.

(B) Of the different Kinds of Executors and Administrators: And herein,

1. *Of an Administrator durante minori ætate of an Infant Executor or Administrator: And,*
 1. Who may be such an Administrator.
 2. What Acts he may do.
 3. When his Authority determines.
2. *Of an Administrator de bonis non, where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will: And,*
 1. In what Cases Administration *de bonis non* shall be granted, and to whom.
 2. What things unadministered such an one is entitled to.
 3. In what Actions commenced before his Time, may an Administrator *de bonis non* proceed.
3. *Of an Executor de son tort: And,*
 1. What Acts or Degree of Intermeddling will make an Executor *de son tort*.
 2. What Acts of his are as valid, as if done by a lawful one.
 3. How he is to be charged, and how far a subsequent Administration purges the first Wrong.

(C) Of the Manner of appointing an Executor.

1. *By what Words an Executor is constituted.*
2. *Of appointing an Executor absolutely, or on Condition.*
3. *Of appointing a temporary Executor.*
4. *Of appointing an Executor with a limited Power, as to administer such a Part of the Estate, &c.*

(D) Of appointing Co-Executors: And herein,

1. *What Acts done by any one of them shall be as valid as if done by them all.*
2. *Where they must answer for each other's Acts; and what Remedy the one has against the other.*
3. *Where they must jointly sue and be sued; and therein of Summons and Severance.*

(E) Of the Probate of Wills, and granting Administration: And herein,

1. *To whom the Probate of Wills and the granting of Administration did originally belong.*

2. *Of*

2. *Of the King's Jurisdiction herein.*
3. *Of the Archbishop's Jurisdiction; and therein of bona notabilia: And,*
 1. *Of what Value the Goods and Effects must be, that will make bona notabilia.*
 2. *Of the Nature of such Goods as will make bona notabilia; and how far it is necessary that they should be in several Dioceses.*
4. *Of the Probate of Wills, and granting Administration by the Bishop of the Diocese.*
5. *Of the Probate of Wills, and granting Administration, where the Party dies within some peculiar Jurisdiction.*
6. *Of the Jurisdiction of some Lords of Manors in the Probate of Wills.*
7. *Of the Jurisdiction of some Mayors in respect of the Burgesses within such a Place.*
8. *The Form of proving a Will and taking out Administration; and therein of entering a Caveat.*
9. *Of the Executor's Refusal.*
10. *What Acts amount to an Administration, so that the Party cannot afterwards refuse.*
11. *Of bringing in an Inventory.*
12. *Where Administration unduly obtained may be revoked or repealed.*
13. *How far a Repeal makes all mesne Acts void.*
14. *What Things an Executor may do before Probate of the Will.*

(F) What Persons are entitled to Administration.

(G) In what Manner the Ordinary may grant it:
And herein of granting it to one or more, or
for a particular Thing.

(H) What shall be deemed the Testator's Personal Estate, or Assets in the Hands of the Executor:
And herein,

1. *What shall be such an Interest vested in the Testator, as shall go to his Executors.*
2. *How far Debts due to the Testator are Assets.*
3. *What shall be deemed his Personal Estate; and therein what Things shall go to the Heir, and not to the Executor.*

4. *What Things shall go to the Wife of the Deceased, and not go to the Executor.*
5. *Where, after Debts and Legacies paid, the Executors shall have the Surplus to themselves, or are to be Trustees for the next of Kin.*

(I) How the Personal Estate, after Debts paid, is to be distributed when the Party dies Intestate: And herein, of the Share the Husband or Wife are entitled to; of the ascending, descending, and collateral Line, and Admission of the Half-Blood; and where the Distribution shall be *per Stirpes*, and not *per Capita*.

(K) Of Advancement, and bringing into *Hotchpot*.

(L) What shall be a *Devastavit*, either in Executors or Administrators: And herein, of the Order of paying Debts and Legacies: And therein,

1. *What Manner of Wasting will amount to a Devastavit.*
2. *Where it will be a Devastavit to pay Debts of an inferior Nature before those of a superior; and the Order in which Debts are to be paid.*
3. *Of paying Legacies before Debts; and therein of the Executor's Assent to a Legacy.*
4. *What shall be allowed on account of Funeral Expences.*

[(L. 2.) Where the Personal Estate only shall be applied in Discharge of Debts, &c. And therein, of marshalling the Assets.]

(M) In what Cases an Executor may make himself liable *de bonis propriis*: And herein,

1. *Where he shall be liable de bonis propriis by his false Pleading.*
2. *Where by his Promise to pay or Discharge the Testator's Debts or Legacies.*

(N) What Actions Executors or Administrators may bring in Right of those they represent.

(O) How such Actions must be laid: And herein of joining a Matter in Right of the Testator, and in their own Right, in the same Action.

(P) Of Actions and Remedies against Executors and Administrators: And herein,

1. *Upon*

1. *Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable.*
2. *Of Personal Torts which are said to die with the Party.*
3. *Of Remedies against Executors, or Administrators of Executors.*
4. *Where they shall be excused from Costs.*
5. *Where excused from putting in Special Bail.*

(A) *What Persons may be Executors: And herein,*1. *Of appointing the King Executor.*

IT seems to be admitted, that the king may be (a) appointed executor; but, as he is presumed to be so far engaged and taken up with the publick and arduous affairs of the kingdom, as not to have leisure to attend to the private concerns of any particular person; so the law allows him to nominate such persons as he shall think proper, to take upon them the execution of the trust, against whom all persons may bring their actions. Also, the king may appoint others to take the accounts of such executors.

4 Inst. 335.
Godolph. 76.
(a) Also my Lord Coke says, that it was assented in parliament, that the king might make his testament, and appoint executors, but

he does not tell us of what. 4 Inst. 335.

Accordingly we find, that *Katherine* queen-dowager of England, mother of *Henry VI.*, who died *June 2. 1436*, made her will, and thereof appointed *Henry VI.* sole executor, and that the king appointed *Robert Rolleston* keeper of the wardrobe, *John Merston* and *Richard Alreed* to execute the said will, by the oversight of the Cardinal, the Duke of *Gloucester*, and the Bishop of *Lincoln*, or any two of them, to whom such executors should account.

4 Inst. 335.

2. *Whether Corporations may be Executors.*

It seems by (b) *Wentworth*, that (c) aggregate corporations consisting of divers persons cannot be executors. 1st, Because they cannot be feoffees in trust for the use of others. 2dly, Because they are a body framed for a special purpose. 3dly, Because they cannot come to prove a will, or at least to take an oath, as others do.

instance of a mayor and commonalty suing as executors, and no objection taken. Ro. Abr. 919. And it seems now, that any corporation aggregate may be executors, Swinb. p. 5. § 1.; they may appoint certain individuals to be syndics, and to receive administration with the will annexed. 1 Bl. Comm. 28. n.] (c) But such corporations, as may duly prove the will and take the oath of an executor, may be executors. Godolph. 85.

(b) Office of Executor, 17. vide id. 25. 1 Bl. Comm. 477. But in the Year-book, 12 E. 4. 9. b. [there is an

3. *Who,*

3. *Who, in respect of their Crimes, are disabled from being Executors.*

(a) How far by the civil and canon law hereticks, apostates, traitors, felons, persons outlawed, incestuous bastards, famous libellers, manifest usurers, sodomites, uncertain persons, &c. are excluded from being executors, *vide* Godolph. 85. Off. of Exec. 17. Swinb. p. 5. § 2. (b) As in Co. Litt. 128. Cro. Car. 8, 9. Ro. Abr. 914, 915. Vern. 184. Outlawry no plea in bar.

(c) 18 H. 6. 4. Also, a villein (c) may be an executor, and the lord cannot seize those goods which he has to the use of the deceased; nay, where (d) a villein was made executor, he might sue his lord for a debt due to the testator. Ro. Abr. 915. (d) 21 E. 4. 50.

Co. Litt. 134. But an (e) excommunicated person cannot be an executor or administrator; for by the excommunication he is excluded from the body of the church, and is incapable to lay out the goods of the deceased to pious uses. 43 E. 3. 13. Theol. 11. Swinb. 349. Godolph. 85.

(e) Whether the statute 3 Jac. 1. c. 5., which enacts, that every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated, extends to disable such person from being an executor, *vide* 1 Hawk. P. C. c. 12. § 1. and Off. of Ex. 17., where it is said, that recusants convicted at the time of the death of any testator, are disabled to be his executors; and 1 Show. 293., where the probate of a will was refused to an executrix, she being a papist convict, and the conviction exhibited into the spiritual court.

[(f) This act, so far as respects persons denying the Trinity, is repealed by the 53 G. 3. c. 160. § 2.] [By the 9 & 10 W. 3. c. 32. persons denying the Trinity (f), or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures to be of divine authority, shall, for the second offence, be disabled to be executors.]

53 G. 3. c. 160. § 2.]

And by the acts for the qualifications for offices, persons not having taken the oaths, and performed the other requisites for qualifying, who shall execute their respective offices after the time limited for their qualifications shall be expired, shall be disabled to be executors.]

4. *Who, in respect of their Country, may be Executors.*

Off. of Execut. 17. Sir Upwell Caroon's case, Cro. Car. 8. It seems agreed, that by our law an alien, or one born out of the allegiance of our king, may be an executor or administrator. Also, it hath been adjudged, that such a one shall have administration of leases as well as personal things, because he hath them *in auter droit*, and not to his own use. — But by the civil law, aliens cannot

be executors, unless they are so appointed in military testaments; and the reason hereof is, that in such testaments respect is had only to the *jus gentium*. Godolph. 86.

(g) Cro. Eliz. 142. Owen, 45. But it hath been long (g) doubted, whether an alien enemy should maintain an action as executor; for on the one hand it is said,

said, that by the policy of the law an alien enemy shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and enrich the enemy, and therefore publick utility must be preferred to private convenience (a): but on the other hand it is said, that those effects of the testator are not forfeited to the king by way of reprisal, because they are not the alien enemy's, for he is to recover them for others; and if the law allows such alien enemy to possess the effects as well as an alien friend, it must allow him power to recover, since in that there is no difference, and, by consequence, he must not be disabled to sue for them; if it were otherwise, it would be a prejudice to the king's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. (b)

Vide tit. Abatement, B. 3.
 (a) Cro. Eliz. 683. Moore, 431. Carter, 49. 191. Skin. 370.
 (b) If the alien enemy's residence be abroad, or here, without the king's permission, expressed or implied, he seems to be disabled. Wells v. Williams.

Williams, 1 Ld. Raym. 282. Brandon v. Nesbitt, 6 T. R. 23. Bristow v. Towers, *Id.* 35. ||

|| By st. 5 G. 3. c. 27. § 3. *British* artificers going out of the realm to exercise, or teach their trades in any foreign country, who shall not return within six months after due warning given them, shall be incapable of being executors or administrators, and deemed aliens, and out of his majesty's protection. ||

5. *Who, in respect of their Want of Understanding, are disabled from being Executors.*

By our law, as well as by the civil law, idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them; but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of it, or not. Godolph. 86.

Therefore it hath been agreed, that if an executor become *non compos*, the spiritual court may, on account of this natural disability, commit administration to another. Salk. 36. pl. 1.

6. *Who, in respect of their Fortune and Circumstances, may be Executors; and therein of obliging an Executor to give Security.*

It seems to be now agreed, that the spiritual court cannot refuse to grant the probate of a will to a person appointed executor, on account of his poverty or insolvency; for, as he is but a trustee for the deceased, and such a person as the testator thought proper to appoint for that office, without any previous qualification, the refusing to admit him executor would be attended with these inconveniencies: 1st, That though he has a temporal interest, yet he cannot sue for the debts of the testator before probate, which may be a considerable detriment to the testator's estate, and, consequently, to creditors and legatees. 2dly, That whilst this affair is in controversy, there will be neither executor nor administrator against whom an action may be Salk. 36. pl. 1. 299. pl. 11. Carth. 457. Show. 293. Ld. Raym. 361.

be brought to recover debts or legacies. 3dly, That if administration should be granted to another, it would be a good plea at law to an action brought by such a one, that there was a will and an executor appointed.

Carth. 457.
The King v.
Sir Richard
Raines, Salk.
299. S. C. and
there said, that
there had been
no precedents
nor practice of
this nature.

Therefore, where to a *mandamus* to the judge of the prerogative court, to grant the probate of a will to a person named executor therein, the ordinary returned, that he was an absconding person and insolvent, and that he refused to give caution to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the ordinary has no authority to interpose and demand caution of the executor, when the testator himself required none.

Hill v. Mills,
Show. 293.
Salk. 36. pl. 1.
S. C. Skin.
299. S. C.

So, where after probate of the will the executor became a bankrupt, and there being a suit commenced in the ecclesiastical court to revoke the probate, and grant administration to another, the court of King's Bench granted a prohibition.

Carth. 458.
Show. 294.
(a) Where,
during the liti-
gation of a will
in the spiritual

But an executor is considered only as a bare trustee in equity; and where he is insolvent, the court of (a) Chancery will oblige him, as they will any other trustee, to give security before he enters upon the trust.

court, the Court of Chancery, on suggestion that the person who claimed as executor under the will was insolvent, ordered that the debtors to the deceased's estate should forbear to pay any money till the matter was settled in the spiritual court. Chan. Ca. 75.

Chan. Ca. 121.

As where the testator bequeathed a legacy to *J. S.*, payable at the age of twenty-one years; on a bill, suggesting that the executor wasted the estate, and praying that he might give security to pay the legacy when due, it was decreed accordingly.

Rous v. Noble,
2 Vern. 249.

So, where the testator bequeathed a legacy to his child, an infant, payable at the age of twenty-three, and made his wife executrix and residuary legatee, and she married a second husband and died, and he took out administration *de bonis non* with the will annexed, (his wife being residuary legatee); upon a suggestion of insolvency, the court decreed him to give security to pay the legacy when it should become payable.

Batten v.
Earnley,
2 P. Wms. 165.

|| So, where an annuity was bequeathed out of the personal estate; the executor having by his answer submitted it to the court, whether he should give security for the payment of it, and appearing to have expressed himself in words threatening to defeat it, and it being three years in arrear, the court ordered part of the personal estate to be set apart to secure it.

Slanning v.
Style, 3 P.
Wms. 334.

And where a testator charged the residue of his personal estate with the payment of an annuity to his widow for her mother's life, which he plainly intended should be duly and quarterly paid; and the estate appeared to consist of some bonds or securities; the executors, though no misconduct was imputed to them, were ordered to bring before the Master a sufficient part of the estate to preserve the annuity.

Blake v. Blake,
2 Sch. & Lefr.
26.

And wherever there are no debts, or the debts are all paid, and there is no purpose for which it is to be left outstanding, the present practice is to have the money lodged in court. ||

[The

[The Court of Chancery too will restrain an insolvent executor, and appoint a receiver, who may bring actions in the name of the executor for the recovery of the testator's effects. In like manner, it will restrain the assignees of a bankrupt executor from paying over the fund to him, and this, upon petition in the bankruptcy, from the peculiar authority it hath over them.]

comes so in the lifetime of the testator, and it is clear, that the testator did not advert to that circumstance, a receiver will be appointed, and the executor will be restrained. But it may be a question whether a person known by a testator to be a bankrupt, and yet appointed by him an executor, can be so controlled. Poverty alone, if known to the testator, would not, it seems, justify the taking of the administration of the property out of an executor's hands. *Gladdon v. Stoneman*, 1 Madd. Rep. 143. *Howard v. Papera*, *Id.*]

Utterson v. Mair, 4 Br. Ch. Ca. 270. 2 Ves. jun. 95. S. C. [No doubt, in the case of a bankrupt executor, where he be-

7. *Of making Infants Executors.*

An infant may be appointed executor, but he cannot administer till he is of the age of seventeen, (a) during which time administration is to be granted to some friend of his.

letter (B), and the statute of 38 G. 3. c. 87. there set forth, which extends the till the age of twenty-one.

Godolph. 103. Off. of Exec. 208. (a) For this vide postea administration

So, a child *in ventre sa mere* may be appointed, and if the mother is delivered of two or more children at the birth, they shall be all executors.

Godolph. 102. Off. of Exec. 213.

As to acts done by an infant in execution of the office of an executor, it seems agreed, that regularly all acts done by him in this respect, before the age of seventeen, are not binding; as, if he (b) sells the testator's goods, (c) assents to a legacy, (d) receives debts due to the testator, &c.

Off. of Exec. 213, 214. Godolph. 103.

age of seventeen cannot sell a lease for years, which he has in right of the testator, with an intent to pay the debts of the testator, and discharge the debts of the infant himself. *Ro. Abr. 730.* — But in *Cro. Eliz. 254.* it is holden, that an infant executor, at the age of thirteen, or other person by his order, may sell goods to pay debts. — And though sold for less than worth, yet the sale is good. 3 *Leon. 143.* (c) That an infant executor cannot assent to a legacy unless he hath assets to pay debts. *Chan. Ca. 257.* (d) Especially before the age of fourteen. *Off. of Exec. 217.*

(b) That an infant executor before the

But all things that an infant executor doth after he attains the age of seventeen, though before the age of twenty-one, if done according to the office and duty of an executor, will hold good and shall bind him, as paying debts, suing for and recovering debts, selling the testator's goods, &c.

Off. of Exec. 215, 216. Cro. Car. 490. Jon. 400. Moore, 852. And. 177. 5 Co. 27. Moore, 146.

But, if an infant executor, after the age of seventeen, but before the age of twenty-one, gives an acquittance or release for a debt or duty owing to the testator, such a release, without an actual payment to the infant, is (e) void; for if this should be construed good, it would be taking away the privilege which the law allows infants to avoid their acts, when they are apparently to their disadvantage; and this, which is in prejudice both to the infant and to the estate of the testator, cannot be said to be done according to his office as an executor.

5 Co. 27. Russell's case. Co. Litt. 172. a. S. P. Off. of Exec. 285. S. C. Hence it is said, that though an infant may administer at seventeen; yet he

he cannot commit a *devastavit* till he is twenty-one. Vern. 328. — And the author of the Off. of Exec. 213, 214. inclines to think, that an infant's assent to a legacy, though after the age of seventeen, is not good, especially if it may subject him to a *devastavit*, as it may do when there are not assets sufficient to pay debts. (e) So, if a bond be forfeited, and the infant executor receive only the principal sum without the penalty, and give a general release of all the debt, this release at law is no bar of the penalty. Cro. Car. 490. Kniveton and Latham. — [The Court of Chancery will not direct money to be paid to an infant executor, though above the age of seventeen; but will refer it to a master to inquire whether there are any debts or legacies, and to consider of a maintenance. Campart v. Campart, 3 Br. Ch. Rep. 195.]

But for this *vide tit. Infancy and Age*, and where he may appear by attorney,

If an infant executor sues or is sued, he must regularly appear by his guardian, and not by attorney, for by law he is disabled to make an attorney; for if he suffers by the neglect or false pleading of his attorney, he has no remedy against him.

being joined with others, who are of full age, *vide* Cro. Eliz. 541. Poph. 130. Cro. Ja. 441. Mod. 47. 298. 3 Bulst. 180. Vent. 102. Sid. 449. Lev. 299. 2 Saund. 212. Yelv. 130. Lev. 181. Cro. Eliz. 378. Carth. 122. Salk. 205. pl. 1. 4 Mod. 7.

8. Of a Feme Covert Executrix.

Off. of Exec.
202. Godolph. 110.

A feme covert may be appointed executrix, and in the spiritual courts she is considered as a feme sole, capable of suing and being sued without her husband; and therefore it seems, that according to their law she may take upon her the probate of the will without the assent of the husband, who hath no right to interpose or meddle in the affair.

Keilw. 122.
And. 117.
Off. of Exec.
203. (a) [If, therefore, the husband be abroad, the Court of Chancery will restrain the executrix from getting in the

But by our law, husband and wife are considered but as one person, and as having one mind, which is placed in the husband, as most capable to rule and govern the affairs of the family, and therefore the wife can do no act, which may prejudice the husband, without his consent and concurrence: hence the husband must be joined (a) in all actions by or against his wife; and, consequently, a wife cannot, by our law, take upon her the office of executorship, without the consent of her husband.

assets of her testator, and appoint a receiver for that purpose, with power to commence suits for the recovery of debts due to the testator's estate. Taylor v. Allen, 2 Atk. 213.]

Off. of Exec.
203.

Therefore, it seems, that if a wife, who is made executrix, is cited in the spiritual court to take upon her the executorship, and the husband appears and refuses his consent thereto, if afterwards they proceed to compel her, a prohibition will be granted.

Godolph. 109,
110.

Also, a wife cannot, against her consent, though her husband is willing, be compelled to take upon her an executorship; but, if the husband administers, she will be bound by it during the coverture.

Godolph. 110.

So, if a wife administers, though against the consent of the husband, and an action is brought against them, they are estopped to say, that the wife was not executrix. || Administration taken by the wife during coverture must be presumed to have been with the assent of the husband. ||

Adair v. Shew,
1 Sch. & Lefr.
243.

So,

So, if a feme sole be made executrix, and she marries before she intermeddles with the estate, and her husband administers; this is such an acceptance as will bind her, and she can never afterwards refuse it. Bro. Executor. Godolph. 110.

It is said, that a feme covert executrix may, without the consent of her husband, make a will, and appoint an (a) executor as for those things which she hath as executrix, for she has them *in auter droit*. Off. of Exec. 198, 199. But how far the husband's consent is necessary to

make the will of a feme covert good, *vide tit. Devises*, letter (A). (a) May make her husband such executor. Godolph. 110.

9. Of making Creditors Executors.

A debtor may make his creditor executor, and in such case the executor may retain so much of the testator's assets as will satisfy himself: but this must be understood where the debt is in an equal degree (b) with those of the other creditors; for if he be a simple contract creditor, he cannot retain against a creditor by specialty, or any other of a superior nature. 12 H. 4. 21. Plow. 185. Hut. 128. Off. of Exec. 31. Godolph. 115. Salk. 304. Godb. 216. Hob.

10. Cro. Car. 372. Jon. 345. Keilw. 59. (b) [Sir William Blackstone founds the executor's right of retaining upon this; that he cannot, without an apparent absurdity, commence a suit against himself as representative of the deceased, to recover that which is due to him in his own private capacity. 3 Bl. Com. 18. But one executor shall not be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both debts shall be discharged in proportion. Vin. Abr. tit. Executors (D. 2).]

So, if administration be (c) granted to a creditor, he may retain so much of the intestate's assets as will satisfy himself; but this also must be understood as to creditors in equal degree. Godolph. 115. Off. of Exec. 31. (c) But an executor

de son tort, who is a creditor, cannot retain, because this would be allowing him to take advantage of his own wrong. 5 Co. 30. Caulter's case. [2 Bl. Comm. 511. Yet if he afterwards takes out administration, he may shew it, and then retain, 2 Vent. 180.; though the administration be granted *pendente lite*. Stil. 337. Andr. 328.]

Also, such an administrator, who is a creditor by specialty, may bring an action of debt against one who possesses himself of the intestate's goods as executor *de son tort*, with an averment, that none of the goods came to his hands to satisfy the debt; for though he may bring trover or trespass against him as administrator, yet as against a stranger he is not deprived of this other remedy; for the reason why the debtor's making the creditor executor, or his taking out administration, is said to suspend or extinguish the action, is on supposition of assets. Ashby and Child, Ro. Abr. 940. Stile, 384. S. C. adjudged *nisi*.

So, if there are no assets, he may sue the (d) heir of the obligor, where the heir is bound. Salk. 304. Ro. Abr. 940.

(d) So, if a creditor is made executor with others, he may sue the others, especially if he hath not administered. Off. of Exec. 32. Godolph. 125. & *vide* Cro. Car. 372. Jon. 345.

So, if A. and B. be jointly and severally bound to C., and A. makes C. his executor, (or as the case was,) makes D. his executor, who makes C. his executor; in this case, if C. has not received 3 Keb. Rep. 116. 2 Lev. 73. Cock and Cross.

received satisfaction of the assets of *A.*, he may sue *B.*; for, being jointly and severally bound, he may sue which of them he pleases, and though the debt be one, yet the obligations are several, and no assets appear of the value of the debt to retain, and there might be a judgment against which he could not retain.

Rawlinson v. Shaw, 3 T. R. 557. [The bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt.]

10. *Of making Debtors Executors.*

Ro. Abr. 920, 921. 5 Co. 30. in Needham's case. It is laid down as a general rule, that if a creditor makes his debtor executor, it is an (*a*)-extinguishment of the debt, for he cannot sue himself.

Off. of Exec. 30. Godolph. 113. (*a*) For being a personal action, and once suspended, it cannot be revived again. Heb. 10. ¶ And the law is the same if the obligee in a joint and several bond make one of two obligors his executor with another; for the action being gone as to one must be gone as to both. Cheatham v. Ward, 1 B. & P. 630. ¶——But though it is a discharge of the action, yet the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. Salk. 306. *per Holt Ch. Just.*

5 Co. 136. Salk. 306. Off. of Exec. 31. (*b*) And therefore if an obligor administers to the obligee, and makes his executor, and dies, the creditor of the obligee may well bring an action against him. Sid. 79. But, if a person dies intestate, and the ordinary commits administration to a debtor, the debt is not thereby (*b*) extinguished, for he comes into the administration by the act of law, whereas the other is the act of the party.

8 E. 4. 3. 20 E. 4. 17. Plow. 264. Leon. 320. (*c*) If the obligee makes the obligor and others his executors, and the obligor refuses, but the others administer, and the obligor dies first, yet the debt is released; for the obligor, notwithstanding the refusal, might have come in and administered, and the probate by the others was for his benefit. Salk. 308. *per Holt.* If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the surviving co-executor shall not have an action to recover the debt against the executor of the debtor, because the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithstanding (*c*) one alone administered; and it could not be brought in both their names, because the debtor could not sue himself.

others administer, and the obligor dies first, yet the debt is released; for the obligor, notwithstanding the refusal, might have come in and administered, and the probate by the others was for his benefit. Salk. 308. *per Holt.*

Wankford and Wankford, Salk. 299. So, where *A.* being bound in an obligation to *B.*, *B.* makes *A.* his executor, who administers several of the goods, but dies before probate of the will, and administration to *B.* being granted to *J. S.*, he brought his action against the heir of *A.*, but it was holden, that the debt was released in this case, though *A.* never proved the will; for by administering as executor he was complete executor for this and several other purposes.

Cro. Car. 373. Off. of Exec. 30, 2 Bl. Comm. 511, 512. But all these cases of extinguishment by making debtors executors, must be understood where there are assets sufficient to discharge and satisfy the testator's debts and legacies.

Therefore,

Therefore, where a debtor and another were made executors by the debtee, who by his will appointed, that out of the debt due to him they should pay a certain legacy, it was adjudged, that as to that legatee this debt was not extinct, but that it remained assets to pay legacies as well as debts; and this being a legacy, and properly recoverable in the spiritual court, the court of *B. R.* refused to grant a prohibition to a suit for it there, and the rather in this case, because it was expressly devised to be paid out of the debt.

So, in a late case, where the testator bequeathed several legacies, and amongst the rest considerable ones to his two executors, to whom also he gave the surplus of his estate; and there being a debt of 3000*l.* due by bond to the testator from one of the executors, he insisted, that as there were sufficient assets to satisfy all the legacies, this 3000*l.* should not be brought into the surplus of the testator's estate, but that the same was extinguished for his benefit by his being made co-executor; and that though the surplus of the estate was given to them both, yet that this debt could not be taken to be part of that surplus, being before extinguished. It was decreed, that the (a) 3000*l.* should be taken as part of the surplus of the testator's personal estate, and both executors equally entitled to the same; for though in some books the testator's making a debtor executor is said to be an extinguishment of the debt, because an executor cannot sue himself; yet it was never doubted, but that such a debt remained assets to satisfy creditors (b), and was also resolved to be assets to satisfy legacies; and this devise of the surplus and residue of the testator's estate being as much a legacy, and as well recoverable in the spiritual court, as any particular legacy, it was but fitting, that, since the courts of equity claim now a concurrent jurisdiction with the ecclesiastical courts in matters of this nature, there should be the same measure of justice in both these courts.

63. A debt due by an executor to the estate of his testator is assets for the same plain reason or which an executor, who is a creditor, may retain; that he cannot sue himself. *Per Lord Eldon*, *Simmons v. Gutteridge*, 13 Ves. 264. In every case then under the usual decree against an executor, an interrogatory should be pointed to the inquiry, whether he has assets in his hands, arising from a debt due by himself. *Ibid.* For as he is bound to call in money out on personal security, so he must pay into court money due by himself. *Eagleton v. Coventry*, 8 Ves. 438.||

|| Where a debtor to the testator was appointed executor, although without a legacy, yet, as it appeared by the tenour of the will, that the testator considered him in the light of a mere trustee of his whole property, the debt was clearly holden not to be discharged.||

[A testator gave legacies to his brother and nephew, who were indebted to him in different sums, and made no disposition of the residue. Lord *Thurlow* said, he thought it had been a settled point in the Court of Chancery, that the appointment of

Flud. and Rumcey, Yelv. 160.

Selwin and Brown, decreed and affirmed in the House of Lords, 21 March, 1734. Cas. Temp. Talb. 240. S.C.

(a) *Philips v. Philips, Chan. Ca. 292. S.P. decreed.*

(b) || *So, Holliday v. Boaz, 1 R. Abr. 920. Co. Litt. 264. b. Askwith v. Chamberlain, 1 Ch. Rep. 138. Field v. Clark, Id. 242. Fox v. Fox, 1 Atk.*

Berry v. Usher, 11 Ves. 87.

Carey v. Goodinge, 3 Br. Ch. Rep. 110. Berry v. Usher, 11 Ves. 90. acc.

the debtor executor, was no more than parting with the action ; and declared it a trust for the next of kin.]

11 H. 4. 83.

Cro. Car. 372.

Jon. 345.

(a) But, if the obligee takes the obligor to

husband ; this is an extinguishment of the debt, because it would be a vain thing for the husband to pay the wife money in her own right. Co. Litt. 264. Salk. 306. — But, if the executrix of the obligee takes the obligor to husband, this is no extinguishment of the debt, for he may pay money to her as executrix ; because if she lays the money so paid to her by itself, the administrator *de bonis non* of her testator (if she dies intestate) shall have that money as well as any other goods that were her testator's. Leon. 320. Moore, 236. Salk. 306.

Joan Bailie's

case,

2 Mod. 315.

Under this head of making debtors executors, it may be proper to observe, that if a debtor be in execution, and the plaintiff die, by which the right of administration descends upon the debtor ; in this case he cannot be discharged upon a *habeas corpus*, because *non constat de personâ* ; neither can he give a warrant of attorney to acknowledge satisfaction ; and therefore it seems most advisable to renounce the administration, and get it granted to another, and then he may be discharged by a letter of attorney from such administrator.

(B) Of the different Kinds of Executors and Administrators : And herein,

1. Of an Administrator durante minoritate of an Infant Executor or Administrator.

1. Who may be such an Administrator.

Godolph. 102.

5 Co. 29.

[Freke v.

Thomas,

1 Salk. 39. 1 Ld.

Raym. 667.

S. C. Id. 338.

S. C. cited

Com. Rep. 110.

S. C. Id. 159.

S. P.] [(b) But

now by st. 38 G. 3. c. 87. § 6. where an infant is sole executor, administration, with the will annexed, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him. § 7. And the person to whom such administration shall be granted, shall have the same powers vested in him, as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin. *Vide ex parte* Sergison, 4 Ves. 147., the circumstances of which case are considered as having been the immediate cause of this alteration in the law.]]

Grandison v.

Dover, Skin.

155.

And as such an administrator is but in nature of a curator for the infant in the civil law, and has no interest or benefit in the testator's or intestate's estate, but in right of the infant ; it has been always holden discretionary in the ordinary to whom to grant it, and

and therefore it hath been frequently (a) adjudged, that he is not obliged within the statute 21 H. 8. c. 5. to grant it to the next of kin either of the deceased or the infant.

(a) Hob. 250.
Vent. 219.
2 Str. 892.
Id. 956.

If A. makes B. his executor, and B. makes C. an infant executor, and letters of administration are granted to J. S. during the minority of C., J. S. cannot bring an action against a debtor of the first testator by virtue of this administration, nor hath he authority to meddle with his goods.

Limner and
Every, Cro.
Eliz. 211.

If an infant, and one of full age, are made executors, he who is of full age may take out administration *durante minoritate* of the infant, and may declare as executor or administrator *durante minoritate*, and there is no absurdity in this case, that there should be an executor and administrator to the same party, and this is only to enable him to sue alone.

2 Lev. 239.

[In suits by executors, some of whom are under age, they must all join, and may sue by attorney; but in suits against them, the infants cannot appear by attorney.]

Smith v. Smith,
Yelv. 130.
Foxwith v.
Tremain,

2 Saund. 212. 1 Mod. 47. 72. 296. S. C. 1 Sid. 449. S. C. 1 Lev. 299. S. C. 1 Vent. 102. S. C. Raym. 198. S. C. Frescobaldi v. Kinaston, 2 Str. 783.

2. What acts he may do.

It seems to be agreed, that though an administrator *durante minoritate* hath but a limited and special property in the estate of the deceased, yet he may do all acts which are incumbent on an executor, and which are for the advantage of the infant and estate of the deceased; and therefore he may sell *bona peritura*, as a bailiff may, such as fat cattle, grain, or any thing else which may be the worse for keeping: so, he may (b) assent to a legacy, and may sue and be sued.

Ro. Abr. 910.
Owen, 35.3 Co.
29. Cro. Eliz.
713. Godb. 104.
(b) But not unless there are assets to pay debts. 5 Co. 29. a.

But he cannot do any thing to the prejudice of the infant; and therefore he cannot sell the goods of the deceased any farther than they are necessary for payment of the debts, nor can he otherwise sell a term for years during the minority of the infant, for the words of his authority are, *administrationem omnium & singulorum bonorum ad opus, commodum & utilitatem executoris durante sua minori etate, & non aliter nec alio modo commitimus, &c.*

5 Co. 29. S. C.
2 And. 132.
Prince's case,
Cro. Eliz. 217.
2 And. 132.
3 Leon. 278.
S. C. & vide
6 Co. 67. b. in
Sir Moyle
Finch's case, a

diversity taken, where administration is granted *durante minori etate executoris*, in such special manner as this case of Prince's is; and when such administration is granted in a general manner; for in the first case such administrator cannot make leases of any term vested in the executor, but in the other case he may, and they shall be good till the executor attain the age of seventeen, and until he enter.

If administration *durante minoritate* be granted to A., and afterwards repealed and granted to B., who obliges A. to account to him, and afterwards gives him a release; this release will not bind the infant, for this does not appear to be for the benefit or advantage of the infant.

Ro. Abr. 910,
911.

If an administrator *durante minoritate* wastes the assets, the more proper way to charge him is by action on the case by the infant when he comes of age: also, by some opinions he may

Latch. 267.
And. 34. Mod.
174. Sid. 57.
6 Co. 18. b.

bring detinue against him for those goods which he still continues in his possession, or he may oblige him to account in the spiritual court, but cannot bring a writ of account against him at law; neither is he chargeable in any action at the suit of a creditor, after the infant comes of age; but such creditor may sue the infant, who has his remedy against the administrator.

Hob. 250. Briers and Goddard; but a *quære* is added, How the case would be if the wife died, by which the husband would be no longer chargeable; & *vide* Raym. 484.

Comb. 465. So, if an action be brought against a special administrator, and the administration determine pending the action, he ought to retain assets to satisfy the debt which is attached on him by the action. (a)

resolved *per* Holt. (a) But this is on the supposition that the action does not abate in that event; which, it seems, would be the case. Ford v. Granvill, Moore, 462. Dub. Gouldsb. 136. S. C. adjudged. Lutw. 342. S. C. cited as adjudged.

3. At what Time the Authority of an Administrator *durante minoritate* determines.

5 Co. 29. Hob. It has been already observed, that there is an established difference, where administration is granted to one as guardian to an infant, who hath a right to administer, but is incapable to take it by reason of his minority, and where an administration is granted during the minority of an infant executor; that in the last case the administration determines as soon as the executor attains the age of seventeen years (b); but in the other case it continues till the infant attains his full age.

251. Cro. Eliz. 602. Cro. Car. 516. Carth. 446. Comb. 475. Salk. 39. pl. 1. Ld. Raym. 338. 667. Comy. Rep. 112. 159. (b) But see 38 G. 3. c. 87. *supra*, 434.

Also it seems agreed, that, if administration be granted during the minority of several infants, it determines upon the coming of age of any one of them; and it is laid (c) down by my Lord Coke, that administration granted during the minority of an infant executrix ceases upon her marriage.

(c) In Prince's case, 5 Co. 29.

But as this matter was fully debated in a late case, I shall here insert so much thereof as relates to this point.

Jones v. Lord Strafford, Hil. 1730. Lord Chancellour, assisted by Lord Ch. J. Raymond, on pleas and demurrers. 3 P. Wms. 79. S. C.

One made his will, and thereby, after several specifick and pecuniary legacies, gave and devised the residue and remainder of his personal estate to his four nieces, and made J. S. his executor, and died. The executor proved the will, and afterwards died intestate; and thereupon administration *de bonis non & cum testamento annexo*, was granted to the plaintiff during the minority of the four nieces. The residuary legatee, one of the nieces, married a person who was of full age; but she herself was an infant under the age of twenty-one years, though above seventeen; and Sir Henry Johnson, in the year 1696, having given the testator a promissory note for the payment of 800*l.* and upwards, by his will in 1719, gave and devised all his real and

and personal estate to *William Guidott, Esq.* for the payment of his debts and legacies, and subject thereto, in trust for such child or children as the defendant, the Lord *Strafford*, should have by his lady, who was the only daughter and heir of Sir *Henry Johnson*, to whom he had been married about six or seven years; and in the same year 1719, Sir *Henry Johnson* died. Mr. *Guidott*, the executor, renounced, and the Lord *Strafford*'s children being infants of tender years, the Lord *Strafford* took out letters of administration *cum testamento annexo*, during the minority of his children, to Sir *Henry Johnson*; and there being likewise a bond given by Sir *Henry Johnson* to the same person, for payment of a further sum of money, the plaintiff *Jones* brought an action of debt upon the bond in the Court of Exchequer, to which the defendant, the Lord *Strafford*, pleaded *solvit ad diem*; and also by leave of the court pleaded further as a double plea, pursuant to the act for amendment of the law, that he had fully administered, *præterquam* such and such judgments, to several persons, and that he had not assets *ultra* sufficient to pay and satisfy those judgments; upon this plea the plaintiff *Jones* brings his bill for a discovery and account of assets, and the three nieces, who were infants and unmarried, and likewise the married niece, who was also an infant, and her husband, were co-plaintiffs in the bill. To this bill, which was not only for a discovery of assets of Sir *Henry Johnson*, but likewise for payment and satisfaction both of the bond-debt, and likewise of the simple contract debt due on the note, the defendant, the Lord *Strafford*, put in a demurrer, which was, that by the plaintiffs' own shewing in their bill it appeared, that one of the nieces was married, and therefore having a husband capable of acting for her, the administration granted to the plaintiff *Jones*, during the minority of the four infants, was determined: the question, therefore was, Whether, one of the four nieces being married, and her husband of full age, the administration granted to the plaintiff *Jones*, during the minority of the four nieces, determined, though she herself was still under the age of twenty-one years? It was agreed on all hands, that where an infant is made executor, and administration is granted during his minority, that such administration ceases *ipso facto*, when the infant attains the age of seventeen years; and the opinion of Lord *Coke*, 5 Co. 29., in Prince's case, was cited, that so it would likewise, if such infant executrix, being under seventeen, should marry, because her husband was capable of acting for her; and it was argued for the defendant, that if this were so in case of an infant executrix, there was the same reason for it in the present case, where one of the four nieces, during whose minority administration *cum testamento annexo* was granted, was married; that it was agreed on the other hand, that whenever any one of the four nieces attained the age of twenty-one years, the administration ceased, and there was the same reason when one of them married and had a husband capable of acting for her; that this was to be resembled to the case of a guardian at common law, and that if an infant feme married, the guardianship was deter-

mined, because the husband was immediately on the marriage become her guardian; and it would be inconsistent that she should at the same time be under the power of another guardian; so here she, from her marriage, became under the care and guardianship of her husband, and he was capable of acting for her, and, consequently, the administration granted during the minority of the four was then determined in the same manner as if she had attained her age of twenty-one years; and then the plaintiff *Jones*, during the minority of the four, had no right to bring this bill, and that the demurrer was good; and for this were cited 5 Co. 29. Prince's case. 6 Co. Sir Moyle Finch's case. 1 Salk. 39., and that the only case against it was 2 Jon. 48.; and they also cited the opinion of *Twisden J.* 1 Vent. 103. But on the other side it was argued, and the court was clear of opinion, that the administration in this case did not determine by the marriage of one of the four nieces; they said, that it was by no means clear, even in the case of the infant executrix, that, if she married under the age of seventeen, the administration granted during her minority was thereby determined; that this was not the principal point in Prince's case, but only the opinion of, or an *obiter* case put by, my Lord *Coke*; that the same case was reported in Cro. Eliz. 718., 2 And. 132., and 3 Leon. 278., and there nothing said of it; that in the Office of Executors, supposed to be written by Justice *Doddridge*, the author much marvels at this opinion of the Lord *Coke*; that in the spiritual courts, where these administrations are granted, they take no notice of the husband, nor will in such case grant probate of the will or administration to him, but look upon the wife as to this purpose as a feme sole, and that the only power, which the husband hath in these cases, is derived to him from the common law, by which he is in many cases enabled to pay and receive, and to act for his wife; but the property of none of the goods or chattels, which the wife hath as executrix or administratrix, is vested in him; for if she survive, they likewise survive to her, and if she die first, there must be an administration *de bonis non* of her testator granted to another; and if this be so in the case of an infant feme executrix, that the administration granted during her minority does not cease by her marriage, much less in the present case; for here the administration is granted to the plaintiff *Jones*, *donec una earum quatuor vigesimum primum ann. ætatis attigerit*; so that, by the express words of the administration, it is not to determine sooner; and though it does then determine when any one of the four attains her age of twenty-one years, that is not the present case; for here, though she is married, yet she is still under twenty-one, and the husband has nothing to do with it: he, by his marriage, is not become next of kin to the testator, nor will the spiritual court grant administration to him; and if the marriage were to be a determination of the first administration, he could not succeed to it, for in that case the administration could only be granted to the wife; nay, they would not grant it to the husband and wife jointly; that the wife, in this case, was

not entitled to the whole personal estate, as an infant executrix is, but only to her own undivided fourth part; and though the spiritual court may grant administration as to a particular thing, or in a particular place, yet they never grant administration as to an undivided third or fourth part of the same thing; for then who should bring the action for it, as of a horse, or other entire thing? The husband in this case would be entitled but to a fourth part of it in right of his wife; and must there be several administrations granted for one and the same thing? This would be absurd, as well to actions to be brought by them, as to actions brought against them; that if the administration is determined by the marriage, it will be to no manner of purpose to make an application to the spiritual court; they will not grant it to the husband, and the wife being still under age, they must grant it to some other person during the minority of herself and her three sisters, as it was before; and then it would be doing a vain thing to determine it: that the spiritual court by 31 E. 3. st. 1. c. 11. is to grant administration to the next of kin, which the husband is not in this case: that the law takes notice of an executor before probate, and he may do several things before probate; but the power of an administrator is derived to him only by the letters of administration; that if the husband has no right to claim the administration in this case, no more has the wife; for she being still under age as well as the other nieces, the court will grant administration to none of them; or, if they would, might grant it to any of the others as well as to her, it being in the discretion of the ordinary; and if the spiritual court should grant administration to the husband, it is not *de jure*, that he is entitled to it, but they may grant it to him as they would to any other person. The court, therefore, was of opinion, that *Jones* still continued administrator during the minority of the four nieces, notwithstanding the marriage of one of them, and that such administration did not determine till one of them came to the age of twenty-one years, and accordingly over-ruled the demurrer.

Although it seems clear, that the authority of an administrator *durante minoritate* of an infant executor determines at seventeen (a), and that of an administrator *durante minoritate* of an infant, who is entitled to administration, at the age of twenty-one, yet, if an action be brought against such an administrator, the plaintiff in his declaration need not aver, that the infant is still under those ages, for this is a matter more properly within the conuzance of the defendant, and if his power be determined, he ought to shew it; but he cannot object it, after he has taken issue on another point, which is an admission that his authority still continues.

But it is (b) said, that if such an administrator brings an action, he must aver, that the infant is still under age, because it is a matter within his conuzance, and the thing that entitles him to the action; but in this case also it hath been (c) adjudged, that the defendant must take advantage of this omission, by way of plea or demurrer, and cannot object it after he has joined

Hob. 251.
Cro. Ja. 590.
2 Ro. Rep.
209. 5 Co.
29. a. Ro.
Abr. 910.
Yelv. 128.
(a) Not till
twenty-one by
st. 38 G. 3.
c. 87. *supra*.

(b) Hob. 51.
Cro. Ja. 590.
2 Ro. Rep.
209. Ro. Rep.
400. (c) Cro.
Car. 240.

issue with him on another point, which admits the continuance of his authority.

But, if an action of debt be brought against an administrator generally, and the defendant plead in abatement, that administration was granted to him during the minority of his wife, he must aver, that the wife is still living; for though he was a special administrator at first, yet, if his wife be dead, he may be administrator generally, as the declaration supposeth.

It seems to be clearly settled, that if an administrator *durante minoritate* brings an action and recovers, and then his time determines, that the executor may have a *scire facias* upon that judgment.

Also, it hath been holden, that if such administrator obtains judgment, he may bring a *scire facias* against the bail, and they cannot object that the infant is of full age; for the recognizance being to the administrator himself by name, though he be administrator *durante minori ætate tantum*; yet he may have a *scire facias* against the bail.

sued out execution upon the principal judgment, it might have been a question, whether that ought to be sued out by him, or by the infant.

|| If judgment be obtained against such administrator, and afterwards the executor come of age, a *scire facias* will clearly lie against the executor on the judgment.

If a bill be filed by such administrator, and just before the hearing of the cause, the infant attain the age of twenty-one, a supplemental bill must be filed.||

2. *Of an Administrator de bonis non, where the first Administrator dies, or the Executor dies intestate, or without Probate of the Will. And herein :*

1. In what Cases Administration *de bonis non* shall be granted, and to whom.

These kind of administrations are granted in the following instances:

1. If a person dies intestate, and administration is granted to *J. S.*, who dies without having administered all the intestate's goods, in this case the ordinary must grant administration of the goods unadministered to another; for the first administrator cannot continue the trust reposed in him to his executor or administrator, because he has no interest but what he derives from the act of the ordinary.

2. So, if an executor dies intestate, administration *de bonis non cum testamento annexo* of the testator must be granted by the ordinary, for they are not devolved on the administrator of the intestate, because he had them *in auter droit*, in order to discharge the trust reposed in him; but, if the executor makes his executor,

Comb. 465.
Ld. Raym.
265. Carth.
432. Sparks
v. Crofts.

Ro. Abr. 888,
889. Cro. Car.
227. 2 Brownl.
83. Godb. 104.
Lev. 181.
Keb. 750. Vern. 25.

2 Lev. 37.
Enbrin and
Mompesson;
but *per Hole*,
in this case, if
after the in-
fant came of
age he had

Sparks v.
Crofts, *ubi*
supra.

Stubbs v.
Leigh, 1 Cox,
133.

Swinb. 396.
Ro. Abr. 907.
Vaugh. 182.

Ro. Abr. 907.
Vaugh. 182.

executor, then the trust is devolved on him; and after payment of the debts and legacies of the first testator, he has an absolute property in the goods.

3. If the executor dies before probate, though he (a) administered in part by disposing of the testator's goods, &c., yet his executor cannot be executor to the first testator; but in this case there is not an administration *de bonis non administratis* granted, but an immediate administration, because the executor died *ante onus executionis testamenti super se susceptum*, which is the foundation the spiritual courts proceed upon.

Ro. Abr. 907.
Salk. 305.
Dyer, 372.
(a) Because the administering is an act *in pais*, of which the spiritual court

cannot take notice; yet the acts done by the executor are good. 1 Salk. 308. *per Holt*,

4. So, if an executor (b) refuses, administration with the will annexed is to be granted to another.

Henslow's case, 9 Co. 37. (b) An

executor may renounce, but cannot assign over the executorship, because it is a personal trust. Vaugh. 182. — Also, where an executor before probate possessed himself of the goods, paid a debt, and converted some of the goods, and after, before the ordinary, refused; and upon such refusal the ordinary granted administration to the widow of the deceased; it was adjudged such administration was void, there being a rightful executor that had administered. Mod. 213, 214. Parten and Baseden's case. 1 Salk. 308. S. C. cited.

In these cases administration is to be granted to the next of kin to the first testator or intestate; but, if the testator appoints a residuary legatee, such legatee is entitled to administration.

Isted and Stanley, Dyer, 372. a. Show. 25. 3 Mod. 59. Vern. 200.

2. To what Things unadministered an Administrator *de bonis non* is entitled.

An administrator *de bonis non* is entitled to all the goods and personal estate, such as terms for (c) years, household goods, &c. which remain *in specie*, and were not administered by the first executor or administrator, as also to all debts due and owing to the testator or intestate.

Salk. 306.
(c) Whether an administrator *de bonis non* be entitled to an estate *per auter vie*,

within the letter and meaning of the statute 29 Car. 2. c. 3. Carth. 376. Q. By stat. 14 Geo. 2. c. 20. § 9. distribution shall be made of estates *per auter vie*, whereof there is no special occupant, and which are undevise.

Also it is holden, that if an executor receives money in right of the testator, and lays it up by itself, and dies intestate, that this money shall go to the administrator *de bonis non*, being as easily distinguished to be part of the testator's effects, as goods *in specie*.

Salk. 306.

But, if A. dies intestate, and his son takes out administration to him, and receives part of a debt, being rent arrear to the intestate, and accepts a promissory note for the residue, and then dies intestate; this acceptance of the note is such an alteration of the property as vests it in the son, and therefore on his death it shall go to his administrator, and not to the administrator *de bonis non*.

Barker and Talcot, decreed, Vern. 473.

¶ An administrator *de bonis non* of the conusee of a statute had agreed with the conusor to assign it in consideration of a sum of money

Anon. 1 Vent. 362. Anon. Skin. 143.

seems to be S. C. but thus differently reported. — One acknowledges a recognisance; the conusee makes his executor, and dies; the executor, before an extent, assigns the recognisance to *J. S.* who pays the money to him. The executor dies, and administration *de bonis non* is committed to the next of kin to the first testator, who sues for this recognisance. But Lord Keeper said, it was like the case where the testator is indebted to *A.*, and *B.* was indebted by bond to the testator, and then the executor assigns *B.*'s bond in satisfaction of the debt owing to *A.*, that here the administrator *de bonis non* shall never recover on this bond; no more shall he in the principal case on the recognisance.

money which upon that agreement the conusor was to pay to him, his executors or administrators, and then the administrator died. The court decreed the money to be paid to the executor of the administrator, and not to the new administrator *de bonis non*; although before the extent it could not be assigned at law. *Sed nota*, adds the reporter, that there were no debts of the first intestate appearing.

Wiseman v. Capel, Ro. Abr. tit. Chancery (U).

If a man possessed of a lease for years as executor of *J. D.*, agrees for a good consideration to assign it to *J. S.*, and after, before it is done, dies intestate, and *J. N.* takes administration of the first testator, he is not bound in equity to convey it according to the agreement of the executor, although the executor during his time had power to dispose of it at his pleasure; because the administrator comes paramount the agreement, and is to dispose of it for the soul, and for the payment of the debts of the first testator. ||

3. In what Actions commenced before his Time, may an Administrator *de bonis non* proceed.

Ro. Abr. 889. W. Jones, 248.

If a feme executrix to *J. S.* takes a husband, and the husband and wife bring an action of debt upon an obligation in right of the wife, as executrix to *J. S.*, and they have judgment to recover the debt with damages and costs; if the wife dies, the husband cannot take out execution, for he is not entitled to the thing recovered, but it shall go to the succeeding administrator of *J. S.*, as the intestate's effects.

Yelv. 33. 83. Latch. 140. Palm. 443. 2 Saund. 149. Sid. 29.

But yet in these cases, though the administrator *de bonis non* was entitled, yet he could not sue out execution, because he was not privy to the judgment, and therefore was driven to a new action; but this being very inconvenient,

(a) Made perpetual by 1 Ja. 2. c. 17.

By the (a) 17 Car. 2. cap. 8. it is enacted, "That where any judgment after a verdict shall be had by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias*, and take execution upon such judgment."

Clerk v. Withers, 6 Mod. 290. 1 Salk. 322. S. C. 2 Ld. Raym. 1072. S. C. 11 Mod. 34. S. C.

|| If the executor or administrator die after suing out the writ of execution, and before the return of it, the administrator *de bonis non* may within the equity of this act perfect the execution so begun; for the right in that case comes to him.

Id. ibid.

If, in such case, the sheriff return a seizure of goods to the value, but that they remain in his hands, *pro defectu emptorum*, the

the administrator *de bonis non* may sue out a *renditioni exponas*, or *distingas nuper per vicecomitem*.

And if at the time of the death of the executor or administrator the money be levied, it shall be brought into court, and the administrator *de bonis non* on producing the letters of administration shall be entitled to receive it. *Id. ibid.*

But, if an executor sues a *scire facias* on a judgment or recognisance, and has judgment *quod habeat executionem*, and dies intestate; the administrator *de bonis non* must sue out a *scire facias* upon the original judgment, and cannot proceed on the judgment in the *scire facias*. *Treviban v. Lawrence, 2 Ld. Raym. 1049.*

This statute extends only to judgments after verdict.

6 Mod. 296, 297.

On any other judgment obtained by the executor or administrator, the administrator *de bonis non* shall not have a *scire facias* for want of privity, but must resort to his remedy at common law by an action of debt *de novo* for the same demand, as administrator to the first testator or intestate. *Toll. Exec. 449. Com. Dig. Admon. (G). Levett v. Lewkenor, Moore, 4. Yate v. Goth,*

id. 680. Cro. Ja. 4. S. C. by the name of Yate v. Gough. Yelv. 33. S. C. by the name of Yaites v. Gough.

Yet even on a judgment by default, if the executor or administrator sue out execution and die when the goods are in the hands of the sheriff, and, consequently, the writ is completely executed; the administrator *de bonis non* shall have the money brought into court, and on shewing the grant it shall be paid over to him. *6 Mod. 299, 300.*

Or, if the judgment by default be for goods taken out of the executor's or administrator's own possession, his executor or administrator shall have a *scire facias* upon it, and account for them to the administrator *de bonis non*.|| *Yelv. 33. Com. Dig. ubi supra.*

3. Of an Executor *de son tort*: And herein,

1. What Acts or Degree of Intermeddling will make an Executor *de son tort*.

An executor *de son tort* is a person who, without any authority from the deceased or the ordinary, does such acts as belong to the office of an executor or administrator. *Swinb. 448. Post. Off. of Exec. 171. Godolph. 90.*

[What acts make a person so liable, is a question of law: whether proved or not, is for the consideration of the jury. 2 T. R. 97.]

There are various acts which will make a man executor *de son tort*; such as possessing and converting the deceased's goods to a man's own use (a); living in the house, and carrying on the trade of the deceased (b); paying the deceased's debts out of his assets; suing for and receiving debts due to him (c); and it is said, in general, that all acts of acquisition, transferring, or possessing of the deceased's estate, will make an executor *de son tort*, because these are the only *indicia* by which creditors can *(a) 5 Co. 33. b. Read's case. Off. of Exec. 171. Godolph. 171. (b) Hooper v. Summerset, 1 Wightw. 16. (c) Dyer. 105. 157. Keilw. 59. Ro. Abr.*

918. 2 Leon. can know against whom to bring their actions; and an administrator is not liable for the goods converted by such executor till he has recovered them in damages. (a)

Godolph. 91, Also, a person may be executor *de son tort*, by releasing debts due to the testator; by paying legacies with the deceased's effects; by entering on a specifick legacy without the executor's assent; by paying and discharging the deceased's mortgages with his money or goods; by delivering to the deceased's (b) wife more apparel than is suitable for her; or by answering as executor to any action brought against him; or by pleading any other plea than *ne unques executor*.
 92. Off. of
 Exec. 174.
 Ro. Abr. 918.
 (b) So, if the wife takes more apparel than is suitable to her degree, this makes her an executrix *de son tort*. Ro. Abr. 918.

10 H. 7. 27. So, if a person is appointed by the ordinary *ad colligendum bona defuncti*, though his acting in obedience to such authority will not make him an executor *de son tort*; yet, if he proceeds further, and sells *bona peritura*, &c., he becomes executor *de son tort*: so, if the ordinary had given him express authority to sell the goods, yet this would not free him from being executor *de son tort*, for the ordinary himself cannot give any such authority.

Paget v. Priest, [So, if the servant of B. sell the goods of C., an intestate, as well after his death as before, though originally by the orders of C., and pay the money arising therefrom to B., B. may be sued as an executor *de son tort*.
 2 T. R. 97.
Id. ibid.

So, if a person having intermeddled in the intestate's affairs, has money belonging to him in his hands at the time when an action is brought against him for a debt due from the intestate, he is liable as an executor *de son tort*.

Edwards v. So, if a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the meanwhile the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued for the debts of the deceased as executor *de son tort*; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors.]
 Harben, 2 T. R. 587.

And by the 43 Eliz. cap. 8. it is enacted, " That all and every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate, upon any fraud, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts, (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts, to him owing by the intestate at the time of his decease,) shall be charged and chargeable as executor of his own wrong; and so far only as all such goods and debts coming to his hands, or whereof he is released or discharged by such administrator, will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts, upon good consideration, without fraud, owing to him

" by

“ by the intestate at the time of his decease, and of all other
 “ payments made by him, which lawful executors or adminis-
 “ trators may and ought to have and pay by the laws and sta-
 “ tutes of this realm.”

But, notwithstanding this, there are several acts which a stranger may do without running the hazard of making himself an executor *de son tort*; such as taking care of the deceased's (a) funeral, feeding his cattle, taking an inventory of his estate and effects, paying or discharging his debts or legacies with his own money, repairing his houses in decay, providing necessities for his children, &c.; for these are to be esteemed offices of kindness and charity, and not such as involve him in an executorship.

of Exec. 174. But it seems, that if the expences of the funeral are defrayed out of the deceased's effects, the person who meddles herein is an executor *de son tort*. Carth. 104.

Also, here we must observe, that regularly there cannot be an executor *de son tort* when there is a rightful executor, or when administration has been duly granted; for if after probate of the will, or administration granted, a stranger gets possession of the deceased's goods, he is a trespasser to such executor or administrator, and may be sued as such.

But, if a stranger gets possession of the deceased's goods before (b) probate of the will, he may be charged as executor *de son tort*, because the lawful executor can be no further charged than for the assets that came to his hands.

gets possession of the deceased's goods, he may be charged as executor *de son tort*, unless he delivers the goods over to the administrator before the action brought; and then he may plead *plene administravit*. Salk. 313. pl. 19.

So, although there be a rightful executor who administered, yet, if a stranger takes the deceased's goods, and, claiming to be executor, pays or receives debts, or pays legacies, or otherwise intermeddles as an executor, he becomes an executor *de son tort*.

As to those things on which a stranger enters and takes possession, and which will make him an executor *de son tort*, it is now clearly agreed, that a person may be an executor *de son tort*, by entering on a lease or term for (c) years, especially, if, according to the old books, he enters in right of the deceased, and does acts upon the land, which belong to the office of an executor or administrator; as ordering the deceased's cattle to be fed on the land, &c.; but, if he enters generally, and does not act as an executor, by meddling with the intestate's goods, &c., he is then a disseisor, and not an executor *de son tort*.

because by the 29 Car. 2. c. 3. such estate is made assets. Carth. 166.

But this matter will be best explained by inserting the two following modern resolutions.

In

Godolph. 95.

(a) || If done as an act of charity and necessity. 4 Ves.

216. || That the expences herein must be suitable to the deceased's estate and quality. Off.

out of the deceased's. Skin. 274. pl. 2.

5 Co. 33.

Chan. Ca. 33.

Salk. 313. pl. 19.

5 Co. 33. b.

Read's case.

(b) So, if before administration granted, a stranger

5 Co. 34. a.

Moore, 126.

Kenrick and Burgess.

Style, 407.

2 Mod. 174.

Swinb. 390.

(c) So, if a stranger enters into an estate *pur autre vie*, this makes him an executor *de son tort*;

Pasch. 31.
 Car. 2. in C. B.
 between Garth
 and Taylor.
 (a) According
 to the resolu-
 tions 5 Co. 31.
 Cro. Ja. 238.
 Bulst. 22, 23.
 Lord Rich and
 Frank. Cro.
 Ja. 546. 549.
 cont. Cro. Car.
 225. Smith
 and Norfolk.
 (b) According
 to Yelv. 103.
 Hawse and
 Webster.
 Cro. Ja. 549.
 —Though it is
 said in Bro.
 tit. Waiver, 10.
 in such a case,
 peradventure,
 he may waive;
 and so is 21
 H. 6. 24. b.
 Bulst. 22.
 (c) According
 to Cro. Eliz.
 102. Stubs
 and Rightwise.
 (d) And so is
 Hob. 49.

In an action of debt in the *debet* and *detinet* against an execu-
 tor upon a lease for years, it was found by special verdict, that
 the plaintiff leased to *Simon Taylor*, father of the defendant, for
 years, rendering 18*ol. per annum* rent; that *Simon* died intestate,
 and the defendant entered and used the intestate's cattle, and fed
 them upon the land for three months, and that he fed the cattle
 with the intestate's hay upon the ground, and, three days before
 the rent became due, the defendant drove the cattle off the land,
 and afterwards took out administration of all but this lease; and
 whether he should be chargeable, or not, for the rent, was the
 question; and all the court were of opinion, and so gave judg-
 ment, that he should be charged. And in this case these points
 were resolved: 1st, (a) That the action was well enough laid in
 the *debet* and *detinet*. 2dly, (b) That an executor cannot wave a
 term, but shall be charged as far as he hath assets, though the
 rent be greater than the value of the land. 3dly, That admini-
 stration may be granted by the ordinary for part, as in this case,
 administration granted, excepting the lease. 4thly, (c) That if
 an executor *de son tort* takes out administration, this does not
 purge the wrong so, but that a creditor may charge him as ex-
 ecutor *de son tort*. 5thly, An executor *de son tort* of a term
 shall be chargeable for the receipt of the profits till there be a
 rightful executor or administrator to charge, as in *Read's* case,
 5 Co. 34. a. after administration or probate, the stranger that
 meddles with goods shall not be chargeable as executor *de son*
tort, (d) unless he, pretending and claiming to be administrator,
 pays debts and does other things as executor: now there being
 no rightful administrator of this term, it being excepted out of
 the grant of administration, the defendant, by his meddling,
 has charged himself as executor *de son tort* thereof.

In an action of waste, the plaintiffs declared that they made
 a lease to *J. S.* of a barn for thirty-one years, who died intestate,
 and that the defendant entered claiming *terminum prædictum* as
 executor, and committed waste by pulling down the said barn;
 and on demurrer it was urged for the defendant, 1st, That there
 could not be an executor *de son tort* of a term, for no man can
 qualify his own wrong, by alleging, when he enters generally,
 that he took only a particular estate; and therefore he must be
 a disseisor in fee. 2. Admitting there may be an executor *de*
son tort of a term, yet there is no privity between the lessor and
 him, to charge him in an action of waste; for at common law,
 and also by the statute of Gloucester, waste lies only against
 tenant by courtesy, dower, for life or years, neither of which is
 this tenant; besides, in this action the place wasted is to be re-
 covered with treble damages, which will be an injury to the
 rightful administrator, as also to the creditors of the deceased.
 As to the first objection, the court was of opinion, that there
 might be an executor *de son tort* of a term; and as to a wrong-
 doer's qualifying his own wrong, the difference in these cases
 they said was, that where a person enters generally upon lands
 of which there is no term in being, there he cannot qualify his
 wrong,

3 Lev. 31. 35.
 Mayor and
 Commonalty
 of Norwich v.
 John. 3 Mod.
 90. S. C. ad-
 judged for the
 plaintiff in
 C. B. and af-
 firmed in B. R.
 2 Show. Rep.
 457.

wrong, by saying that he claims only a particular estate, but must be a disseisor in fee: so, where there is a term in being, as in this case, he cannot enlarge his estate by claiming a fee, and it is no objection, that the lessor did not charge him as a disseisor, when he had it in his election to charge him either way; which is the distinction taken in the (a) books. As to the second objection, it was holden, that the want of privity was not material, and that since the statute of Gloucester, which is rather a remedial than a penal law, privity is not requisite, for waste will lie against the lord of a villein, who enters upon the land leased to the villein for life, or years: it will lie also against an occupant, who is a mere stranger, as well as against a special occupant, who comes in by the limitation of the lessor. So, if tenant for life commits treason, and the king grants over the estate, waste will lie against the grantee: so, if a reversion escheats, waste will lie for the lord; in all which cases there is no privity: and it would be a manifest injury to the lessor in this case, if he should be delayed of his action till administration is taken out. And as to the objection, that this will be an injury to the rightful administrator, the court held, that the rightful administrator might falsify the recovery; for a recovery against one, that has not right, shall not bind him that has; and after administration granted he is paramount the recovery, viz. from the death of the intestate.

(a) As in 9 H.
6. 20. b. Dyer,
134. pl. 6. 14.
114 pl. 18.

As to the value of the things taken by a stranger, so as to make him an executor *de son tort*, it seems not to be material; and therefore where an action was brought against such an one, who pleaded *ne unques executor*, and it was found that a bedstead only came to his possession, he was charged with a debt of 60*l*.

Noy, 69.
Gouls. 116.

So, where on a like plea it was found, that the defendant took only a Bible, he was charged with a debt of a hundred pounds.

Noy, 69.
Offley's case
cited to have
been 39 or 40 Eliz.

So, where the jury found, that the defendant detained *bonam partem bonorum*, and sold them, though it was objected, that *bona pars* was very uncertain; yet the court held, that he should be chargeable, for he cannot detain any part; and if he does, let it be of ever so small value, he is liable as an executor *de son tort*.

Cro. Eliz. 472.

But in these cases, where the things are of a very inconsiderable value, it is said that there may be relief in equity, as where on a plea of *ne unques executor*, the plaintiff proved that a chimney-back came to the defendant's hands, or that the defendant took money for a pot of ale sold by the testator; in these cases the defendant was relieved in equity.

2 Vern. 147,
148.

2. What Acts of an Executor *de son tort* are as valid as if done by a lawful one.

Off. of Exec.
179.

An executor *de son tort* may do several acts which a lawful executor may do, and which shall be as binding as if done by a rightful executor.

5 Co. 30. Off.
of Exec. 180.
Carth. 104.

Therefore, if he pays (a) just debts, and an action is brought against him by a creditor, he may plead *plene administravit*.

Sid. 76. (a) An executor *de son tort* shall be allowed, in equity, all such payments as were incumbent on the executor, according to the course of law; but as to payments made out of order and rule, which the law left the executor liable to, he shall not be allowed them, because to the prejudice of the executor. Chan. Ca. 33. — So, where a widow possessed herself of the personal estate as executrix, under a revoked will, and paid debts and legacies, but had no notice of the revocation; it was holden in equity, that she should be allowed those payments. Chan. Ca. 126. & *vide* Ro. Abr. 919.

Carth. 104.

Skin. 274.

pl. 2. [Bull.

Ni. Pri. 48.

(b) He may,

perhaps, of

such goods

as he hath

sold. Bull.

Ni. Pri. *ibid*.

If the action be trespass, instead of trover, payment of debts to the value will go only in mitigation of damages. *Id. ibid.*] (c) For this would take from the rightful executor the liberty which the law gives him of preferring one creditor to another; nay, of preferring himself to other creditors who are in equal degree with him. Off. of Exec. 181.

Coulter's case,

5 Co. 30. Cro.

Eliz. 630.

Ro. Abr. 922.

Moore, 527.

Brownl. 103.

Yelv. 137.

Mod. 208.

Carth. 104.

2 Stra. 1106.

Andr. 328. 356. 3 T. R. 590. 2 H. Bl. 26.

Also, it is clearly agreed, and hath been solemnly adjudged, that an executor *de son tort* cannot retain any part of the deceased's effects, in satisfaction of a debt due to himself, either against a creditor whose debt may be inferior to his, or against the rightful executor or administrator; for if it were permitted every man to be his own carver, it would occasion endless strife and confusion, and would in effect be allowing him to take advantage of his own wrong.

3. How an Executor *de son tort* shall be charged, and how far a subsequent Administration purges the first Wrong.

(d) 5 Co. 30.
Hob. 49. Off.
of Exec.
(e) Ro. Abr.
919.

(d) An executor *de son tort* makes himself liable, as far as he hath assets, to all the debts due by the deceased, as also to his (e) legacies, and subjects himself to the action of the rightful executor or administrator, and may by his false plea (as, if an action is brought against him by a creditor, and he pleads *ne unques executor*, which is found against him) subject himself to the payment of the whole debt, though the goods which came to his hands be of ever so small value.

Godb. 217.
3 Leon. 198.
Cro. Eliz. 102.

And though an executor *de son tort* does afterwards take out letters of administration, yet it is still in the election of a creditor

to charge him as executor or administrator; for having (a) once made himself liable to the action as executor *de son tort*, he (b) shall never after discharge himself by a matter *ex post facto*. an administrator, and his administration is repealed, he shall be charged as executor of his own wrong. Mod. 63. (b) And there an executor *de son tort* cannot plead, that he is an administrator, though administration was actually taken out before the action brought. 2 Vent. 180. & vide 5 Mod. 145.

But this it is said must be so understood, that the defendant cannot by this plea abate the plaintiff's writ, by alleging himself administrator; but that yet to other purposes a subsequent administration purges the first wrong, and hath relation to the death of the party; as, if one possesseth himself of the goods of an intestate, and pays as much money as the goods are worth, and then takes out letters of administration; in this case he may plead *plene administravit*, and shall retain the goods in satisfaction of what he paid.

executor, he pleads a retainer for a debt due to himself; to which the plaintiff replies, that the defendant is executor *de son tort*; the defendant rejoins, that letters of administration were granted to him *puis darrein continuance*; this plea was holden good on demurrer, and judgment for the defendant. Vaughan v. Browne, 2 Str. 1106. Andr. 328. S. C. 3 T. R. 588. S. C. cited. If H. get the goods of an intestate into his hands, and administration be granted afterwards, he still remains chargeable as a wrongful executor, unless he deliver over the goods to the administrator before the action is brought, and then he may plead *plene administravit*. Per Holt C. J. 1 Salk. 313. And he cannot avail himself of a delivery over of the effects to the rightful administrator after the action brought, though in fact no administration was granted at the time of its commencement; nor of the assent of the administrator to his retainer, so as to defeat the action of the creditor. Curtis v. Vernon, K. B. 3 T. R. 587. Affirmed in the Exchequer-chamber, 2 H. Bl. 18.— But, an executor *de son tort* is not liable, it seems, *de bonis propriis*, but only so far as he hath wrongfully administered the effects of the deceased. Harris's Justin. 87. n. cites 1 Mod. 213, 214. Swinb. 337. ed. 1743.]

So, where an executor *de son tort* enters and takes possession of the goods, and sells them, and afterwards takes out administration, yet the sale is good by relation: but, if the intestate was entitled to a lease for years in reversion, and such an executor *de son tort* had sold the term, and afterwards had taken out administration, and then had sold it again to another, the second vendee must have enjoyed it, because there can be no executor *de son tort* of a reversion: besides, no entry can be made on a term in reversion.

If a widow takes possession of her husband's goods, and with the assent and direction of her son sells thereof to the value of 400*l.*, and afterwards the son takes out administration and discharges all the debts of the intestate, not only to the value of this 400*l.*, but all the assets which the intestate died possessed of, and an action is brought against her by a creditor, she may plead *plene administravit*, and shall be discharged upon this evidence; for the action being brought against her after administration taken out, it is unreasonable that she should be liable (c) both to the creditor and administrator, or that creditors should have satisfaction for more than the party died possessed of.

Ro. Abr. 923.

Style, 337.

Sid. 76.

Raym. 58.

[A person, entitled to administration, is opposed in the ecclesiastical court, and *pendente lite*, being sued as

Kenrick and Burges, Moore, 126.

Whytmore and Porter, Cro. Car. 88.

(c) Where, in trover, against an executor *de*

son

son tort, at *nisi prius*, before North C. J., the question was, Whether goods having been taken in execution upon a judgment obtained against the defendant, by a creditor of the deceased, should discharge him against the plaintiff, who brought his action as administrator; and the opinion of the Chief Justice was, that this execution was a good discharge against another creditor that should sue him, to whom he might plead *riens en ses mains*; but it was no discharge against an administrator; for men must not be encouraged to meddle with a personal estate without right; but to prevent this mischief, where the party dies intestate, and there is contest about the administration, a man may procure from the ordinary letters *ad colligendum*. Vent. 349, 350.

(C) Of the Manner of appointing an Executor: And herein,

1. By what Words an Executor is constituted.

Godolph. 76.
Off. of Exec. 3.
Noy, 12.

(a) But, as to land, a will is good, though there be no executor named, for an executor hath nothing to do with lands and tenements which were not originally testamentary, but are made devisable by act of parliament. Off. of Exec. 3, 4.

HERE we must first observe, that the appointing of an executor is an essential part of a will; for if a man makes several devises, &c., and appoints no executor, he dies intestate as to his (a) goods and chattels. But, though such a signification of the testator's mind as to the disposition of his goods, &c. be no more properly to be called a testament, than any deed wherein he expresses his mind to grant such and such things, may be called a testament; yet it is not altogether of no force and validity; for since there is an expression of the testator's mind for the disposition of his goods in this or that manner; so far it shall be of effect, that the disposition shall be made according as he hath expressed his mind, and therefore shall administration be granted to the next of kin *cum codicillo annexo*, as it is when a perfect will is made, and an executor refuses.

Godolph. 82.
Off. of Exec. 3.

On the contrary, the bare naming of an executor in the will, without giving any legacy, or appointing any thing to be done, is sufficient to make it a will, and as a will it is to be proved; for the naming of executors is by implication a gift or donation to them of all the goods, chattels, credits, and personal estate of the testator, and the laying upon them an obligation to satisfy the testator's debts to the just value of his goods and chattels.

Off. of Exec. 8.
Godolph. 82,
83. Dyer, 90.
[A testator desired certain persons to act as his executors, and gave one of them a

legacy; the Master of the Rolls held, that the legatee, so appointed executor, could not claim his legacy without acting, or at least proving the will. Read v. Devaynes, 3 Br. Ch. Rep. 95.]

Godolph. 83.

Therefore, if the testator says, that he commits all his goods to the administration, or to the disposition of A. B., in this case A. B. is as effectually made executor as if the testator had made

use of the word *executor* : so, if the testator appoints that *A. B.* should dispose of the goods in his custody, he is thereby made executor of those goods; or if he says, *I make A. B. lord of all my goods*, or *I leave all my goods to him*, or *I make A. B. legatary of all my goods*, or *I leave the residue of my goods to him*.

[So, if after giving several legacies, the testator appoint *A. B.* to receive and pay the contents.] Pickering v. Towers, Ambl. 364.

So, if the testator saith, *I will that A. B. be my executor if C. D. will not*; in this case *C. D.* is appointed executor, and may if he pleases be admitted to the executorship, and exclude *A. B.** Godolph. 83. *Sed qu. if *A. B.* should not be first cited, and refuse?

So, if the testator, supposing his child, his brother, or his kinsman to be dead, says thus in his will; *forasmuch as my child, my brother, &c. is dead, I make A. B. my executor*; in this case, if the person, whom the testator thought dead, be alive, he shall be executor. Godolph. 83.

Also, if the testator, being asked by another, whether he doth make *A. B.* his executor, doth answer, *yea, I do*, or *what else*, or *why not*? or, *whom else should I make executor*? or, *I cannot deny it*, or other words to that purpose, *animo testandi*, this amounts to an assignation of *A. B.* executor. Godolph. 83.

So, if the testator doth make *A. B.* or *C. D.* his executors; in this case they shall both of them be executors, for *or* shall be here construed *and*, rather than the party for this incertainty should be said to die intestate. Godolph. 84.

But, if *A.* be made an executor, and *B.* a co-adjutor, without more, he is not by this an executor with *A.*, nor hath such co-adjutor or overseer any power to administer, or to intermeddle otherwise than to counsel, persuade, and advise. 21 H. 6. 6. Off. of Exec. 9. Ro. Ab r. 14.

It is said, that appointing him executor, who is named in such a note left with *C. D.*, is not a sufficient making of him an executor at all: but according to *Godolphin*, this must be understood, that it is no sufficient appointing of an executor to make it a written will, because the appointing of an executor is left out of the will; but surely it will be a good nuncupative will, if not a good written will; for why should not such an appointment be good in case where the testator had made a disposition by writing, as well as if he appoint an executor by word of mouth, where he hath made disposition by writing of his goods and chattels? Godolph. 76.

If one appoint my executor to be his executor, and die; if the will be not void for incertainty, yet he is dead intestate until I die, and die testate; but if I die intestate, then he is dead intestate also. Godolph. 78.

If there be demonstration in a will, that is only added as *descriptio personæ*, and that be false; yet if the person be well enough known with it, that is sufficient; as if the testator appoints his son *Thomas*, who was lately married, to be his executor, that is well enough, though he be not married. Godolph. 85.

2. *Of appointing an Executor absolutely, or upon Condition.*

Off. of Exec. 10. Godolph. 40. (a) But a proviso that one shall not meddle during the other's life, is good; and by this they shall be executors successively, and not jointly. Off. of Exec. 13.

Godolph. 43. A condition ought properly to relate to something in contingency, that may, or may not be; for if it be subject to no contingency either in substance or circumstance, it is no condition; as, if *A.* makes *B.* his executor, upon condition the sun rise ten days after his death, he is executor absolutely, for there is no contingency to suspend his being so. So, if the testator make *A.* his executor, upon condition the testator's wife and daughter be alive at the time of the death of the testator, and he never had any daughter, the will is absolute, for there is nothing possibly to overthrow it; and in such case, where there is nothing to be a contingency, the adding of a condition can be interpreted nothing but the making of an illicit grant. So, capitious conditions, that are contrary to the dispositions made, are void, because they cannot be supposed to be made with any other design than that a man should avoid his own grant.

Godolph. 44. Necessary conditions, either in respect of fact or law, are of no manner of force; for it is in vain to require that which must necessarily be. Impossible conditions in respect of law, persons, nature, or contrariety, are in themselves void, and therefore hinder not an executorship.

Off. of Exec. 11. If an executor is appointed upon condition that he gives security before such a day to perform the will, or before he takes upon him the administration, he must in those cases perform the condition before he is complete executor.

Godolph. 43. 78. But in case of arbitrary conditions, the executor hath time, during his life, to perform the condition, and may enjoy the executorship in the mean time, unless the judge appoints a time for him to perform the condition in; but, if the judge appoint time and place, and the executor do it not, then is the condition (b) broken, and the person intestate, and so administration is to be granted to the next of kin.

(b) But though the executorship be determined, yet all acts done by such an executor in pursuance of his office, before such condition broken, are good. Godolph. 77.

3. *Of appointing a temporary Executor, as for a limited Time, during the Absence of J. S. &c.*

Godolph. 77. The time may be limited when the executorship shall begin, and that either certainly or with reference to contingency; for by our laws it is lawful for a testator to appoint his executor, either from a certain time, or until a certain time, and in the mean

mean time administration may be committed to the next of kin, or to the widow; and the acts done by such administrator cannot be (a) avoided by the executor afterwards; and in this sense the same person may be said to die partly testate, and partly intestate, which by the strictness of the civil law is not allowable. (a) Hob. 265, 266.

So, a person may appoint, that J. S. shall be executor till his son comes of age, or for any limited time he pleases. Off. of Exec. 10. So, 3 Atk. 180.

4. Of appointing an Executor with a limited Power, as to administer Part of the Estate.

The testator may limit and divide the power of his executors (b) in the following manner: 1st, He may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for the debts due to him; or, 2dly, He may appoint A. executor for his goods in the county of S., B. for his goods in the county of N., and C. for his goods in the county of H. Off. of Exec. 12. Godolph. 78. Ro. Abr. 914. [(b) Yet quoad creditors, they are all executors, and as one executor, and may Cro. Car. 293.]

be sued as one executor. 19 H. 8. 8. Dy. 3. 32 H. 8. Br. Exec. 155.

And though several executors are appointed with separate and distinct powers, yet is the will but one will, and needs only one probate. Off. of Exec. 13.

But, if a person is made executor without any limitation or restriction, he cannot take out administration for part, but must renounce the executorship *in toto*, or not at all. Salk. 927. pl. 6.

Therefore if an executor has a term, and the premises are of less value than the rent reserved thereon; in an action brought against him in the *debet* and *detinet*, he must plead specially, that he has no assets, and that the land is of less value than the rent, and demand judgment, if he ought not to be charged in the *detinet tantum*; and this will free him from being charged *de bonis propriis*; for otherwise the premises shall be presumed to be of greater value than the rent. Yelv. 103. Cro. Ja. 549. 5 Co. Hargrave's case, Mod. 185. Salk. 297. pl. 6. post.

(D) Of appointing Co-Executors: And herein,

1. What Acts done by any one of them shall be as valid as if done by them all.

IF a man appoints several executors, they are esteemed in law but as (c) one person, representing the testator, and therefore the acts done by any one of them, which relate either to the delivery, gift, sale, payment, possession, or release of the testator's goods, are deemed the acts of all, for they have a joint and entire authority over the whole. (d) Godolph. 134. Off. of Exec. 95. Ro. Abr. 924. (c) Therefore all of them shall have but one essoign, either before

appearance or after; because their testator himself, whose person they represent, could have no more. Godolph. 135. [(d) The law is otherwise, it hath been said, with respect to administrators. Lord Bacon's Tracts, 162. Hudson v. Hudson. But see *contr.* Jacomb v. Harwood, 2 Ves. 265. See too, Touchst. 484, 485.]

Dyer, 23. b. pl. 146. Cro. Eliz. 347. (a) So, if one executor releases a debt, it is good, and shall bind the rest. 21 H. 7. 25. b. Dyer, 23. b. in margin. — So, if one executor surrenders a term. 28 H. 6. 3. Dyer, 23. b. in margin. — So, if one acknowledges a judgment on an action. 17 E. 3. 66. Dyer, 23. b. in margin. — So, if on a *quid juris clamat* one of them attorns, it shall bind them all.

Hence it hath been adjudged, that if the testator dies possessed of a lease for years, and having made two executors, one of them grants all his interest to a stranger, that the whole term passes, for each had an (a) entire authority and interest different from other jointenants.

Godolph. 134.

And for this reason it is holden, that if one executor grants or releases his interest in the testator's estate to the other, nothing passes thereby, because each was possessed of the whole before.

2 Ro. Abr. 46. Kelsick and Nicholson, Dyer, 23. b. in margin. S. C. Cro. Eliz. 478. pl. 8. and 496. pl. 15. S. C. adjudged by three judges against one. — [Qu. As to this determination, for the obligation was only evidence of the debt; and as the debt was not assignable, being a *chose in action*, and only a mere delivery, what interest could pass?]

Also, it hath been adjudged, that if an obligee makes two executors, and dies, and one of them delivers the obligation to a stranger in satisfaction of a debt due from himself, and dies, though the debt does not pass by the assignment, being a *chose in action*, and not properly assignable; yet by this delivery the party hath such an interest in the paper and wax, that he may justify the detainer in an action of detinue brought against him by the surviving executor.

[Qu. As to this determination, for the obligation was only evidence of the debt; and as the debt was not assignable, being a *chose in action*, and only a mere delivery, what interest could pass?]

2. Where they must answer for each other's Acts, and what Remedy the one hath against the other.

Godolph. 134. Off. of Exec. 100.

(b) Cro. Eliz. 318. Hargthorp and Millforth adjudged.

It is clearly agreed, that one executor shall not be charged with the wrong or *devastavit* of his companion, and shall be no farther liable than for the assets which came to his hands; and therefore where an action (b) was brought against two executors, and the jury found that the two and another were made executors, and that the third wasted the assets to the amount of 600*l.*, and died, and that only 16*l.* came to the hands of the two others; the court held, that they should be chargeable for no more than the 16*l.*, for that it was the testator's folly to trust such a person, which must not turn to the prejudice of the other executors.

Churchill v. Lady Hobson, Salk. 318. pl. 26. per Hargcourt, Chan. [1 P. Wms. 241. S. C. (c) This distinction is not made by the decree, nor hath it been adopted in later cases. Vide Sadler v. Hobbs, 2 Br. Ch. Rep. 117., and the decree in 1 Cox's P. Wms 243. But

Also, it hath been holden in Chancery, that if there be two executors, and they join in a receipt, and one only receive the money, as to creditors, who are to have the utmost benefit of law, each is liable for the whole, though one executor alone might give a discharge, and the joining of the other was unnecessary; but as to legatees (c), and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other, for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience.

Vide Sadler v. Hobbs, 2 Br. Ch. Rep. 117., and the decree in 1 Cox's P. Wms 243. But

243. But in the case of *Gibbs v. Herring*, Pr. Ch. 49., it is stated to have been taken and allowed; but the editor of the last edition of that work hath not been able to discover any such case in the Register-book. The distinction, therefore, is, in truth, without authority. — Taking it without the distinction, the rule laid down in the text, as to executors joining in receipts, hath been generally admitted as established law. *Fellows v. Mitchel*, 1 P. Wms. 81. *Aplyn v. Brewer*, Pr. Ch. 173. *Leigh v. Barry*, 3 Atk. 584. *Ex parte Belchier*, Ambl. 219. *Sadler v. Hobbs*, 2 Br. Ch. Ca. 116. But it hath been broken in upon by Lord *Harcourt* in the case of *Churchill v. Hobson*, *ubi supra*, and by Lord *Northington* in *Westley v. Clarke*, 25th June 1759, reported in 1 Cox's P. Wms. 83., and *Finch's* edition of Pr. Ch. 173.; and the Master of the Rolls (Sir *R. P. Arden*) hath expressly entered his dissent from it in its fullest extent, viz. that an executor, by joining in a receipt, shall in all cases be liable. *Scurfield v. Howes*, 3 Br. Ch. Rep. 94.] || Lord *Eldon*, however, disapproves the relaxation of the rule, which has obtained in some later authorities, for, as he expresses himself, "a simpler rule never existed, than that if the executor acts without necessity he takes the power over the fund; and shall not say, he has not the power over it." *Chambers v. Minchin*, 7 Ves. 198, 199. *Brice v. Stokes*, 11 Ves. 324, 325. *Lord Shipbrook v. Lord Hinchinbrook*, 16 Ves. 479.] [And it is clear from all the cases, that where, by any act done by one executor, any part of the estate comes to the hands of another executor, the former will be answerable for his companion in the same manner as if he had enabled a stranger to receive it. *Sadler v. Hobbs*, *Scurfield v. Howes*, *ubi supra*. 1 Cox's P. Wms. 241. note, *Gill v. Attorney-General*, *Hardr.* 314.] || *Ex parte Shakeshaft*, 3 Br. Ch. Rep. 197. *Doyle v. Blake*, 2 Sch. & Lefr. 231. *Chambers v. Minchin*, 7 Ves. 186. *Lord Shipbrook v. Lord Hinchinbrook*, 11 Ves. 252. 16 Ves. 477. *Langford v. Gascoyne*, 11 Ves. 333. *Underwood v. Stevens*, 1 Mer. 712. *Joy v. Campbell*, 1 Sch. & Lefr. 341. *Hovey v. Blakeman*, 4 Ves. 596. But, where a co-executor, who proved the will, but had never acted, having received a bill by the post on account of the estate, transmitted it immediately to the acting executor, he was holden not to be responsible for the administration of the property. *Balchen v. Scott*, 2 Ves. jun. 678. 1 Sch. & Lefr. 341. *Bacon v. Bacon*, 5 Ves. 331. So, if *A.* interested in the fund concur in authorizing *B.*, one executor, to part with it to *C.*, his co-executor, and it be wasted, *B.* shall not be responsible to the extent of *A.'s* interest, but he shall be responsible to the other parties, who may be interested in the fund, if they did not acquiesce in his transferring it to *C.* *Brice v. Stokes*, 11 Ves. 319.]

If *A.* devises legacies, and makes *B.* and *C.* his executors, and *B.* makes *C.* and *D.* his executors, and dies, and they possess themselves of the estate of *A.*, they may be both charged in equity; for though in point of law the executorship survived to *C.*, and *D.* is not privy, yet the estate of *A.*, in (a) whose hands soever, ought to be liable. Chan. Ca. 57. (a) That a creditor may follow the testator's estate, into whose hands soever it comes, notwithstanding any assignment of it by the executor. 2 Vern. 75. || As to the general power of an executor to dispose of the assets of his testator, and of legatees and creditors to follow the assets disposed of by him in the hands of third persons, see *Hill v. Simpson*, 7 Ves. 152.]

One executor (b) cannot regularly sue another of his co-executors touching any thing relating to their testator's will, or that is within the power, interest, duty, or office of an executor. Off. of Exec. 99. *Godolph.* 135. (b) But may in equity, and compel him to account for a moiety, &c.; yet *vide* *Sid.* 33.

But, if the residue of the personal estate, after debts and legacies, be devised to both the executors, one of them may sue the other in the spiritual court for a moiety, for this is in the nature of a gift or legacy to him, and he may bring trespass against the other executor, if he takes it out of his possession, or detain * if he detains it from him. Off. of Exec. 99. *Godolph.* 135. * *Qu.* As to detainue, if a partition has not been made, so as to distinguish the plaintiff's share.

3. Where they must jointly sue and be sued; and therein of *Summons and Severance*.

As executors in representing the testator make but one person, *Godolph.* 134. Off. of Exec.

95. Com. son, they are all regularly to sue and be sued, ||although some
Dig. tit. have omitted to prove the will, or have renounced before the
Abatement, ordinary.||
(E.) 13.

Pleader. 2 D. 1. 9 Co. 37. 1 Lev. 161.

Lev. 161. But, if debt be brought against an executor, and he plead
Swallow and that *J. S.* is co-executor with him, and that he is not named in
Emberson, the writ, without averring that *J. S.* hath administered, the plea
Sid. 242. will be ill; for although, when an executor sues, the defendant
Rawlinson v. may plead another executor not named, without shewing that
Shaw, 3 T. R. the other hath administered, because he cannot know whether
560. Alexander the other hath administered or not; yet, when an executor is
v. Maw- sued, if he pleads another executor not named, he ought to go
man, Willes's farther and say, that he has administered, for that lies in his
Rep. 42. own conuizance.

Carth. 61. Also, if an action be brought against one executor, where
there are more, if that one executor do not plead the matter in
abatement, but plead to the action, he shall never have the ad-
vantage of such a plea afterwards.

Salk. 3. pl. 6. If two executors sue, and set forth themselves to be executors,
Brookes and and that they proved the will †, but upon the probate set forth
Stroud. it appears that one only proved the will, and the defendant
† It is not pleads this in abatement, a *respondeant ouster* will be awarded,
necessary to for both have the right in them; and he that did not prove may
say they prove come in when he pleases, but cannot refuse during the life of
the will; but him that has proved.
it is sufficient
for them to

declare generally as executors, and make a profert of the letters testamentary, and the defendant must plead to the action: If the probate is called for on the trial, it will thereby appear that the plaintiffs are executors, named such by the testator himself.

Cro. Car. 420. If a man appoints two executors, there shall be summons and
2 Ro. Abr. 98. severance, because one of the executors may release; yet such a
Off. of Exec. release is a *devastavit* in him; but, if he will not proceed at law,
96. 104. it is no *devastavit* in him; and therefore, both executors being
only trustees for the person deceased, they shall not be compelled
to go on together: but, if one refuses, the other may bring his
action in the name of both, and have summons and severance;
for otherwise a co-executor might, by collusion with the debtor,
and not proceeding, keep the other from recovering assets, and
not create a *devastavit* in himself; but after such summons and
severance he does not proceed for a moiety, but as representative
of the testator proceeds for the whole the testator was entitled
to, and shall have judgment only in his own name.

Cro. Eliz. 652. Therefore if there are two executors, and they bring an action
Co. Litt. 139. of debt, and one of them is summoned and severed, and the
(a) Not being severed person dies, the writ shall not (a) abate.
a party, he
could not sue out execution if he was alive. Off. of Exec. 105.

Toll. Exec. || In equity, if two co-executors are plaintiffs, and one of them
457. Pr. Reg. is excommunicated, the other may be severed, and the defendant
in Chancery, shall answer him.
2d edit. 209.

In a suit by executors, the proceedings do not abate by the death of one of them. || Hinde's Pr. Ch. 47.

If debt be brought against several executors, and one appear, and the other make default upon the grand distress, the court may proceed against him that appears; and if the plaintiff recover, judgment shall be against all the executors for the goods of the testator; and the 25 E. 3. st. 5. cap. 17., which gives a *capias* in debt, has been always construed within the equity of the 9 E. 3. st. 1. c. 3., so that if there be several executors defendants, and a *cepi* is returned as to one, and a *non est inventus* as to the rest, the plaintiff shall proceed against him that appears, and shall have judgment against all; for the default upon a *capias* is the same as upon the grand distress. *Ergo*, error must be brought by all. Salk. 312.
pl. 17. per
Holt C. J.
2 Ld. Raym.
870.

If one executor hath the possession of the testator's goods, which are taken from him (a), both must join in an action (b) of trespass; for the possession of one is the possession of the other; and if one only should bring the action, and the other should release it, such release would be good. (a) 19 H. 6. 65.
16 H. 7. 4.
3 Leon. 209.
S. P. per Coke;
but in Godolph. 134.

and Off. of Exec. 104., it is said, that if goods be taken out of the possession of one executor, he alone may maintain an action for the same, and that without naming himself executor; for which is cited 38 E. 3. 9. (b) But, if one executor alone sells the goods of the testator, he alone may maintain an action of debt for the money. Godolph. 135.
Off. of Exec. 104.

It is said that executors, when sued, cannot plead distinct pleas, because they represent but one person, who could have but one plea, if he was living; but it is said to be holden by others, that executors may plead distinct pleas, and that shall be tried which is (c) best for the testator, and most peremptorily to settle the controversy. Off. of Exec. 98. Godolph. 136.

the one prays a *capias*, and the other a *feri facias*, the *capias* shall be awarded as best for the testator. (c) So, if two executors have judgment, and as best for the
Hob. 61. cited as the opinion of *Cotismore* in 7 H. 6. 6.

(E) Of the Probate of Wills, and granting Administration: And herein,

1. To whom the Probate of Wills and granting of Administration did originally belong.

IT appears to have been a matter of great controversy, to whom the probate of wills and granting of administration did originally belong, and whether these were matters entirely of ecclesiastical cognizance (d): but it seems to be now the better opinion, that the probate of testaments did not originally belong to the ecclesiastical jurisdiction, but to the respective lords of manors where the testator died, as all other matters did. (d) Lyndw. 174.
in voc. "Ap-
probatib," says,
that the juris-
diction of the
ecclesiastical

courts touching testamentary matters, is by the custom of England, and not by the ecclesiastical law. — Wilkins, 78. Lamb. *Saxon Laws*, 64., make it appear, that the bishop and sheriff sat together in the county courts; and by the *Saxon Laws*, which they give us, it plainly appears, that the probate of testaments was in the county courts, — *Selden*, *Eadmerus*, 197., gives

gives us the charter of *William the Conqueror*, which first separated the ecclesiastical court from the civil; but this charter does not mention matters testamentary, or the probate of wills, to be of ecclesiastical consuance; but only says, that the crimes, that were to be prosecuted *pro salute animæ*, were to be of that consuance. — And therefore, according to *Selden*, *Eadmerus*, 168., the ecclesiastical jurisdiction did not prevail herein till the time of *Richard II.* at which time the clergy got the king to publish the law of *William the Conqueror*, and confirm the same, and that no matters of ecclesiastical consuance should be transacted in the county court; this is the charter of 2 Rich. 2. Membrano, 12. No. 5., and is mentioned in *Selden's Eadmerus*, 168. — Henceforward the clergy had the whole jurisdiction of wills, because the county court could not receive the probate, and the king's court could not intermeddle with it, because by a charter in *Henry I.'s* reign, the king's tenants, who owed suit to it, were enabled to dispose of their personal estate for the good of their souls, and of this the clergy were thought to be the proper persons to take care. Plow. 179. in the case of *Greys* and *Fox*. — Hence, in *Fitz. Abr. tit. Testament*, 148., it is said by *Fairfax*, that it was but of late the church had the probate of wills, and he supposes that it was given to them by some act of parliament. — And in the 11 H. 7. *Fineux* asserts, that the probate of wills did not belong to the spiritual court by the ecclesiastical law, but came to them by custom and usage: — and with these opinions my Lord *Coke* agrees in *Henslow's case*, 9 Co. 38., and on these foundations concludes, that when the will is proved in the ecclesiastical court, the court has executed its authority; for the executors are to sue in the temporal courts to get in the estate of the deceased.

Raym. 405,
406. Sid. 359.
Noell and
Wells, Lev.
235. Hard.
131. 2 Ro.
Abr. 299.
[1 Str. 481.
671. 12 Ves.
298. Hence
also, payment
of money to
an executor
who hath ob-
tained probate
of a forged
will, is a dis-

But, however it might have been formerly, it is now certain, that the spiritual court is the only court, except as herein after excepted, that has jurisdiction of the probate of wills, and, as incident to such jurisdiction, hath power to determine all those matters that are necessary to the authenticating of them. Hence it hath been adjudged, that if the seal of the ordinary appears to the probate, it cannot be suggested or given in evidence in the common law courts, that the will was forged *, or that the testator was *non compos*, or that another person was executor; but it may be given in evidence, that the seal was forged, or the will repealed, or that there were *bona notabilia*, because these are not in contradiction to the real seal of the court, but admit the seal and avoid it.

charge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the next of kin. *Allen v. Dundas*, 3 T. R. 125.] || But payment of money under probate of a supposed will of a living person would be void; because in such case the ecclesiastical court has no jurisdiction; the power of the ordinary extending only to the proving of wills of persons deceased. *Id.* 130. || [As a prisoner cannot be convicted of forging a will during the existence of the probate, *R. v. Vincent*, 1 Str. 481., it is the practice to postpone the trial till the spiritual court hath determined upon its validity. *R. v. Goodrich*, O. B. 1784, cited in 3 T. R. 126. *R. v. Rhodes*, 1 Str. 703.]

Skin. 299.
pl. 2. Salk.
36. pl. 1.
S. C. Comb.
185. S. C.
12 Mod. 9.

But, if the spiritual court do admit a will, but yet will not give the probate thereof to the executor, because he cannot give security for a just administration, the temporal courts will grant (a) a *mandamus*; for though they are to determine whether there be a will or not, yet if there be a will, the executor has a tem-

* That is as to chattels, or personal estate; for with respect to real estate, if any question arises, the original will must be produced, and not the probate, which cannot authenticate the will as to real estate; and in such case the validity of the will may be called in question, and forgery, insanity of the testator, or any other matter that avoids the will, may be given in evidence.

poral right, and they cannot put any terms on him but what are mentioned in the will. S. C. Holt. 305. S. C.

refuse administration to the next of kin; 5 Mod. 374., unless it be controverted by will alleged in spiritual court. *Vide infra*, (G). (a) So, if they

As to the disposition of intestates' estates and granting of administration, it is plain, that by the (b) common law and before the statute of Westm. 2. cap. 19., the ordinary had the absolute disposal of intestates' estates. Ro. Abr. 906. Raym. 497. Salk. 37. pl. 3.

thinks that this was granted them by some particular constitutions; and therefore says, that anciently the kings of *England*, by their proper officers, *solebant capere bona intestatorum in manus suas*, 9 Co. 36. &c. in *Henslow's case*. 3 Mod. 24. (b) But my Lord Coke

And therefore, if a man died intestate, neither his wife, child, nor next of kin had any right to a share of his estate, but the ordinary was to distribute it according to his conscience to pious uses: and sometimes the wife and children might be amongst the number of those whom he appointed to receive it: however, the law trusted him with the sole disposition. 2 Inst. 399. Plow. 277. 3 Mod. 59.

The first statute, that abridged the power of the ordinary herein, was the statute of Westm. 2. or 13 E. 1. cap. 19., by which it is enacted, "That where a man dies intestate, and in debt, and the goods come to the ordinary to be disposed, he, *de cætero*, shall satisfy the debts, so far as the goods extend, in such sort as the executors of such persons should have done in case he had made a will."

Before this statute, no action lay against the ordinary at the suit of a creditor, where the party died intestate, nor could the ordinary maintain an action against the debtor of the intestate; but, if he had seised the goods, he might bring trespass against any one who took them out of his possession. Ro. Abr. 906. 8 Co. 135. Raym. 497.

but for the alterations herein by several acts of parliament, *vide infra*, letter F.

2. Of the King's Jurisdiction in granting the Probate of Wills and Administration.

As all jurisdiction flows from the king, so he is said to be the supreme ordinary in this kingdom; and therefore where an action of debt was brought by an administrator, and the plaintiff declared of letters of administration granted to him *per Carolum regem*, without saying *debito modo*, yet this was holden good on demurrer, because the king hath universal jurisdiction here. Allen, 53. Hobson and Wills; for this *vide Prærogative*.

But it is said, that if a person dies intestate, and without kindred, though the usual course is to procure the king's letters patent, and then the ordinary admits the patentee to administration; yet that this is not *de jure*, but rather out of respect; for the ordinary might originally have disposed of intestates' estates to pious uses; and the instance of some lords of manors having a jurisdiction herein, is not a proof to the contrary. Salk. 37. pl. 3. [If the effects of an intestate vest in the king by a forfeiture for felony, and the ordinary grant letters of administration to A. in consequence of

of a warrant from the king, and they run in the usual form, *viz.* "to pay debts, &c." though with this additional clause, "to the use of his majesty," *A.* may be sued by the creditors, and shall not be permitted to impeach the letters of administration. *Megit v. Johnson*, Dougl. 542.]

3. *Of the Archbishop's Jurisdiction; and therein of bona notabilia.*

Off. of Exec. If a person dies, having goods in several (*a*) dioceses, the probate of his will, as also the granting of administration to him, belongs to the archbishop of the province in which the goods are.

44. Ro. Abr. 908. Dyer, 305. || This power is reserved in the statute of frauds and perjuries, 29 Car. 2. c. 3. § 24. by which it is provided, that "nothing in the said statute shall extend to alter or change the jurisdiction or right of probate of wills concerning personal estates, but that the prerogative court of the Archbishop of *Canterbury* and other ecclesiastical courts, and other courts having right to the probate of such wills, shall retain the same right and power as they had before in every respect; subject nevertheless to the rules and directions of the said act." And by st. 23 H. 8. c. 9. (which directs that persons shall not be cited out of their proper diocese), it is enacted, "that the same shall not extend to the prerogative of the Archbishop of *Canterbury* for calling any person out of the diocese where he shall be inhabiting, for probate of any testament; nor shall be in anywise prejudicial to the Archbishop of *York*, concerning probate of testaments within his province and jurisdiction, by reason of any prerogative." || (*a*) So, where a man dies intestate, having lands in divers peculiars, the granting of administration does not belong to the ordinary of the diocese, but to the metropolitan of the province; for they are excepted out of the ordinary's jurisdiction. Lev. 78. *per Twisden and Windham*. [But where the deceased has goods within the diocese of *York*, and also within a peculiar in that diocese, two administrations shall be granted; for the archbishop shall not have his prerogative in such case, the peculiar being derived out of his jurisdiction. Cro. El. 718.]

Ro. Abr. 908. So, if a person dies intestate beyond sea, and hath goods here, though but in one diocese, yet the archbishop is to grant administration.

Ro. Abr. 909. So, if a man dies in one diocese, not having any goods there, (*b*) By a canon, 1. Ja. 1. c. 92., if a man dies on a journey, the goods, which he had at that time with him, shall not cause his testament or administration to be liable to the prerogative court. Godolph. 71.

2 Lev. 86. So, if a man dies having *bona notabilia* in the several provinces of *Canterbury* and *York*, the archbishop of each province shall grant administration according to the *bona notabilia* in their respective provinces; for they are two supreme jurisdictions, and neither can act in the other.

Dyer, 383. So, if a man dies intestate, having *bona notabilia* in *England* and *Ireland*, several administrations shall be granted, *viz.* by the archbishop of *Canterbury*, for the goods in his province, and by the archbishop of *Dublin*, for the goods in his; but this by S. P. *per Hale*.

(c) Ro. Abr. 908. (*c*) *Rolle* must be understood, where the party hath goods in divers dioceses in each of their provinces, or in the diocese of the archbishop; for otherwise it ought to be granted by the ordinary where the goods are, and not by the archbishop.

5 Co. 30. If the archbishop commits administration, though there be no
Hob. 185. *bona*

bona notabilia, yet such administration is not void, but only voidable, and shall stand till it is remedied by complaint of the inferior ordinary: but, if the inferior ordinary commits administration, and the superior also, supposing that there are *bona notabilia*, if there are none, then the first by the inferior is good; if there are, it is absolutely void.

8 Co. 135.
Cro. Eliz. 6.
283. 456.
Lev. 305.
7 Mod. 146.
Godolph. 70.
S. P. because
the metropoli-
tan hath jurisdiction in all places within his province.

The probate of every bishop's will, though he had goods but in his own jurisdiction, belongs to the archbishop of the same province.

4 Inst. 335.

1. *Of what Value the Goods and Effects must be, that will make bona notabilia.*

There appears to have been formerly diversity of opinions as to the value of the goods, which was necessary to make *bona notabilia*; some holding 10*l.* necessary, some 5*l.*, others 40*s.*, and by others even a penny was thought sufficient to make *bona notabilia*.

For these vide
Ro. Abr. 909.
Off. of Exec.
44. Godolph.
70.

But it is now settled as established by the 92 canon of Ja. 1. that goods amounting to the value of 5*l.* make *bona notabilia*.

Ro. Abr. 909.
4 Inst. 335.
Off. of Exec. 45.

But by the said canon it is provided, that this shall not prejudice the jurisdiction of those dioceses where, by composition or custom, *bona notabilia* are valued at a greater sum, as, in London, where by composition *bona notabilia* are to be to the value of 10*l.*

4 Inst. 335.

It is not necessary that the deceased should have goods to the value of 5*l.* in each of the several dioceses where his goods are dispersed; but, if he hath goods in any one diocese amounting to 5*l.*, besides that in which he died, these make *bona notabilia*.

Godolph. 69.

But, if his goods in the diocese where he died amount to 10*l.* or more, yet, if he hath not goods to the value of 5*l.* in some other diocese, these will not be *bona notabilia*.

Godolph. 69.

2. *Of the Nature of such Goods as will make bona notabilia, and how far it is necessary they should be in several Dioceses.*

If a man hath goods in one diocese to the value of 5*l.*, and a lease for years of that value in another, these make *bona notabilia*; for though a lease or term for years, according to the civil law, is not properly *bonum*, nor a thing (a) moveable; yet it is a chattel, and as such must be pleaded.

Ro. Abr. 909.
Godolph. 71.

utors for payment of debts and legacies, these, though they become assets, will not make *bona notabilia*. Off. of Exec. 46.

(a) But in case
lands be de-
vised to exe-
cutors, will not make

Debts due to the deceased make *bona notabilia*, as well as goods in possession; but, if there be a bond of the penalty of 5*l.* for payment of a less sum, and the same be forfeited; though according

Godolph. 70.
Off. of Exec.
46. ¶ And
now by st. 4 &

5 Ann. c. 16. according to the strict rules of law the whole penalty is forfeited,
 § 13. the penalty is saved yet this does not make *bona notabilia*.
 on bringing principal, interest, and costs into court.||

Debts due to the deceased make *bona notabilia*, be they ever so desperate or difficult to be recovered; and, therefore, it (a) seems that a debt due from the king, for which there is no remedy but by petition, makes *bona notabilia*.

(a) Off. of
 Exec. 46. left
 a *quære*.

Godolph. 70,
 71. Off. of
 Exec. 46. Ro.
 Abr. 909.

Dyer, 305.
 (b) Therefore where a man died in *Lancashire*, which is in the diocese of the bishop of *Chester*, and had a bond in *London*, it was adjudged that administration as to this bond, ought not to be granted by the bishop of *Chester*, but by the bishop of the diocese where the bond was. Byron and Byron, Cro. Eliz. 472.

Godolph. 70.
 Off. of Exec.
 46.

But, as to debts by simple contract, they, by our law, follow the person of the debtor, and are esteemed the deceased's goods in that diocese where the debtor resided at the time of the creditor's death.

Carth. 149.
 3 Mod. 324.
 S. C. Gold
 and Strode,
 Salk. 40., pl. 9.,
 2 Salk. 679.,

On this distinction it hath been holden, that a judgment obtained in any of the courts of *Westminster* made *bona notabilia*, though the action upon which it was obtained was laid in *Dorsetshire*, because the record was at *Westminster*.

pl. 7. 2 Ld. Raym. 854., and 6 Mod. 134., Adams and Savage, S. P., adjudged, where an administrator brought a *scire facias* against the tertenants of Savage, on a judgment obtained by his intestate in *B. R.*, and shewed as his title, that administration was granted to him by the archdeacon of *Dorset*, though the defendant, without taking advantage hereof, pleaded over; yet the court abated the writ *ex officio*; for they held, that they were obliged to take notice, that the place where they sat was not within the jurisdiction of the archdeacon of *Dorset*; but that if the plaintiff had not been thus particular, but had declared on an administration generally, and the defendant taken no advantage of it, it had been well enough.

Carth. 148.
 3 Mod. 324.
 the above
 authorities.
 Gold and
 Strode ad-
 judged.

But, if an administrator takes out administration by an inferior ordinary, and on a *scire facias* has judgment to have execution on a judgment obtained by his intestate in *B. R.*, and thereupon a *capias ad satisfaciendum* issues, on which the defendant is taken, and the sheriff suffers him to escape; the sheriff, in an action against him, cannot take advantage of this error, for the court had jurisdiction over the cause, and the judgment was only erroneous, but not void.

Carth. 373.
 Yeomans and
 Bradshaw,
 Comb. 392.
 S. C. adjudged,
 and the plain-
 tiff's writ
 should abate.
 Qu.

If a merchant in *London* draws a bill of exchange on his correspondent in *Newcastle* in favour of *J. S.*, and the bill is refused, and *J. S.* dies intestate, his administrator, on letters of administration taken out in *Durham*, cannot bring an action on the custom of merchants against the drawer, and lay the same in *London*, for a bill of exchange is not equal to bond or specialty, which are the deceased's goods, where they happen to be at his death,

death, but is a simple contract debt which follows the person of the debtor, and makes *bona notabilia* where he resides.

|| In debt by an administrator on an administration committed by the Bishop of *London*, the defendant pleaded in bar that the intestate at the time of his death was resident in another diocese; and it was holden good on demurrer. And by the court; the simple contract debts are personal, and administration must be committed of them where the party dies. And if a man have two houses in several dioceses, and live most at one, but sometimes go to the other, and being there for a day or two, die; administration of his personal estate shall be granted by the bishop of this diocese, for he was commorant there, and not there as a traveller.||

Hilliard v.
Cox, 1 Salk.
37.

With regard to the following persons, the law is altered by the 4 Ann. c. 16. § 26., by which, reciting, "That great trouble is frequently occasioned to the widows and orphans of persons dying intestate to monies, or wages due for work done in her majesty's yards and docks, by disputes happening about the authority of granting probate of the wills and letters of administration of the goods and chattels of such persons; it is enacted, for the preventing of such unnecessary trouble and expence, That the power of granting probates of the wills and letters of administration of the goods and chattels of such person and persons respectively is, and is hereby declared to be, in the ordinary of the diocese, or such other persons to whom the ordinary power of probate of wills, or granting letters of administration, doth belong, where such person or persons shall respectively die; and that the salary, wages, or pay due to such person or persons from the queen's majesty, her heirs or successors, for work done in any of the yards or docks, shall not be taken or deemed to be *bona notabilia*, whereby to found the jurisdiction of the prerogative court."

|| To obtain an order of the Court of Chancery for the payment of a sum of money out of court, however small the amount, a prerogative probate is holden to be indispensable.||

Newman v.
Hodgson,
7 Ves. 409.
Thomas v.

Davies, 12 Ves. 417.

4. *Of the Probate of Wills, and granting of Administration by the Bishop of the Diocese.*

The ordinary hath regularly the probate of wills and granting of administration of every person dying within his diocese: this jurisdiction he may either exercise himself, or it may be done by his official, for it is but a ministerial act, and no ways concerns the bishop, as bishop in his spiritual capacity, and, therefore, he may do the thing by another; for originally the probate of wills did not belong to the ecclesiastical judges.

Godolph. 58.
See Gilb. Eq.
Rep. 203.
Cowp. 141.

This power of granting administration is annexed to the person of the bishop, and, therefore, if a bishop of *Ireland* happens to be in *England*, he may grant administration here of any thing within his diocese in *Ireland*.

Godb. 33.
Carter and
Cross, Cro.
Car. 214.
6 Mod. 145.

S. P. per Holt C. J.

If

Ro. Abr. 908.
1 Lutw. 30.

If a bishoprick be vacant, the dean and chapter are to grant administration.

5. *Of the Probate of Wills, and granting of Administration, where the Party dies within some peculiar Jurisdiction.*

4 Inst. 338.
Salk. 40. pl. 10.

If a person dies within some peculiar jurisdiction, the probate of his will, as also the granting of administration, belongs to the judge of such peculiar, which is founded upon a supposition of an original composition between him and the ordinary of the diocese for that purpose.

Salk. 41.

6 Mod. 241.

(a) Where ad-
ministration

These peculiars are either regal, archiepiscopal, episcopal, or archidiaconal, in each of which the owner of (a) common right hath power to grant administration.

was granted by a rural dean, the goods of the deceased not amounting to more than 40*l*.
5 Mod. 424.

6. *Of the Jurisdiction of some Lords of Manors in the Probate of Wills.*

(b) Such as that
in the manor
of *Mansfield*,
and those in
Cowle and
Caversham in
Oxfordshire,
which the author of *Off. of Exec.* 43. says, he himself kept.

Although it be regularly true, that at present the spiritual court is the only court that hath jurisdiction in the probate of wills and granting of administration; yet from this general rule must be excepted all (b) courts-baron that have had probate of wills time out of mind, and have always continued that usage.

Thomp. Entr.
342. Salk. 41.
6 Mod. 242.

This jurisdiction can only be claimed by prescription, and therefore a person who has administration granted to him by a lord of a manor declares, that *per A. B. dominum manerii cui administrationis commissio de jure pertinet per consuetudinem infra maner. præd. a tempore cujus contrarii memoria hominum non existit usitat. et approbat. debito modo commissa fuit.*

7. *Of the Jurisdiction of some Mayors in respect of the Burgesses within such a Place.*

Off. of Exec.
45. Godolph.
58. For the
custom of
London in re-
lation to orphans, &c. *vide tit. Custom of London.*

By custom the probate of wills belongs to the mayors of some boroughs in respect of the burgesses, as to lands devisable in such boroughs; but as to goods the same will may also be proved before the ordinary.

8. *The Form of proving a Will and taking out Administration, and therein of entering a Caveat.*

Godolph. 60.

The judge may, *ex officio*, or at the instance of the party interested, call the executor to prove the will: some say, he may be cited at the instance of any person, to know whether the party instancing hath any legacy left him, or not.

If the executor appears not to prove the will upon the ordinary's process, but stands in contempt, he is excommunicable; 59. Godolph. 58.
but if he appears and makes oath, that the testator had *bona notabilia* in divers dioceses, or within some peculiar jurisdiction than that wherein he died, he is to be dismissed to prove the will in the archbishop's court, and to exhibit the same under seal within forty days next after.

Also, the ordinary or metropolitan, as the case shall require, may sequester the testator's goods until the executor proves the will. Godolph. 63.

If it be uncertain whether the testator be dead or alive, it must be left to the discretion of the judge, whether he thinks him so or not; and if there be good presumptive evidence in law to think him dead, then he must prove the will; as if he be beyond sea in remote parts, and it is common and constant fame that he is dead; especially, if the executor of such person be honest, and the goods are *bona peritura*, and the testament itself in favour of children, or *ad pios usus*. Godolph. 61, 62.

The time of proving a will is left to the discretion of the judge, according as the circumstance of the case shall require or admit; but regularly it ought to be insinuated within four months after the testator's death. (a) Godolph. 61.
(a) || But now by st. 55 G. 3. c. 108. § 37. it is enacted, that "if any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased, every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds *per centum* on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased."||

Testaments may be proved either in common form, as where there is no contest about the will; but the executor presenting the will before the judge, without citing the parties interested, doth depose the same to be the true, whole, and last will of the testator, and thereupon the judge does allow the will, and fix his seal and probate to it. Godolph. 62.

Or, a will may be proved in form of law, as when it is exhibited before the judge in presence of the parties interested, as the widow and next of kin, and then the proof examined and fully heard, and at last allowed. Godolph. 62.

The difference between the two probates is this; where a will is proved in common form, it was, at any time afterwards within thirty years, to be questioned and called in debate, which it cannot be in case it be proved in form of law. Godolph. 62.

If the executor refuse to prove the will, or if there be a will and no executor named, the ordinary is to commit administration *cum testamento annexo* to some proper person, from whom he may take bond for a faithful administration; but in case there be no will, then he is to grant administration to the next of kin of the deceased; and in case of their refusal, he may grant

it to a creditor, or any other person desiring the same; and if nobody will take administration, the ordinary may grant letters *ad colligend. bona defunct.*

If there be a testamentary disposition without an executor, the party, in whose favour the disposition was made, must cite the next of kin before he can have administration.

Godolph. 258.

Goldsb. 119.

(a) As said by

Dr. Talbot in

his argument

of the case of

It is usual when there is a contest about a will, or when the right of administration comes in question, to enter a *caveat* in the spiritual court, which by their law is said to stand in force for (a) three months.

Hutchins and Glover. 2 Ro. Rep. 6. Cro. Ja. 463, 464.

Ro. Rep. 191.

Cro. Ja. 463.

2 Ro. Rep. 6.

But it is said that our law takes no notice of a *caveat*, and that it is but a mere cautionary act done by a stranger, to prevent the ordinary from doing any wrong, and that, therefore, if administration be granted pending a *caveat*, this is valid in our law, though by the law in the spiritual court, it may be such an irregularity as will be sufficient to repeal it.

Lev. 186.

Offley and

Best, Sid.

293. and 2 Keb.

63. 72. S. C.

In the case of one *Offley*, administration was granted to him pending a *caveat*, and no notice taken of it, or of the party that entered it, and for this cause there was a citation to have this administration repealed; and on a motion for a prohibition in behalf of *Offley*, it was urged, that the spiritual court having once granted administration, they had executed their authority, and had no power over the administrator afterwards, and a *caveat* is only for private information of the judge, but does not suspend their jurisdiction; it is *concilium*, but not *praeceptum*; no countenance was ever given to it by the law: that to give them liberty to repeal administration for this cause, were to give it them in all cases, and then 'all the inconveniences of compelling distribution will follow, for they may leave out some formality on purpose to preserve a power over the administrator, or they may make it cause of repeal, because administration is granted to a child already preferred, or the like; and by the 21 H. 8. c. 5. they have an election, which when it is once made, no man can complain; for none have any right or title precedent: and for these reasons a prohibition was granted: but on another day, on motion for a consultation, the court said, that to take from the spiritual court all power of examining the formality of granting letters of administration, would occasion undue catching of administrations, and confound and destroy all their forms and course of proceedings, which are in some cases necessary; and it was not the intention of the statute to alter the course of granting administrations, and to establish irregular administrations, but only to direct the ordinary, and to streighten the liberty they took upon them before; and for the matter of the *caveat*, we know not what weight and regard it may have in their law; it may be essentially necessary, that where there is a contest and competition, both parties should be heard before any thing be done, or the *caveat* dismissed: they have a rule, that no administration should be granted within fourteen days, that no party may be surprised,

surprized, and we have known an administration granted against this rule repealed, though nobody else could pretend any right; but the same day a new administration has been granted to the same party: and in these kind of questions creditors are concerned; and it may be very mischievous to throw off and slight all their forms; wherefore the court would advise. And according to the report of this case, in 1 Lev. *Moreton and Windham*, at another day, were for discharging the rule for a prohibition; and they held, that granting administration, pending a *caveat*, was sufficient cause to revoke, and that it was like a *supersedeas* in our law, which made a judgment given afterwards erroneous. But *Kelynge* and *Twisden* held, that the *caveat* was of no force to hinder the grant of the administration; for it was not a judicial act of the court, but only an entry of a *memorandum* by a clerk in court, for the giving of caution; and being no judgment or record of the court, the court of *B. R.* are as proper judges of the force and effect of it as the spiritual courts, and are likewise to see that they grant administration according as they are empowered by the statutes. And the court being thus divided, there could be no rule for discharging the prohibition.

9. Of the Executor's Refusal.

The executor being a private officer of trust named by the testator, and not the law, he may refuse, but cannot assign the office.

If the executor refuses to appear upon the ordinary's summons, he is punishable for a contempt; but yet he cannot be compelled to accept the executorship, whether he will or not.

Off. of Exec.
36, 37. Go-
dolph. 140.
Vaugh. 144.

And, therefore, if an executor refuses before the ordinary to take upon him the executorship, the ordinary may grant administration *cum testamento annexo* to another person; and he can never afterwards be permitted to prove the will.

Ro. Abr. 907.
Plow. 281.

But, if the executor appears and takes the usual oath before the surrogate, and afterwards refuses before the ordinary, yet administration cannot be granted to another; for having once taken the oath, he has made his election, and cannot afterwards refuse the executorship; and if the ordinary will not admit him, a *mandamus* will lie, though on oath taken before a surrogate, the ecclesiastical court have no further authority.

Vent. 535.

In case the ordinary himself is made executor, he may refuse before the commissary.

Off. of Exec.
37.

But an executor cannot refuse by any act *in pais*, as by declaring that he would not accept the executorship, but it must be done by some (a) act entered and recorded in the spiritual court, and before the ordinary.

Off. of Exec.
37. (a) But
where *Bacon*
Lord Keeper,
Catlin Ch. Just.

and the Master of the Rolls, were made executors, and they wrote a letter to the ordinary, signifying that they could not attend the executorship, and desiring him to commit administration to the next of kin of the deceased; which being recorded, it was holden a sufficient refusal. Cro. Eliz. 92. Off. of Exec. 37. Owen, 44. Moore, 272. Leon. 135. S. C.; and that no executor named could act after. But an executor may pray time to consider if he will act, and the ordinary may give and grant letters *ad colligendum* in the *interim*, but not administration.

Godolph. 141.

2 Jon. 72.

2 Mod. 146.

Vent. 303.

2 Lev. 182.

(a) || And now accept the executorship, and prove the will.

by 55 G. 3.

c. 108. § 37. (*supra*, 465.) if he administer, and omit to take probate within six months after the death of the deceased, he is liable to a penalty of 100*l.*, and also to pay 1*ol. per cent.* on the amount of the stamp duty.||

Ro. Abr. 907.

Off. of Exec.

40. 41. [*Sed**Vide* 1 Mod.

213. that the

administration

in such case

is void.

Yet it is said, that if the judge, knowing that one hath administered, will, notwithstanding, accept his refusal, and commits administration, that is good, for the spiritual judge is the proper judge of the matter; but after refusal and administration granted to another, the executor may not recede from it, and go back to prove the will and assume the executorship.

Off. of Exec.

40, 41.

But, if administration be committed only because the executor did not upon process or summons appear to prove the will, the executor may at any time after come in and prove the will.

Off. of Exec.

40, 41.

If after the executor hath refused, and the ordinary hath committed administration, it appears to the ordinary that the executor had administered before, and so determined his election, he may revoke the letters of administration, and enforce the executor to prove the will.

Leon. 154, 155.

Off. of Exec.

40, 41.

If an executor hath once administered, though he afterwards refuse before the ordinary, yet it seems he still continues liable to the creditors, for the plea is *ne unq. executor, ne unq. administ. come executor.*

Ro. Abr. 907.

If there are several executors, and they all refuse before the ordinary, he may grant administration with the will annexed.

5 Co. 28. 9 Co.

36. Moore, 373.

Dyer, 160.

Hard. 111.

7 Mod. 39.

(b) Salk. 311.

pl. 15. S. P.

where it is

said, that the

civilians held,

that by their

law a renunciation

was pe-

remptory. [So, Robinson v. Pett, 3 P. Wms. 251. Arnold v. Blencowe, at the Rolls, Jan.

31. 1788. *Et vide* R. v. Simpson, 3 Burr. 1463. and 1 Bl. Rep. 456.]

But, if there are several executors, and some of them renounce before the ordinary, and the rest prove the will, by (b) our law they who renounced may, at any time afterwards, come in and administer, having the right in them; and though they never acted during the life of their companions, yet may they come in and take upon them the execution of the will after their death, and shall be preferred before any executor made by their companions, because, as the will is proved, the ordinary has no authority to take the refusal; and probate by one executor entitles all the executors to sue.

10. What Acts amount to an Administration, so that the Party cannot afterwards refuse.

Off. of Exec.

38. Mod. 213.

[If there are

two executors,

and one admi-

nisters, he alone will be charged with the receipts in equity, though he afterwards re-

nounce, and pay over the money to the other executor, who proved the will. Read v.

Truelove, Amb. 417.]

It hath been already observed, that if an executor once administers, he cannot afterwards refuse to prove the will, because by the administration he has made his choice, and subjected himself to the actions of the testator's creditors.

Therefore,

Therefore, it is necessary to consider what acts will amount to an administration, and here we may lay down two general rules: 1st. That whatever the executor does with relation to the goods and effects of the testator, which shews an intention in him to take upon him the executorship, will regularly amount to an administration. 2dly, That whatever acts will make a man liable as an executor *de son tort*, will be deemed an election of the executorship. Ro. Abr. 917.

Hence, it hath been adjudged, that if the executor takes possession of the testator's goods, and converts them to his own use, or disposes of them to others, that this is an administration. Ro. Abr. 917. Dyer, 166. Off. of Exec. 39.

So, if he takes the goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration. Ro. Abr. 917.

As, where the testator being tenant at will of certain goods, his executor seised the goods, supposing them to belong to the testator, with an intent to administer; it was holden, that his intention appearing, this made him executor in law. Ro. Abr. 917.

But if an executor seises the testator's goods, claiming a property in them himself; though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shews a different view and intention in him, than that of administering as executor.

If an executor receives debts due to the testator, and, especially, if he gives acquittances for such debts, this amounts to an election of the executorship. Moore, 14. And. 11. Ro. Abr. 917.

So, if he releases a debt due to the testator. Ro. Abr. 918.

So, if there are two executors, and one of them hath a specifick legacy devised to him, and he takes possession of it, without the consent of his co-executor, this amounts to an administration; for a devisee cannot take a personal chattel devised to him without the assent of the executor. Ro. Abr. 917.

11. *Of bringing in an Inventory, and accounting.*

An inventory is a full and just description of all the personal estate and effects which belonged to the deceased, and which by the civil law, and also by the statutes of this realm, executors and administrators are obliged to make, and present the same to the proper ecclesiastical judge. Godolph. 150. Swinb. 401.

The practice of exhibiting an inventory was introduced from a rule in the civil law, subjecting the heir to the payment of his ancestor's debts; which proving very prejudicial to him, as such debts often amounted to more than the value of the inheritance which descended to him, it was ordained, that if the heir would exhibit a true inventory of all the goods and chattels of the deceased, he should be no farther chargeable than to the value of the inventory; and so much strictness was required by that law in making an inventory, that if the heir neglected it for a year or more, he was obliged to pay all the debts and legacies, though he had not sufficient of the testator's estate to do it. Godolph. 150.

Swinb. 401.

Godolph. 151.

The reason of an inventory with us at this day, is for the benefit of creditors and legatees; and, therefore, every executor is compellable to bring in an inventory, at the discretion of the ordinary; and if he presumes to administer without bringing in such inventory, he is punishable in the spiritual court.

But as this matter of bringing in an inventory and accounting is enjoined and directed by several acts of parliament, we shall here take notice, and in the first place insert those clauses of the statutes which are relative to this matter. By the 31 E. 3. c. 9. "Administrators shall be accountable to the ordinaries as executors be in the case of testaments."

By the 21 H. 8. c. 5. § 4. it is enacted, "That the executor and executors named by the testator or person deceased, or such other person or persons to whom administration shall be committed, where any person dieth intestate, or by way of intestate, calling or taking to him or them such person or persons, two at the least, to whom the said person so dying was indebted, or made any legacy; and upon their refusal or absence, two other honest persons, being next of kin to the person so dying, and in their default or absence, two other honest persons; and in their presence, and by their discretions, shall make or cause to be made a true and perfect inventory of all the goods, chattels, wares, merchandizes, as well moveable as not moveable, whatsoever, that were of the person so deceased, and the same shall cause to be indented; whereof the one part shall be by the said executor or executors, administrator or administrators, upon his or their oath or oaths, to be taken before the bishops, ordinaries, their officials or commissaries, or other persons, having power to take probate of testaments, upon the *holy evangelists*, to be good and true, and the same one part indented shall present and deliver into the keeping of the said bishop, ordinary or ordinaries, or other person having power to take probate of testaments; and the other part thereof to remain with the said executor or executors, administrator or administrators; and that no bishop, ordinary, or other whatsoever person having authority to take probate of testament or testaments, upon the pain in this estatute (a) hereafter contained, refuse to take any such inventory or inventories to him or them presented or tendered, to be delivered as aforesaid."

(a) 101.

By the 22 & 23 Car. 2. c. 10. it is enacted, "That all ordinaries, as well the judges of the Prerogative Courts of *Canterbury* and *York* for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administration of the goods of persons dying intestate, of the respective person or persons to whom any administration is to be committed, take sufficient bonds, with two or more able sureties, respect being had to the value of the estate, in the name of the ordinary,

"with

“ with the condition in form and manner following, *mutatis*
 “ *mutandis*: The condition of this obligation is such (a), that
 “ if the within bounden A. B., administrator of all and sin-
 “ gular the goods, chattels, and credits of C. D., deceased, do
 “ make, or cause to be made, a true and perfect inventory of
 “ all and singular the goods, chattels, and credits of the said
 “ deceased, which have or shall come to the hands, possession,
 “ or knowledge of him the said A. B., or into the hands and
 “ possession of any other person or persons for him, and the
 “ same so made do exhibit, or cause to be exhibited, into the
 “ registry of court, at or before the day of

“ next ensuing, and the same goods, chattels, and
 “ credits, and all other the goods, chattels, and credits of the said
 “ deceased, at the time of his death, which at any time after shall
 “ come to the hands or possession of the said A. B., or into the
 “ hands and possession of any other person or persons for him, do
 “ well and truly administer according to law; and further, do
 “ make, or cause to be made, a true and just account of his said
 “ administration, at or before the day of :

“ And all the rest and residue of the said goods, chattels, and credits,
 “ which shall be found remaining upon the said administrator’s ac-
 “ count, the same being first examined and allowed of by the judge
 “ or judges for the time being of the said court, shall deliver and
 “ pay unto such person or persons respectively, as the said judge
 “ or judges, by his or their decree or sentence, pursuant to the true
 “ intent and meaning of this act, shall limit and appoint. And if it
 “ shall hereafter appear, that any last will and testament was made
 “ by the said deceased, and the executor or executors therein named
 “ do exhibit the same into the said court, making request to have
 “ it allowed and approved accordingly, if the said A. B. within
 “ bounden, being thereunto required, do render and deliver the said
 “ letters of administration (approbation of such testament being first
 “ had and made) in the said court, then this obligation to be void
 “ and of none effect, or else to remain in full force and virtue.

“ Which bonds are hereby declared and enacted to be good to all
 “ intents and purposes, and pleadable in any courts of justice;
 “ and also that the said ordinaries and judges respectively shall
 “ and may, and are enabled to proceed to call such administra-
 “ tors to account, for and touching the goods of any person
 “ dying intestate; and upon hearing and due consideration
 “ thereof, to order and make just and equal distribution, &c.”

But by the 1 Ja. 2. c. 17. § 6. it is provided, “ That no ad-
 “ ministrator shall be cited to any of the courts in the said last
 “ act mentioned, to render an account of the personal estate of
 “ his intestate, (otherwise than by an inventory or inventories
 “ thereof,) unless it be at the instance or prosecution of some
 “ person or persons in behalf of a minor, or having a demand
 “ out of such personal estate, as a creditor or next of kin, nor
 “ be compellable to account before any of the ordinaries or
 “ judges by the said last act empowered and appointed to take
 “ the same, otherwise than as is aforesaid.”

H h 4

(a) [The next of kin, or a creditor, have a right *ex debito justitiæ* to put this bond in suit in the name of the ordinary, Archbishop of Canterbury v. House, Cowp. 140., and, therefore, the ordinary, or his personal representative, may be compelled by *mandamus* to deliver up the bond for this purpose. *Rex v. Johnson, Executrix of the Bishop of Worcester, and others, East, 29 Geo. 3.*]

Per Holt C. J.
 Even before this statute, the ordinary could not *ex officio* cite an administrator to account; so that really this statute has no effect at all, for the law was so before.
Salk. 316.

The

Godolph. 152. The inventory is to contain, in separate and distinct articles, (a) And by all the (a) goods, chattels, and credits, or (b) debts due to the Swinb. 407. deceased, and the prices at which they were valued. the order

heretofore used, was first to inventory and appraise the moveable goods, such as household stuff, corn, cattle, &c.; then the immoveable, as chattels real, or leases of lands, and after, the debts due to the testator; which order, he says, is observed to this day. (b) That, on a plea of *plene administravit*, all sperate debts mentioned in the inventory shall be accounted assets in the executors' hands; for it is as much as to say, that they may be had for demanding, unless the demand and refusal be proved. Salk. 296. pl. 3. ruled upon evidence by Holt C. J. [And if the inventory does not distinguish between the *sperate* and *desperate* debts, it will charge the executor with the whole as assets, and put him to prove if any of them were desperate. Bull. N. P. 140. 2. Upon the issue of *plene administravit*, the plaintiff cannot give in evidence a copy of the inventory delivered by the defendant to the spiritual court, unless it be signed by him, though it be signed by the appraisers: but, if he can give an inventory in evidence, he may shew that the goods were under-valued. *Id. ibid.*]

Godolph. 152. But such things as are fixed to the freehold, and belong to the heir, as glass-windows, wainscot, fish in a pond, and doves in a pigeon-house, are not to be put into the inventory.

Godolph. 153. So, the wife's *paraphernalia*, or such apparel as is suitable to her degree and quality, need not be put in the inventory, for they survive to her, and are not esteemed part of the husband's personal estate.

Swinb. 405. By the ecclesiastical law, the time of making and exhibiting (c) And according to an inventory is left to the discretion of the ordinary, who may require it to be done (c) sooner or later, according to the distance Godolph. 150., the goods lie from the executor, and other circumstances.

the making an inventory is to be begun within thirty days after opening the testament, and notice thereof to the executor, and is to be finished within sixty days after, unless the executor and the testator's goods, or the greatest part thereof, be far remote and distant from each other, in which case the law doth allow one year from the time of the testator's death for the making thereof; and during this time no suit is to be commenced against the executor in the ecclesiastical court; and in Godolph. 225. it is said, that an executor is to have a competent time to account, which time is a twelvemonth.

And as an explanation of the manner of bringing in an inventory and accounting, and the necessity thereof, and how these are construed and required by the common law courts, I shall here insert the following case:

In debt upon an administration-bond, and *oyer* prayed of the condition, defendant pleads, 1st, That he did exhibit an inventory by the time. 2dly, That he had administered all according to law. 3dly, That he was not cited to bring in his accounts, so that no decree was made concerning them. Plaintiff replies, that the intestate was bound in a bond of so much, &c. to *J. S.* for payment of such a sum, and that *J. S.* had brought an action of debt upon that bond against the defendant, and had got judgment; and though divers goods to the value of that debt came to the defendant's hands, yet he had not paid it, but had converted them. Defendant makes a frivolous rejoinder; and upon that the plaintiff demurs; and the question made upon the case is, if the defendant the administrator is bound to bring in his accounts before the ordinary in the ecclesiastical court, by the time specified in the condition of the bond, not being cited or summoned

Hill. 6 Ann. Archbishop of Canterbury v. Willis, Salk. 251. pl. 3. S. C. || This case was cited by Lee C. J. in Folkes v. Dominicque, B. R. 13 & 14 G. 2., and allowed to be law. And it was there holden, that although the administration

moned thereto. And *Holt* Ch. Just. in pronouncing the opinion of the court said, that they were all unanimous, that he was obliged to account though not cited or summoned. And he said first, that an executor or administrator is obliged to account is very plain by the 31 E. 3. st. 1. c. 11., at the end of the statute, where they are made accountable to the ordinary, as executors be in case of testament; and though the ordinary had no power to oblige them to account upon oath, yet, if they were sued in Chancery by any creditor for the discovery of assets, there they were obliged to account upon oath, and the ordinary could not relieve them, *Noy*, 78. 2 Inst., 600. but that the account given in before the ordinary should be looked into, and unravelled. 2dly, If a legatee comes to sue for his legacy, he may unravel the account given in before the ordinary, because he cited them into the spiritual court, and has no remedy elsewhere for his legacy; but, if the executor or administrator will pay the legacy, then he cannot unravel their accounts, because when the legacy is paid, this is the end of their suit; as in *Raym.* 470. *Boon's* case. As to the principal point, this statute 22 & 23 Car. 2. c. 10. was made to make the wife and next of kin as legatees, after all debts paid, and they are to sue for their legacies or shares in the ecclesiastical court; for the law was defective before, in that the ordinary had no power to compel a distribution, because the administrator had the same power as the executor; and after administration committed, the ordinary's power was at an end, and he had nothing more to do with the goods of the intestate; but now this statute was made to ascertain and settle a distribution; and the wife and next of kin may compel the administrator to make such division and distribution, and he is bound at his peril to account by the time limited; and if not done, he must shew some reasons wherefore it was not done; as that no court was then holden, &c., or some other matter which rendered it impossible to account by that time. And it appears by Co. Ent. 1. 8. that the condition of administration-bonds before this statute was, that he should account when thereunto required; not *ex officio*; but now the act of parliament enjoins him to account peremptorily before such a time, and therefore he is bound at his peril to do it; and in all cases where a man is bound in a bond to do a thing, he is bound at his peril to do it; as, if a man is bound in a bond, with condition to pay money at such a time and place, although the obligee does not come there at the time, so as that he cannot pay it; yet if the obligor is not there ready to pay it, and does not stay there till the last instant or sun-set, he forfeits his bond, and he must plead that he was there and staid till sun-set, and had the money ready, and that nobody came there to receive it; and if a request be to be made, he must be there ready to be requested. And he took a difference between rent payable by reservation only, and when a bond is given for it; for in case of the bond he forfeits it, if he be not there ready to pay it, though no demand be made, *Hob.* 8. *Baker* and *Spain*. Suppose one is bound in a bond conditioned to do

bonds taken by 22 & 23 Car. 2. are conditioned for the payment of debts as well as legacies; yet the breach therein is not assignable for the non-payment of debts, but only for the non-payment of legacies; for the spiritual court has no power over the debts. MS. ||

a thing,

a thing, which without the concurrence of the obligee cannot be done, as to levy a fine in *C. B.* in *Oct. Hil.* if no writ of covenant be sued out, yet he is bound to be there at the time ready to levy it, and must plead so, and that no writ of covenant was sued out; so here, if he could not account, because no court was holden, he ought to have pleaded it, for he ought to have done all in his power; but it is most certain the ecclesiastical courts are always open, and the statute makes no alteration as to the accounts. But then he made another point of the case, and ordered counsel to speak to it the next term. The point was this, the bar, which says he was never cited to account, is ill, because he ought to have accounted at his peril, without any citation; but then this leaves room for an implication, that he may have accounted, though not cited; for he only says, he was not cited to account, and then the replication, which assigns for breach, non-payment of such a debt, is ill, and does not maintain the declaration as to the not accounting; and the meaning of the statute was not, that he should pay all debts *ex officio*, but as the creditors called him to pay them; and then whether the plaintiff shall have judgment upon the insufficient bar of the defendant, or whether by his replication it appears he has no cause of action, and so cannot have judgment, is a point fit to be argued, and cited 1 *Lutw.* 182. 8 *Co.* 120. *Dr. Bonham's case*, and 130. *Turner's case*.

Swin. 228.

[If the executor enter to the testator's goods, and will make no inventory thereof, then may every legatory recover his whole legacy at his hands; for, in this case, the law presumeth, that there are sufficient goods to pay all the legacies, and that the executor doth secretly and fraudulently subtract the same; whereas otherwise, the executor is presumed not to have any more goods which were the testator's, than are described in the inventory (a), the same being lawfully made.

(a) Nor shall the inventory

be conclusive on him, if there should be afterwards an unexpected deficiency of the assets.

2 *Ves.* 194.

Corporation of Clergy-men's Sons v. Swainson, 1 *Ves.* 75.

If the executor make no inventory, but pay interest on a legacy, or pay all the legacies but one, this shall be received as evidence of assets as to that legacy, though not positively conclusive.]

Orr v. Kaines, 2 *Ves.* 194. *Belt's Supplem.* 324.

4 *Burn's E. L.* 267. *Hinton v. Parker*, 8 *Mod.* 168. *Catchside v. Ovington*, 3 *Burr.* 1922.

¶ After an inventory is exhibited, a creditor cannot impeach it in the ecclesiastical court; for the stat. 21 *H.* 8. which requires an executor or administrator to make an inventory, enjoins him only to deliver it on oath into the keeping of the ordinary, who is bound to receive it on its being so presented.

2 *Fonbl.* 418. *Note.*

A creditor may indeed state objections to the inventory in that court, which the party is bound to answer upon oath; but no evidence is admissible to contradict the answer. If the creditor is still dissatisfied, he may resort to equity for more effectual relief.

By

By the custom of *London*, if any man or woman free of the city, die, leaving an orphan within age, and not married, the mayor and aldermen may compel the executor or administrator to appear at a court of orphanage, and exhibit an inventory; and in case any debt appear to be outstanding, to give security to the chamberlain to render upon oath a true account of the same when received; and on his refusal, may commit him till compliance. Nor shall his having already given security to the spiritual court, release him from the obligation of the custom.||

Toll. Exec.
254. Com.
Dig. Guardian
(G. 1.) Luch's
case, Hob. 247.
1 Ro. Abr. 550.
S. C.

12. Where Administration unduly obtained may be revoked or repealed.

It seems to have been formerly holden in some cases, that if the ordinary once granted administration, he could not afterwards revoke or repeal it; for having once executed his power, he had nothing further to do in the affair.

Fotherbie's
case, Cro. Car.
62. Ro. Abr.
303. Style, 10.
6 Co. 18. Cro.
Eliz. 459. Moore, 396.

Hence in *Sir George Sands's* case, where a prohibition was prayed, because *Sir George* had the administration of his son's goods granted to him; and since that a woman, pretending she was his wife, sued to have the administration repealed; a prohibition was granted; for though the statute says, the ordinary may grant administration to the wife or next of kin; yet when he has granted it to the next of kin, as the father is, he has executed his power, and his hands are closed, and he cannot repeal it.

Sir George
Sand's case,
Sid. 179. Keb.
683. and
Raym. 93.
S. C. in which
last book a
further reason
seems to be
given, viz. that
our law is to
determine

who is the next of kin within this statute; and that by our law the father is next of kin to his child, *vide* 3 Co. in *Ratcliffe's* case, and Bro. tit. Administration, 47. But 3 Salk. 22. *feme covert* died intestate; administration granted to her next of kin; husband sues for a repeal; prohibition denied, for ordinary could not grant administration to any but the husband.

But, notwithstanding these opinions, it is now agreed, that the ordinary may revoke or set aside an administration granted to the next of kin, and that for several causes; as, if they forge or suppress a will; if they come too hastily to take out administration within the fourteen days; if they go beyond sea; become *non compos*; or if they take out administration without security to account and exhibit inventories; or, if there be a residuary legatee; and may in general, for any fraud used in obtaining it; for it would be absurd to allow a court jurisdiction herein, and at the same time deprive them of the liberty of vacating and setting aside an act of their own, which was obtained from them by deceit and imposition.

Latch. 67.
Dyer, 372.
Sid. 280.
Lev. 157.
Keb. 846. 854.
2 Keb. 63. 72.
Sid. 293. 370.
Lev. 186.
2 Lev. 55.
2 Str. 911.

13. How far a Repeal makes all mesne Acts void.

If the testator makes a will and appoints an executor, and the ordinary, without taking notice of any such will, grants administration to *J. S.*, and afterwards the executor comes in and proves the will, such executor shall regularly avoid all mesne

acts

Greysbrook
and Fox,
Plow. 277.
2 Lev. 182.
2 Jon. 72.
Vent. 303.

acts done by the administrator; for the executor, by being made such, had an (a) interest, which the ordinary could not deprive him of.

(a) And therefore if an executor sells a term, and afterwards refuses before the ordinary, and administration is granted to J. S., who likewise sells this term to another, the first vendee shall have it. 2 Lev. 183. said *arguendo*.

Peckham's case, Plow. 279. 4 Eliz. cited in Greysbrook and Fox. (b) So, it was holden in equity, where a widow possessed herself of the personal estate as executrix under a revoked will, and paid debts and legacies, but had no notice of the revocation, that she should be allowed those payments. Chan. Ca. 126.; but ordered the leases she had made to be set aside.

But, if the ordinary grants administration, and after there appears to be an executor, if the administrator pays debts, legacies, or funeral expences, which the executor ought to have paid, in trespass against him by the executor, he shall (b) recoup so much in damages.

Ro. Abr. 919. 16 Car. 1. in B. R. between Greves and Weigham, said to be adjudged by the advice of all the judges in Serjeants' Inn, in an action brought by B. against such creditor. [Comyns, 150. But see 3 T. R. 125. *contra*—where the authority of the cases, both in Rolle and Comyns, is denied. See also S. P. Stephens v. Langley, Finch's Rep. 40. Vin. Abr. tit. Executors, (M. 10.) pl. 6.]

If the testator makes a will, and thereof appoints A. executor, and afterwards makes a second will, and thereof appoints B. executor, and A. has the probate of the first will granted to him, by virtue of which a debtor to the testator pays him a debt without notice of any second will, and has a release from him; yet, upon B.'s proving the second will, and repeal of the probate of the first, he may compel the debtor to pay the money over again; for though this be a particular hardship, yet the inconveniency would be much greater, to allow the ordinary to make any other executor than whom the testator had made.

Hill. 25 & 26 Car. 2. between Digby and Hollis v. Wray in B. R. (c) That an appeal suspends the former sentence; but a citation is in nature of a new suit, and has no effect till there be judgment on it. 6 Co. 18. b. Lev. 158.

But in a case where the plaintiffs, as executors, had a judgment against the defendant, and then there was a suit in the spiritual court before the same judge, who granted letters of administration to the plaintiff to repeal them; and the defendant therefore prayed that execution might not go out against him till the matters in the spiritual court should be determined; the court denied it, for this reason, that if a debtor pay money on a judgment and execution to one who is executor *de facto*, having a probate under the seal of a prerogative court, he shall never be forced to pay it again; and here the suit to repeal the administration being before the same judge who granted it, can have no influence only from the time of the judgment of repeal; but, (c) if it had been before the delegates by way of appeal, it might be otherwise.

Raym. 224. 2 Lev. 90. S. P.

6 Co. 18. b. Packman's case. Cro. Eliz. 459. Moore, 396. S. C.

(d) So, if ad-

It is clear, that if the ordinary grants administration to (d) a stranger, and he is cited by the next of kin to have it repealed, pending which suit the administrator (e) sells the goods, and then the administration is repealed; that in this case the sale is good, for the administrator acted under a lawful authority, which vested the absolute property of the goods in him; and though

though the sale had been fraudulent, yet it could not be avoided by the second administrator; but as to creditors it may, by the 13 Eliz. c. 5. administration be committed to a creditor, and after repealed at the suit of the next of kin, he shall retain against the rightful administrator; and his disposal of the goods, even pending the citation, till sentence of repeal, stands good. Salk. 38. pl. 6. Ld. Raym. 684. Com. Rep. 96. pl. 65. per Holt C. J. (c) But, where an administrator released to a creditor, and after the administration was revoked, the release was holden void. Brown. 51.

So, in debt for rent, where on the pleadings the case was, lessee for years died intestate, and administration was granted of his goods to A., who assigns this term to B., who assigns to C., who surrenders to the reversioner; afterwards a third person cites the administrator before the ordinary to repeal the administration, who confirms the same; then the third person appeals from that sentence to the dean of the arches, where the sentence is avoided, and administration granted to the appellant—whether this avoidance of the sentence should avoid all acts done by the administrator before the action was the question; and it was resolved, according to the above case, that it should not. Syms and Syms, Raym. 224. 2 Lev. 90. S. C. by the name of Semaine and Semaine.

But after the administration is repealed, the authority of the administrator is determined; and, therefore, if he obtains judgment in an action of debt on a bond due to the intestate, and then the administration is repealed, he cannot proceed to execute that judgment; if he doth, the party will be discharged upon motion, because the execution *erronice emanavit*, for he had no authority but by virtue of a commission from the ordinary, and when that was determined, his authority ceased. Barnehurst and Sir Charles Yelverton, Yelv. 83. Brownl. 91. S. C.

So, in an *audita querela*, the plaintiff says, that E. P. died intestate, and that Davies, the now defendant, had administered his goods, and that some of the money came to the plaintiff, and that Davies, as administrator, brought trover and conversion for the money, and had judgment to recover, and before execution sued, the administration was repealed and granted to another, and that notwithstanding he threatens to take the now plaintiff in execution, upon which there is a demurrer; and the question was, Whether, seeing the trover was for a wrong done in the administrator's time, and for which he might have declared in his own name, without naming himself administrator, and shall pay costs if it goes against him, whether he shall not take out execution after the administration is repealed? and the whole court held, that he could not; for though it be a wrong done to the administrator, yet when the money is recovered, it is assets, and the second administrator must be put to another action, to recover it out of his hands, which is a circuitry the law will not allow. Turner v. Davies, 2 Saund. 137. Mod. 62. 2 Keb. 668. S. C.

14. What Things an Executor may do before Probate of the Will.

An executor derives all his interest from the (a) will; and as it is that which gives him a right, so there are several acts which he
 Off. of Exec. 33. Godolph.

144. Ro. Abr. he may do, and which will be valid, though done before probate; for though the spiritual court may compel him to come in and prove the will, or renounce the executorship; yet this is only looked upon as (b) a ceremony, which he may comply with after several acts done by him.

917. 5 Co. 27. Co. Litt. 292. (a) But an administrator derives his whole authority from the ordinary, and therefore can do no act, unless he has letters of administration granted to him. Salk. 303. Skin. 87. pl. 5. (b) That, however, proving the will is necessary, because thereupon an inventory is to be exhibited, and other acts to be done, which are for the benefit of executors and legatees. Hut. 30.

Off. of Exec. Therefore, an executor, before probate, may possess himself of the testator's goods, and may enter into the house of the heir (if not locked) and take specialties and other securities for money due to the testator.

33. Godolph. 144. 2 And. 151. Plow. 277.

Off. of Exec. So, an executor, before probate, may pay debts and legacies, receive debts, make acquittances and (c) releases of debts due to the testator, and take releases and acquittances of debts owing by the testator.

33. 34. 5 Co. 28. (c) Where a release given by an executor

for a particular purpose, though it contained general words, yet was holden to extend only to the things intended to be released, *vide* 2 Lev. 214. Morris and Wilford, 2 Mod. 108. 2 Jon. 104. 2 Show. 46. pl. 32. 3 Keb. 814. 840. S. C.

Off. of Exec. Also, an executor, before probate, may sell, give away, or dispose, as he thinks proper, of the goods and chattels of the testator.

34.

Off. of Exec. So, an executor, before probate, may assent to a legacy, and such assent shall vest the interest in the legatee.

34.

Off. of Exec. So, if a bond be made payable to the testator, with a certain penalty, that it shall be paid by such a day, and the testator dies before the day, the principal sum must be paid his executor by the day, although he did not prove the will by that day; otherwise the penalty is forfeited. *

34. * But now the penalty is saved by bringing principal, interest, and costs into court, by 4 Ann. c. 16. § 13.

Ro. Abr. 917. Upon this foundation, that it is the will which vests an interest in the executor, it is clearly agreed, that an executor may, before probate, commence an action in right of the testator, but he cannot declare before probate; for without producing his letters testamentary he cannot assert his right in court; but as soon as he has these, the impediment is (d) removed *ab initio*.

Raym. 481. Salk. 302. S. P. admitted, Comb. 371. (d) But if A. be arrested at the suit of an executor, before probate of the will, and after pay money to a stranger, and continue two months in prison, the arrest *quoad* the stranger is illegal, and A. shall not be adjudged a bankrupt from that time, so as to avoid the payment made to the stranger; for though the arrest, as to the executor and party, is lawful; yet it is good only by relation; but no such relation shall prejudice a third person. 3 Lev. 57. Duncomb and Walter, Raym. 479. Vent. 370. S. C. Skin. 22. 87. pl. 5. S. C.

Humphreys v. Humphreys, 3 P. Wms. 351. (e) Pat- chequer, *arguendo*, that it had been determined by that court

about three years ago, that it was sufficient if the probate were obtained at any time before hearing.]

v. Panton, to a bill by the plaintiff as executrix, for an account of money which the defendant was charged with having embezzled; and that certain annuities purchased by the plaintiff in the 5 *per cents.* might be transferred to the plaintiff; the defendant pleaded that no probate had been granted, and that a suit was depending between the plaintiff and defendant touching the right of the plaintiff to probate. The court gave no judgment upon the argument, and the case was never afterwards moved.

trix, v. Panton,
1793. In this
case of *Patten*

Also, an executor, before probate of the will, may maintain trespass, (a) trover, or detinue for the goods of the testator, and declare as of his own possession.

Off. of Exec.
35. 8 Co. 144.
Yelv. 33. 83.
125. Cro.

Car. 208. 227. Salk. 302. (a) May maintain trover in his own name before the seizure of the goods or the probate of the will. *Carth. 154. per Curiam.*

So, where a reversion for years comes to an executor from his testator, he may avow without probate for the rent which accrued after the testator's death, though not for such as accrued before.

Salk. 302.
7 T. R. 359.

So, he may maintain actions upon contracts either actually made with him subsequent to the death of the testator; or arising by implication of law, as *assumpsit* for the goods sold by him, or for money due to the testator, and received by the defendant after the testator's death.

Anon. 1 Ventr.
109. *Bollard*
v. Spencer,
7 T. R. 358.
Harris v.
Hanna, Ca.
temp. Hardw.

204. *Cockerill v. Kynaston*, 4 T. R. 277. *Nicholas v. Killigrew*, 1 *Ld. Raym.* 436. *Toll. Executors*, 48.

So, if an executor be entitled to the next presentation to a church which becomes void, and he grant it to another, the grantee may maintain a *quare impedit* for it, without producing the probate of the will; for the executor himself, before probate, might have maintained this action on his own possession.

Off. of Exec.
35.

(F) *What Persons are entitled to Administration.*

BEFORE the statute of West. 2. c. 19. the ordinary had the absolute disposal of intestates' estates; and as that statute first subjected them to an action at the suit of creditors; so from thence they found, as my Lord *North* observes, that what was before very beneficial to them began to be very troublesome, which obliged them to put the administration into other hands, taking security to save them harmless from suits.

Raym. 497.

But this method did not entirely free them from the trouble they had before; for such persons, being looked upon as servants, or attorneys to the ordinaries, could not sue for, nor gather in the intestate's estate.

2 Inst. 397.
Co. Litt. 133.
Ro. Abr. 906.

But they were eased herein by the statute 31 E. 3. c. 11., which enacts, "In case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods, which deputies shall have

" have

“ have an action to demand and recover, as executors, the
 “ debts due to the said person intestate in the king’s court, for
 “ to administer and dispend for the soul of the dead, and shall
 “ answer also in the king’s court to others to whom the said dead
 “ person was holden and bound, in the same manner as execu-
 “ tors shall answer. And they shall be accountable to the ordi-
 “ naries, as executors be in case of testament.”

And by the 21 H. 8. c. 5. § 3. ¶ “ In case any person die in-
 “ testate, or the executors named in any testament refuse to
 “ prove the said testament, then the ordinary, or other person
 “ having authority to take probate of testaments, shall grant
 “ the administration of the goods of the testator, or person de-
 “ ceased, to the widow of the same person deceased, or to the
 “ next of his kin, or to both, as by the discretion of the same
 “ ordinary shall be thought good.”—“ And in case where di-
 “ vers persons claim the administration as next of kin, which be
 “ equal in degree of kindred to the testator or person deceased;
 “ and where any person only desireth the administration as next
 “ of kin, where indeed divers persons be in equality of kindred,
 “ as is aforesaid; in every such case the ordinary to be at his
 “ election, and liberty to accept any one or more making re-
 “ quest, where divers do require the administration.” § 4. Or
 “ where but one, or more of them, and not all being in
 “ equality of degree, do make request, then the ordinary to ad-
 “ mit the widow, and him or them only making request; or any
 “ of them, at his pleasure.”¶

Raym. 498.

Hereupon the common law was to judge who were the best friends; and therefore if there were husband and wife; in default of them, son or daughter; in default of them, or their children, father or mother; in default of them, brothers or sisters; in default of them, or their children, uncles or aunts; the ordinary was compellable to grant administration to them in their several orders.

Raym. 498.

But, as they had a liberty by the statute of granting administration to the wife or next of kin, so also had they a liberty, where there were several in an equal degree of kindred, to prefer whom they pleased, which liberty they made use of on pretence of avoiding confusion, and was a matter of great advantage to their jurisdiction; for hereby they chose him that was most obsequious to them; and when they called him to account, upon pretence of bestowing the overplus for the good of the deceased’s soul, (a device in those popish times to make profit for the clergy,) they disposed of the overplus as their own.

(a) Hob. 83.
 191. Cro.
 Car. 62. 202.
 Jon. 228.

But it came afterwards to be solemnly (a) resolved, that the ordinary, after administration granted by him, could not compel the administrator to make distribution; and it being very unreasonable that one person should run away with the whole personal estate, though there were several others in equal degree of kindred with him; this mischief was remedied by the 22 & 23 Car. 2. c. 10., which allows all those who are in equal degree to

come

come in for a distributive share, though one only, or though a creditor or stranger takes out administration.

It seems to have been always holden (a), that the husband was entitled to administration as best friend to his wife, within the words of the statute 31 E. 3. st. 1. c. 11.; but there being some doubt, whether since the statute of 22 & 23 Car. 2. c. 10., he was not obliged to make distribution amongst the rest of her kindred, it was thought proper to settle this matter by a subsequent law.

minister to his wife is controverted by some. Cro. Car. 106. Others conceive him entitled within the equity of the stat. 21 H. 8. whereby the ordinary is directed to grant administration of the husband's effects to the wife, or next of kin, or to either. Vin. Abr. tit. Executors, (K.) pl. 4. Moore, 871. Others support his claim, by the statute of 31 E. 3. not as described *ex nomine* in that statute, but as comprehended within its general provision, 1 Salk. 36. Vin. Abr. tit. Executors, (E.) (K.) pl. 4. (M. 9.) pl. 27. 1 Show. 327. 1 P. Wms. 344. Fettiplace v. Gorges, 1 Ves. jun. 9. Others hold, and among them is Lord Chancellor Loughborough, (Watt v. Watt, 3 Ves. 246.) that the husband is entitled at common law, *jure mariti*, and that his right is not derived from any of the statutes, but, on the contrary, though it derives support from them, it exists independently on them all. Com. Dig. tit. Administrator, (B. 6.) 2 Bl. Comm. 515. 4 Co. 516. Ro. Abr. tit. Executor, (K.)]

4 Co. 51. b.
Oguel's case.
Ro. Abr. 910.
Cro. Car. 106.
Show. 351. Sid.
409. [(a) This
exclusive right
of the hus-
band to ad-

And accordingly by the 29 Car. 2. c. 3. § 25. it is enacted,
“ That neither the said statute 22 & 23 Car. 2. c. 10., nor any
“ thing therein contained, shall be construed to extend to the
“ estates of feme covert that shall die intestate (b), but that
“ their husbands may demand and have administration of their
“ rights, credits, and other personal estates, and recover and
“ enjoy the same as they might have done before the making of
“ the said act.”

[(b) For a
feme covert
may make a
will with the
consent of her
husband, and
in such case,

he cannot be entitled to administration. R. v. Bettesworth, 2 Str. 1112. Marshall v. Frank, Pr. Ch. 480. Gilb. Eq. Rep. 143. S. C. He may, indeed, administer to her notwithstanding a will, if she have power to dispose only of part of her property. R. v. Bettesworth, 2 Str. 891.—In case of the husband's death *after* the wife, the administration must be granted to his next of kin. Squibb v. Wynn, P. Wms. 378. Bacon v. Bryant, 11 Vin. Abr. tit. Executors, (K.) pl. 25. Humphrey v. Bullen, *id.* pl. 26. Elliott v. Collier, 3 Atk. 526. 1 Ves. 15. 1 Wils. 168. Bouchier v. Taylor, Hargr. Law Tracts, 473. 7 Br. P. C. 414.]

Also, since the statute 22 & 23 Car. 2. c. 10. the ordinary may grant administration to the wife or next of kin, at his election, but then she must have her distributive share: also, the ordinary may grant administration *quoad* part to the wife, and as to the other part to the next of kin; in which case neither can complain, since the ordinary need not have granted any part of the administration to the party complaining.

Sid. 179.
Raym. 93.
Show. 351.
Salk. 36.
3 Danv. 407.
pl. 1. Holt,
42. pl. 1.

¶ Although a feme covert be entitled to the administration, yet she cannot administer without her husband's permission, because he is required to enter into the administration bond, which she is incapable of doing. If it can be shewn by affidavit, that the husband is abroad, or otherwise incompetent, a stranger may join in such security in his stead. In either case the administration is committed to her alone, and not jointly with her husband; else, if he should survive her, he would be administrator, contrary to the meaning of the act.

Toll. Exors. 91.
2 Bl. Rep. 801.
Vin. Abr. tit.
Executors, (K)
Com. Dig. tit.
Administra-
tion. (D)
4 Burn's E. L.
241. 3 Salk.
21. Sty. 75.

If it were committed to them jointly, during coverture only, it

1 Salk. 306.
2 Bl. Rep. 801.

might, perhaps, be good, because, if committed to the wife alone, the husband, for such period, may act in the administration with or without her assent; and therefore the effect of the grant seems in either case the same. ||

2 Vern. 125.
said *arguendo*.

[(a) For the
proximity of
degree is reck-
oned according

If there be grandfather, father, and son, and the father die intestate, the son shall have the administration, and not the grandfather, though they be both in equal degree (a), as to nearness of kindred.

to the civilians. Pr. Ch. 593. 2 Ves. 215.]

(b) Black-
borough v.
Davis, 1 P.
Wms. 40.
Woodroffe v.
Wickworth,
Pr. Ch. 527.

[If there be neither father nor son of the intestate, the next in succession are (b) brothers and grandfathers: these are followed by (c) uncles, or nephews, and the females of each class respectively, who must, as equally near, take *per capita*, and not *per stirpes*; and lastly, cousins.

(c) Durant v. Prestwood, 1 Atk. 454. Loyd v. Tench, 2 Ves. 215.

Croke v. Watt,
2 Vern. 124.
Show. P. C.
108.

A brother of the half blood shall exclude an uncle of the whole blood, for the half blood are of the kindred of the intestate; and the ordinary may grant administration to the sister of the half, or brother of the whole blood at his discretion.

Bac. Elm. 80.
1 Salk. 38.

If none of the kindred will take the administration, it may be granted to a creditor.

Pierce v.
Parks, 1 Sid.
281. Thomas
v. Butler,
1 Vent. 219.
Plowd. 278. a.

If the executor refuse, or die intestate, the administration is to be granted to the residuary legatee, in exclusion of the next of kin.

In defect of all these, the ordinary may commit administration, as he might have done before the statute of Edw. 3., to such discreet person as he approves of, or may grant letters *ad colligendum bona defuncti*.

Manning v.
Napp, 1 Salk.
37. Jones v.
Goodechild,
3 P. Wms. 33.
See Dougl.
542.

If a bastard, (who hath no kindred, being *nullius filius*.) or any one else that hath no kindred, die intestate, and without wife or child, it hath been formerly holden, that the ordinary could seize his goods, and dispose of them to pious uses: but the usual course now is, for some one to procure letters patent, or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown.]

(d) Whether a
person's giving
security and
an entry in
the registry of
the adminis-
tration, be
sufficient with-
out taking out
letters of ad-
ministration,
vide Show.
406. &c.
(e) 4 Mod.
15.

(G) In what (d) Manner the Ordinary may grant Administration; and herein of granting it to one or more, or for a particular Thing.

THERE hath been some (e) doubt whether the ordinary could grant administration to one during the absence of the person appointed executor. The reasons offered against it were, that his authority herein was entirely regulated by the statutes, which mention no such administrator; that creditors would be put to great hardships, in being obliged at their peril to take notice of the return of such absent person, which determining the

the authority of the administrator would put them under a necessity of commencing their actions a-new, which would be great delay and expence to them: but notwithstanding these reasons, it is now clearly (a) agreed, that the ordinary may grant administration during the absence of another, and that for the same reasons for which he may grant administration during the nonage of an infant executor, or one entitled to administration; for without this power the inconveniency to creditors would be much greater, in that there would be no person against whom they could commence their actions, nor any one to take care of the deceased's estate or effects.

(a) 5 Co. 9. Sid. 185. Keb. 682. and by 1 Ro. Abr. 90. if the person entitled to administration be outlawed, in prison, or beyond sea, the ordinary Salk. 42. pl. 11.

may grant administration to another, for which is cited 34 H. 6. 14.; & vide Sec 3 Sulk. 23. 2 Ld. Raym. 1071. 6 Mod. 304. Lutw. 342. S. P. admitted.

¶ And by the stat. 38 G. 3. c. 87. "if at the expiration of twelve calendar months from the death of any testator, the executors or executor to whom probate of the will shall have been granted, are or is then residing out of the jurisdiction of His Majesty's courts of law and equity, it shall be lawful for the ecclesiastical court, which hath granted probate of such will, upon the application of any creditor, next of kin, or legatee, grounded on an affidavit therein mentioned, stating the nature of his demand, and the absence of the executor, to grant such special administration in the form therein set forth."¶

Also, there appears to have been some doubt whether the ordinary could grant administration *pendente lite* of a will; and in *Moore* it is said, *semble per Cur.* that he could not.

Moore, 606.; Robin's case, but in 2 Show. 69., it seems

to be taken for granted, that there may be an administrator *pendente lite* of a will; for there the question was, whether such an administrator was liable to an action; and said to be clearly agreed, that he was, for that he was fully administrator for the time. *Vide infra.*

And in *Carthew* it is reported as the opinion of the court, that administration *pendente lite* concerning a will, is utterly void, and a difference there taken, where there is a controversy in the spiritual court concerning the right of administration, and where it is concerning a will; for in the first case an administration granted *pendente lite* is good; but it is otherwise where the controversy is concerning a will, for he who comes in under a will shall avoid all that which an administrator can do.

Frederick v. Hook, Carth. 153.

But this matter came fully to be considered in a late case, in which it was determined, that the ordinary may grant administration *pendente lite* of a will, and that it depended on the same reasons by which he is enabled to grant administration *durante minoritate* or *absentiâ*.

Mich. 1731. between Wolleston and Walker, 2 P. Wms. 576. Fitzgib. 202.

Barnard, K. B. 423. 2 Str. 917. ¶ But the jurisdiction of a court of equity to protect the property by the appointment of a receiver pending a litigation for probate or administration in the ecclesiastical court, is not ousted by this power in that court to grant administration *pendente lite*. King v. King, 6 Ves. 172. Atkinson v. Henshaw, 2 Ves. & Beam. 85. Ball v. Oliver, id. 96. Gallivan v. Evans, 1 Ball & Beat. 191. Phipps v. Steward, 1 Atk. 285. Wills v. Rich, 2 Atk. 285. But Knight v. Duplessis, 1 Ves. 325. and Richards v. Chave, 12 Ves. 462. *contr.*¶ [*Lis pendens* about the will is a good return to a mandamus to grant a probate, Andr. 366. or administration. 4 Burr. 2295. 1 Bl. Rep. 640.]

Adair v. Shaw,
1 Sch. & Lefr.
243.

|| The authority conferred by letters of administration *pendente lite* is merely to collect the effects and to pay debts. Such an administrator has nothing to do with the will; he is only to hand over the assets to the person entitled, or to dispose of them pursuant to the directions of a court of equity. He has no authority to pay legacies; though, if paid *bonâ fide*, a court of equity will allow him for it.||

Adams v.
Buckland,
2 Vern. 514.
Hudson v.
Hudson, Ca.
temp. Talb.
127. Eyre v.
Countess of
Shaftesbury, 2 P. Wms. 121.

The ordinary may grant administration to two, or more, and if one of them dies, yet the administration does not cease; for it is not like a letter of attorney to two, where by the death of one the authority ceases; but it is rather an office, and administrators are enabled to bring actions in their own names, for they come in the place of executors, and therefore the office survives.

Ro. Abr. 908.
Salk. 36. pl. 2.

Also, the ordinary may grant administration as to a particular thing or place to one, and so of another part of the intestate's estate to another; but he cannot grant several administrations for one and the same thing; as, if the intestate leaves a bond-debt of 100*l.*, or a horse, &c.; for these things being entire things, it would be absurd, that two persons should have a right to them.

Com. Dig. tit.
Administrator
(B. 7.) Ro.
Abr. tit.
Executors.(D)
pl. 2.

|| Administration may be also granted on condition, as, where a former grantee is outlawed, and in prison beyond sea, it may be committed to another, but so as if the first grantee shall return, he shall be entitled to administer.

By st. 55 G. 3. c. 184. § 38. "no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons an affidavit, or solemn affirmation in the case of *Quakers*, that the estate and effects of the deceased for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting any thing on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge, information, and belief, in order that the proper and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased."

The affidavit, which is in the 2d section, states the nature of the demand upon the estate, that the only executor capable of acting is out of the jurisdiction, and that the deponent is desirous
of

of exhibiting a bill in equity, for the purpose of being paid his demand out of the assets.

By the form of the administration, as prescribed in the 4th section, it is directed that the party shall be administrator for the purpose of becoming a party to a bill or bills to be exhibited against him in any of his Majesty's courts of equity, and to carry the decree or decrees of any of the said courts into effect, but no further or otherwise.

By § 4. "it shall be lawful for the court of equity in which such suit shall be depending, to appoint (if it shall be needful) any persons or person to collect in any outstanding debts or effects due to such estate, and to give discharges for the same, such person or persons giving security in the usual manner duly to account for the same."

By § 5. it is provided, that "if the executors or executor capable of acting as such, shall return to and reside within the jurisdiction of any of the said courts pending such suit, such executors or executor shall be made party to such suit, and the costs incurred by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such persons or person, or out of such fund as the court where such suit is depending shall direct."

The administration under this statute being, not for a limited time, but for a limited purpose, must continue until that purpose be effectually answered. It does not cease immediately upon the return or death of the executor; for then the suit would abate, to which the act requires that the executor returning shall be made a party. The substitution must be entirely made, the administrator's accounts settled, and his expences satisfied, before his connexion with the suit is determined. ||

Taynton v. Hannay, 3 B. & P. 26. by two judges against Lord *Alvanley* C. J. But see acc. S. C. 7 Ves. 460.

(H) What shall be deemed the Testator's Personal Estate, or Assets in the Hands of the Executor: And herein,

1. *What shall be such an Interest vested in the Testator, as shall go to his Executors.*

ALL the personal estate whereof the testator died possessed, whether it consists in chattels real, as leases for years, mortgages, &c. or chattels personal, as household goods, money, cattle, &c. (the first of which the civil law distinguisheth by the name of immoveable goods, the latter of moveable,) belong to the executors, and are (a) assets in their hands for payment of the testator's debts and legacies.

Off. of Exec. 52. *Godolph.* 180. (a) For assets in the hands of the heir, vide tit. *Heir and Ancestor.*

And as the executor represents the testator as to his personal estate, therefore, let the value of the thing be ever so inconsiderable, yet the executor shall have the same interest as the testator had in it; as, if the testator had dogs, ferrets, &c., they belong

Off. of Exec. 57, 58.

to the executor; and if taken from him, the law gives him the same remedy which the testator had.

Off. of Exec. Also, he hath the same interest in an apprentice (a) which the
95. vide tit. testator had, and shall be bound according to his testator's
Master and covenant, to provide for such apprentice, &c.
Servant.

(a) || But *qu.* the contract, in regard to instruction, being in its nature merely personal, and dying with the master. *Baxter v. Burfield*, 2 Str. 1266. *Pearce v. Chamberlain*, 2 Ves. 35. See also St. 32 G. 3. c. 57., which empowers two justices upon application within three months after the master's decease, to order apprentices with whom no more than five pounds have been paid at binding, to serve out the remainder of their time with the widow, son, daughter, brother, sister, executor, or administrator of such master, they having lived with and been part of his family at the time of his death. But, though the apprentice be not strictly transmissible, yet, if, with the consent of all parties and his own, he continue with the executor, it is a continuation of the apprenticeship, provided, in the case of a trade, it be of the same species. *R. v. Stockland*, Dougl. 70. *R. v. Bridgford*, 2 Str. 1115. The assets are liable on the master's covenant to maintain the apprentice, Cro. El. 553. 1 Sid. 216. 1 Salk. 66.; but justices of the peace have, generally speaking, no authority to order an executor to maintain an apprentice; for such a jurisdiction would prevent his insisting by a plea of *plene administravit* on a deficiency of assets as an exemption. *Carth.* 231. 1 Show. 405. It was said by *Holt C. J.* that, by the custom of *London*, the executor is bound to put the apprentice to another master of the same trade. 1 Salk. 66. ||

Off. of Exec. So, of a debtor in execution at the suit of the testator, he has
46. an interest in the body, which is a pledge for the debt, and the prisoner cannot be discharged without the concurrence of the executor.

St. 8 Ann. || So, the testator's interest in his literary property may devolve
c. 10. 15 G. 3. upon the executor pursuant to several statutes.
c. 53. 8 G. 2.
c. 13. 7 G. 3. c. 38. 17 G. 3. c. 57.

St. 21 Ja. 1. So may the testator's interest in a patent granted to him for
c. 3. the invention of a new manufacture within the realm. ||

Off. of Exec. And as the law lays the burden of performing the testator's
65. Ro. Abr. will on the executor, and for that purpose gives him the personal
921. Hob. 265. estate; so it supposes and vests the interest in him before he has actually reduced the goods into his possession, and therefore all the testator's personal estate, how remote soever situated, is (b) assets in the hands of the executor.

(b) And therefore where the jury found assets in *Ireland*, it was holden surplusage; and that if the executor hath goods in any part of the world, he shall be charged with them. 6 Co. 47. a. || In *Bligh v. Darnley*, 2 P. Wms. 622. the Master of the Rolls doubted whether a leasehold estate in *Scotland* could be looked upon as personal estate in *England*, though he admitted that such an estate in *Ireland* might be so considered. || [An estate in the plantations is testamentary, and assets to pay debts. *Noell v. Robinson*, 2 Ventr. 358.] — But, if an executor lives in *London*, and his testator hath goods in *Bristol*, though the executor hath such an immediate possession of those goods, that he may maintain trover for them in his own name, and the damages recovered shall be assets in his hands; yet, if he doth not recover so much as the goods are really worth (if there be no default in him), he shall answer for no more than he recovers; and if the goods are perishable, and are impaired, without any default in him, either to preserve them, or to sell them at the full value, he shall not answer for the first value, but may give that matter in evidence to discharge himself; but, if he neglects to sell the goods at a good price, and afterwards they are taken from him, there the value of the goods shall be assets in his hands. 6 Mod. 181. ruled in evidence by *Holt C. J.* || If an executor hath a lease for years of land of the value of 20*l.*, but rendering rent of 10*l.* a-year, it is assets in his hands only for 10*l.* over and above the rent. Cro. El. 712. ||

But debts due to the testator, whether by bond, statute, judgment, the arrears of rent, &c., are not assets till they are recovered by the executor, but only choses in action; yet, if executor releases the debt, he releases the action, and is answerable to the value. Off. of Exec.
65. Owen, 36.

Also, as to chattels real, such as an interest for years in advowsons, commons, fairs, houses, lands, markets; these, though they go to the executor, yet is not the possession in him till he has actually entered; but a lease for years of tithes is deemed to be in the actual possession of the executor, because of this there can be no entry. Off. of Exec.
60.

¶ But, if the lease be of a rectory, consisting not only of tithes, but also of glebe lands, then it appears, that the executor is not in possession of the tithes, unless he enter upon the lands. ¶ Off. of Exec.
109.

And as the executor's interest vests immediately upon the death of the testator, so it hath been always holden, that an executor or administrator may bring trespass for goods taken away after the testator's death, though before probate or administration granted, and that their interest shall have relation to the time of his decease. Dyer, 110.
367. a. 5 Co.
88. Off. of
Exec. 49.
Comb. 451.
R. v. Stone,
6 T. R. 295.

Doe v. Porter, 3 T. R. 13.

But the absolute property of the goods must have been vested in the testator, so as to entitle the executors, or to make them assets in their hands; and, therefore, if the testator takes a bond for another in trust, and dies, this is not assets in the hands of his executor. So, if the obligee assigns over a bond, and (a) covenants not to revoke, and dies, that bond is not assets in the hands of the executor of the obligee. Deering v.
Torrington,
1 Salk. 79.

(a) Where
goods remain
assets, not-
creditors, see

withstanding a fraudulent bill of sale of them. Cro. Eliz. 405. [And as to stat. 13 Eliz. c. 5., and *ante*.]

So, where an executor pleaded, that he had *riens in ses mains*, but certain goods distrained and impounded; it was adjudged, that they were not assets to charge him. Cro. Eliz. 23.

The testator pawned his goods, and the executor redeemed them with his own money, and retained them till he was satisfied; and it was adjudged, that he might retain them, the property being altered by payment to the value, and that they were not assets. Keilw. 63.

[If an executor renew, he shall account for the new lease as well as the old, for the benefit of the creditors. Anon. 2 Ch.
Ca. 208.

If a man devise land to be sold, neither the money thereof coming, nor the profits thereof for any time to be taken, shall be accounted as any of the goods and chattels of such person deceased. St. 21 H. 8.
c. 5. § 5.

But, if a man devise lands to be sold by one for payment of his debts and legacies, and make the same person his executor; the money made by such person upon the sale of the land shall be assets in his hands. 1 Ro. Abr. 92c.

But otherwise it is, where the land is devised to be sold by the executor Id. Ibid. But

it shall be as-sets in equity, though not at law. 1 Eq. Cas. Abr. 141. Such assets as are liable to debts and legacies by the course of law, are called *legal assets*; such as are only liable by the help of a court of equity, are called *equitable assets*. 4 Burn. E. L. 288. Yet legal assets, although they cannot be come at without the assistance of equity, shall be applied in a course of administration. Therefore, if a mere trust estate descend on the heir at law, though it may be necessary to go into equity, to reduce it into possession, yet it will be considered as legal, and not as equitable assets, a trust estate being made assets by statute. But an equity of redemption of a mortgage in fee, being merely an equitable interest, and not made assets by any legislative provision, will, therefore, be considered as equitable assets. *Plunkett v. Penon*, 2 Atk. 294. So, it hath been said, that if a tennor for years mortgage his term, the equity of redemption will be equitable assets. *Case of Sir Charles Cox's Creditors*, 3 P. Wms. 342. *Hartwell v. Chitters*, Amb. 308. But this last point was not in fact determined in the case of *Sir Charles Cox's Creditors*; and yet the case of *Hartwell v. Chitters* rests entirely on the supposed authority of that case. And it hath been adjudged in several preceding cases, that chattels, whether real or personal, mortgaged or pledged by the testator, and redeemed by the executor, shall be assets *at law* in the hands of the executor for so much as they are worth beyond the sum paid for redemption, though recoverable only in equity. *Hawkins v. Lewes*, 1 Leon. 155. *Harcourt v. Wrenham*, or *Harwood v. Wrayman*, Moore, 858. 1 Ro. Rep. 156. 1 Brownl. 76. 1 Ro. Abr. 920. *Alexander v. Lady Graham*, 1 Leon. 225. Formerly it was holden, that whatever comes to the executor's hands, or he is entrusted with, as executor, is assets at law: therefore money arising from the sale of lands devised to an executor to sell, or which he is empowered to sell for the payment of debts and legacies, were considered as legal assets, and administrable as such. *Girling v. Lea*, 1 Vern. 63. *Greaves v. Powell*, 2 Vern. 248. *Anon. id.* 405. *Cutterback v. Smith*, Pre. Ch. 127. *Bickham v. Freeman*, *id.* 136. *Dethwicke v. Caravan*, 1 Lev. 224. *Burwell v. Corrant*, Hardr. 405. *Lord Masham v. Harding*, Bunb. 339. *Blatch v. Wilder*, 1 Atk. 420. But modern resolutions have taken a different turn; and courts of equity have considered the real estate in such case as merely a trust fund, and distributable among the creditors *pari passu*; *Anon.* 2 Vern. 133. *Challis v. Casborn*, Pr. Ch. 408. *Chambers v. Harvest*, Mosel. 123. *Hall v. Kendall*, *id.* 328. *Lewin v. Oakley*, 2 Atk. 50. *Batson v. Lindegreen*, 2 Br. Ch. Rep. 94. And that, though the devise be not to the executor expressly upon trust, or in trust, or as a trustee, provided there be enough in the will to convert the executor into a trustee, as, if the devise be to him and his heirs. *Silk v. Prime*, 1 Br. Ch. Rep. 138. n. *Newton v. Bennett*, *id.* 135. *Barker v. Boucher*, *id.* 140. But, if the executor has merely a naked power to sell *quâ executor*, *quære*, whether the assets are legal or equitable? *Silk v. Prime*; *Newton v. Bennett*, *ubi supra*. It has indeed been holden, that if an estate descend to the heir, charged with debts, it will be legal assets. *Freemoult v. Dedire*, 1 P. Wms. 430. *Plunkett v. Penon*, 2 Atk. 290. But it is now quite settled, that in this instance also the assets shall be deemed to be equitable. *Bailey v. Ekins*, 7 Ves. 319. *Shiphard v. Lutwidge*, 8 Ves. 26. It seems then, from the above cases, that assets are considered as equitable, either in respect of the intent of the testator, or of the nature of the testator's interest in the property. In the first case, the charge upon the real estate must be for the payment of debts generally: in the latter case, the interest of the party in the property must be purely an equitable interest, and not made legal assets by any statute. 2 Fonbl. Eq. Tr. 404. n. f.]

2. How far Debts due to the Testator are Assets.

Off. of Exec. 65. Ro. Abr. 920. Owen, 36. All debts due to the testator, whether by judgment, statute, recognizance, mortgage, bond, &c., are assets, but the executor is not to be charged with them till he has received the money.

Off. of Exec. 65. Ro. Abr. 920. (a) So, recovered by him, by decree in a court of equity, shall be assets. Moore, 858. Brownl. 76. 2 Chan. Ca. 152. (b) Though the covenant founded in the realty, as for not assuring lands, &c. yet, if it be broken in the testator's life-time, the executor shall have the action. Off. of Exec. 65.

So,

So, if the executor, in right of the testator, is entitled to Off. of Exec. a writ of error, attain, deceit, *audita querela*, *identitate nominis*, 71. whatsoever is regained by any of these ways, as unduly lost by the testator, shall be assets.

[So, a debt due from an executor to his testator, is assets in 3 Ch. Ca. 89. equity to pay legacies.]

But though debts, &c. due to the testator are not assets till recovered, yet, if the executor gives (a) a release or acquittance for any such debt, he shall be charged in the same manner as if he had received the money. (b)

an executor lost a bond due to the testator, and a creditor having recovered judgment against him, the question came to be in equity, whether the executor was obliged to make good the debt to the testator's estate; and it being urged, that the loss of the bond was not a loss of the debt, because the same still subsisted, and might be recovered in equity, and that it would be hard in this case to charge the executor, when in truth the obligor was insolvent; the court directed the executor to prosecute a suit against the obligor, and respited the judgment obtained by the testator's creditor in the mean time. 2 Vern. 299. [(b) So, if he neglects to bring an action on a bond, he shall be charged with the amount of it. Lawson v. Copeland, 2 Br. Ch. Rep. 156.]

So, if the executor submits to arbitration (c) the debts or damages which he is entitled to in right of his testator, and the arbitrators award a release or discharge thereof; this being his own voluntary act, shall charge him in the same manner as if he had received the money.

itself an admission of assets. But, if he binds himself by a personal engagement to perform the award; or, if his submission to arbitration is a reference, not only of the cause of action, but also of the question, Whether he has, or has not assets, and the arbitrator awards him to pay the amount of the plaintiff's demand, it is equivalent to determining as between the parties, that he has assets to pay the debt. The award, therefore, is conclusive upon him, although it will not operate as an admission of assets in any other suit. See Barry v. Rush, 1 T. R. 691. Pearson v. Henry, 5 T. R. 6. Worthington v. Barlow, 7 T. R. 453.]

If the plaintiff, as executor, and the defendant submit all controversies relating to the testator's estate to arbitration, and the arbitrators award, that the defendant shall pay the executor 300*l.*, and there is a custom of foreign attachment in London, that if a suit be commenced against the executor of any person, any debt, which was due to the testator *tempore mortis sue*, may be attached; yet this 300*l.*, although it be assets, and shall charge the executor, shall not be within the custom; for it was not the testator's at the time of his death, and all customs are to be construed strictly.

3. *What shall be deemed the Testator's Personal Estate; and therein what Things shall go to the Heir, and not to the Executor.*

The more general division of the testator's estate is into chattels real and personal, or things immoveable and moveable, according to the civil law: the moveable goods are again divided into things animate and inanimate: of the first, are all the testator's horses, cows, sheep, fowls, &c., which clearly belong to the executor; the inanimate things are all the testator's money, household-

Off. of Exec.

71. 3 Leon. 51.

[(c) The mere act of an executor's submitting to an

award is not of

Horsam v. Turgot, 1 Vent. 111. Lev. 306. and 2 Keb. 716. 731. 741. S. C. Fisher v. Lane, 3 Wils. 297. 2 Bl. Rep. 834.

Horsam v.

Turgot, 1 Vent.

111. Lev. 306.

and 2 Keb. 716.

731. 741. S. C.

Fisher v. Lane,

3 Wils. 297.

2 Bl. Rep. 834.

Off. of Exec.

53. Godolph.

120. Dyer, 383.

household-stuff, implements and utensils, hay, carts, ploughs, coaches, &c., and these also belong to the executor.

Off. of Exec. 53. Godolph. 120. Chattels real, or things immoveable, are such as are annexed to and savour of the freehold and inheritance; such as an interest for years in houses, lands, advowsons, commons, fairs, markets, the interest in a ward, in an estate by statute staple, merchant, or *legit*, and mortgages; and these also regularly go to the executor.

But here it will be necessary to inquire more particularly into the nature of those things, which, from the different rules of law that govern real and personal property, will make some things belong to the heir, and others to the executor.

Off. of Exec. 54. (a) So, if a man possessed of a term for years, devises it to another and his heirs, or heirs male of his body; this being but a chattel, shall go to his executors. 10 Co. 47. Yelv. 73. Fearn, 342, &c.

If the king by an attainder of felony is entitled to the *annum, diem & vastum*, which is a power of taking the profits of the offender's lands for a year, and also of committing waste in houses and cutting down trees, and he grants this to a man and his heirs; yet it shall go to the executors of the grantee, for this is but a (a) chattel.

Vent. 161. (b) But, if a termor of 100 years leases for fifty years, reserving rent to him and his heirs, during the term, the executors shall have the rent after the death of the lessor; for here the rent is made to continue during the term. Vent. 161.—So, if *A.* grants a rent-charge to *B.* for forty years, with a clause of distress to *B.* and his heirs, during the term; the executor of *B.* may distrain for it during the term; for the distress is expressly given during the term, and therefore must belong to the executor, who has a right to the rent-charge, being a *chattel interest*. Cro. Eliz. 644. Darrel v. Wilson.

So, if a man possessed of a term for one hundred years, makes a lease for fifty years, reserving rent to him and his heirs, this rent determines upon his death, for the heir cannot have it, because he cannot succeed in the estate, being a chattel interest, to which the rent, if it continues after the life of the lessor, must belong; and the executors cannot have it, because there are no (b) words to carry it to them.

Off. of Exec. 52. vide tit. Guardian. (c) That a guardianship pursuant to the statute 12 Car. 2. c. 24. cannot be assigned, neither shall it go to the executors or administrators, being a personal trust. Vaugh. 180.

If a person were guardian in chivalry or knight's service, and died, the ward went to the executor; for this being an interest by reason of tenure did not determine by the guardian's death, and therefore went as a chattel to the executor. But, if a guardian in (c) socage died, the ward went neither to the heir nor executor; but, if the infant was of the age of fourteen, he was allowed to choose his guardian; and if under, the next of kin, to whom the inheritance could not come, was to be guardian.

Godolph. 121. Off. of Exec. 54. If a person purchase the next presentation to a church, and die before it becomes void; this, as a chattel, shall go to the executor, and not to the heir.

Godolph. 133. F. N. B. 33. P. acc. So, if there be tenant in tail, and the church happen to become vacant in his life-time, and he die before he hath presented, his executor, and not the issue in tail, shall present to this turn.

But,

But, where the case was, that a parson of the church of *D.* purchased the inheritance of the advowson to him and his heirs, and died; and the question was, Whether the executors of the parson, or the heir should present? it was resolved, that the heir should present, and not the executors, and that it should descend to the heir, and be consolidated with the fee, by the same reason that it may be (a) devised over; for where the law makes a division of an estate, it is either in grants, *ut res magis valeat*, or in favour of ancient rights; as, where one joint-tenant devises, the devise is void, and the survivorship shall hold place, notwithstanding the devise; and if in this case there must be a construction to devise the estate, it ought to be in favour of the heir, it being no injury to the executors; for the church being void, it is not assets in their hands.

3 Lev. 47.
Holt and the
Bishop of
Winchester.

(a) Where a
parson, who
had the in-
heritance of
the advowson,
devised the
advowson
in fee to a
stranger; it
was resolved,

that the devisee should have the next avoidance. *Pinchyn v. Harris.* Cro. Ja. 371.

¶ A grant of the next presentation of a living to *J. S.* during his life, is limited, and will not carry the presentation to his executors on his dying before the church becomes void.¶

Mann v.
Bishop of
Bristol, Cro.
Car. 505.

Sir W. Jon. 407. S. C.

If a man *seised in fee* makes a gift in tail, lease for life or years, reserving rent, this rent, as incident to the reversion, shall go to the heir, and not to the executor; for since, during the continuance of the particular estate, the reversioner loses the profits of the land, the rent ought to be paid to him as a compensation for the loss.

Co. Litt. 47. a.
143.
Ro. Abr. 447.
2 Saund. 369.
Hard. 95.

Therefore, if *A.* covenants and grants with *B.* that he shall have and enjoy Black-acre for six years, and *B.* covenants to pay to *A.*, his heirs, executors, and administrators, an annual rent during the term; this, being a good reservation of a rent, shall, upon the death of *A.*, be paid to his heir, who has the reversion as a retribution for the profits of the land, which he cannot enjoy during the term; and the executors of *A.* shall never have any thing by virtue of the covenant, though it is in express words granted to *A.* and his executors.

Drake v.
Munday, Cro.
Car. 207.

So, if *A.*, being *seised in fee*, makes a lease, reserving rent to him and his executors and assigns, and dies, this rent is determined; for the executors cannot have it, being strangers to the reversion, which is an inheritance, and therefore, being never to enjoy the profits of the land after the expiration of the term, can never have a right to a retribution or compensation for them.

Co. Litt. 47. a.
2 Ro. Abr.
450.

But, if a man *seised in fee* makes a lease for years, reserving rent to him and his assigns during the term, this reservation shall not determine by the death of the lessor, but the rent shall go to his heir; for though there be no mention of the heirs in the reservation, yet there are words that evidently declare the intention of the lessor, that the payment of the rent shall be of equal duration with the lease, the lessor having expressly provided, that it shall be paid during the term; consequently, the rent must be carried over to the heir, who comes into the inheritance

Sury v. Brown,
Latch, 99.
2 Ro. Abr.
451. S. C.
ill reported
to the con-
trary; but
Vent. 163.
S. C. cited,
and admitted
to be law.
3 Bulstr. 328.
S. C.

ritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made: and if the lessor assigns over his reversion, the assignee shall have the rent as incident to it, because the rent is to continue during the term, and therefore must follow the reversion, since the lessor made no particular disposition of it separate from the reversion.

So, if a lease be made for years, reserving rent during the term to the lessor, his executors and assigns; this, by a late (a) resolution, shall not determine upon the death of the lessor, but shall go to the heir; because the reservation being to the lessor and his assigns, during the term, (for the words, executors and administrators, are void, the lessor having the inheritance,) such express words evidently discover the intent of the contract, and that the lessee agreed and bound himself to the payment of the rent during the continuance of the demise.

(a) Sacheverel
v. Frogate,
reported in
Vent. 161, 162.
2 Saund. 367.
Raym. 213.
2 Lev. 13.
and therefore
the case in
Cro. Eliz. 217.,

Richmond and Butcher, to the contrary, is not law; & vide 3 Co. 115. a.

Godolph. 121.
Off. of Exec.
53, 54.

But though rent, as incident to the reversion, shall go therewith, and be payable to the heir, yet the arrearages, which incurred and became payable in the life-time of the testator, shall go to the executor as part of his personal estate.

10 Co. 127.
Cro. Jac. 309,
310. Cro.
Eliz. 575.
Moore, pl.
1012. Yelv.
167. * At the
death of ten-
nant for life,
a proportion-
able part of
the rent shall
be paid to the
executors.
11 G. 2. c. 19.
§ 15.

But, if a lease be made, reserving rent at *Michaelmas*, or ten days after; if the rent is not paid at *Michaelmas*, and before the ten days are expired the lessor dies, the heir, and not the executor, shall have the rent; for though it was in the election of the lessee to pay the rent at *Michaelmas*, yet the ten days after are the true legal term, so that the rent was not legally due before that time, and therefore no chattel. So, if the lessor dies on the day on which the rent is to be paid after sun-set, and before mid-night, the heir, and not the executor, shall have the rent; for it is not due till the utmost limit of the day, which ends not till twelve o'clock, though the time for demanding it for conveyance be a convenient time before the sun sets.*

As to things fixed to the freehold or parcel thereof, how they may become chattels, and go to the executor, or are to be considered as part of the inheritance, and to descend to the heir, it is necessary to observe,

Ro. Abr. 919.
Off. of Exec.
62.

That though the thing be a chattel in itself, yet if it cannot be removed or severed without prejudice to the inheritance, there it shall descend and belong to the heir, and not to the executor.

21 H. 7. 26, 27.
Keilw. 88.
(b) But, if a
person, who
hath a parti-
cular interest
in the house,

As, if a man erects a furnace in the middle of a floor, though it doth not depend upon any wall; yet it goes to the heir with the land, and not to the executor as a chattel, for it is to be esteemed (b) parcel of the house, there placed on purpose by the ancestor, to descend as the law would carry it.

doth annex any thing to the same for the benefit of his own trade, he may disunite it during the continuance of that interest, if it may be done without any destruction or disadvantage to the freehold; and, therefore, if a dyer, being a termor for years, erects a furnace in the middle of the floor, not affixed to any wall, he may take it down during his term, because

such

such trader erects for the use of his trade, and is owner both of the floor and the furnace, and it may be disunited and altered without prejudice to the landlord. 20 H. 7. 13. 21 H. 7. 27. Owen, 70. 71. — But, if he doth not take it down during the term, it goes to him in reversion, because he is not master of both those things that are to receive alteration. 21 H. 7. 27. Owen, 70. Off. of Exec. 61.

The same law of coppers, leads, fats for dyers or brewers, Off. of Exec. 61. 4 Co. 63, 64. 3 Atk. 16. || salt-pans set up in wyche-houses, || pales, posts, rails, windows, whether of glass or otherwise, benches, wainscots, doors, locks, keys, millstones, anvils, &c.; for these being fixed to the freehold are not chattels, but parcel of the freehold.

And though pictures and looking-glasses are esteemed part of the personal estate, yet if they are put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir; for the house ought not to come to the heir maimed and disfigured. 2 Vern. 508. so ruled in equity. [But this doctrine, as to annexation to the freehold,

hath been gradually relaxing for a long time; and if things of the kind above-mentioned can be taken away without prejudice to the fabrick of the house, the executor, it seemeth, shall have them. This relaxation hath been made upon reasons of publick benefit and convenience. Lawton v. Lawton, 3 Atk. 14. Lord Dudley v. Lord Ward, Amb. 113. Harvey v. Harvey, 2 Str. 1141.]

As to the timber-trees, they originally belong to the soil by right of accession; yet if a man sells the timber-trees on his soil, the executors of the vendor (a) shall have them, and not his heir: so, if a man sells his land reserving the timber-trees, they remain by particular contract as a chattel in him, distinct from the soil, and shall go to his executors. 4 Co. 62. Off. of Exec. 60. [(a) This must be understood of tenant in fee-simple; for such a sale

by tenant in tail would not be effectual without docking the entail, unless they were actually felled in the life-time of such tenant, for otherwise they descend with the land to the issue in tail. Hob. 173. 11 Co. 50. a.

And as the trees, unless severed, belong to the heir, so does the fruit which they bear, as apples, pears, &c., belong to the heir: also, grass growing, though fit to be mowed down for hay, shall, with the land, descend to the heir. Off. of Exec. 59. Godolph. 122.

But corn, though growing, as also every thing else of that kind which is produced annually by labour and cultivation, shall go to the executor, and not to the heir, as hops, saffron, hemp, &c. Off. of Exec. 59. [If lessee for life of a hop-ground dies in August before severance of the hops, the executor may maintain trover for them against the remainder-man, though growing on ancient roots. Latham v. Atwood, Cro. Car. 515. Hargr. Co. Litt. 55. b. n. r. Hal. MSS.]

Also, if an inheritor of tithes dies after the tithes are set out, they go to his executor, and not to his heir. Off. of Exec. 60.

[If disseisor sow the land of tenant for life, and tenant for life die before severance, his executors, and not the disseisor, or the reversioner, shall have the corn. Knevit v. Poole, Gouldsb. 143.]

But, though the things which require labour and cultivation, and are of annual produce, regularly belong to the executor; yet roots (b) of all kinds, such as parsnips, turnips, skerrets, &c. belong to the heir, for these cannot be come at without digging. Off. of Exec. 62, 63. (b) || But, if the roots be set by the testator, Lord

Coke says, the executors shall have that year's crop. *Co. Litt.* 55. 1 *Ro. Abr.* 728.||

ging up the earth, which must necessarily be a spoil and injury to the inheritance.

Off. of Exec.
63.

And therefore the *Office of Executors* says, that the executor must content himself with those things whose fruit is above ground, such as melons of all kinds; but as for artichokes, though the fruit be above the ground, the author thinks that they have not such yearly setting and manurance as should sever them in interest from the soil, and that therefore they shall go with it to the heir.

Co. Litt. 8.
Off. of Exec.
57. *Swinb.*
403.

If a man hath fish in his pond, and die, they go to his heir, for they are considered as the profits thereof, and therefore descend with the pond to the heir.

Co. Litt. 8.

But, if a man has fish in his trunk or net, they go to the executor, for they are severed from the soil, and felony may be committed in stealing them.

Off. of Exec.
57.

So, doves in a dove-house descend, together with the house, to the heir; but the young ones, that are not able to fly out, belong to the executor.

Off. of Exec.
57.

So, deer, conies, pheasants, or partridges, if tame, or kept alive in any room, cage, or like receptacle, as pheasants and partridges often are, shall go to the executor: so, hawks reclaimed shall, as chattels personal, go to the executor.

Ro. Abr. 919.
Off. of Exec.
63, 64. *Jones*
v. Jones, 3 *Br.*
Ch. Rep. 80.
[If the writings

As to charters and writings relating to the freehold and inheritance, they follow the interest of the land, and belong to the heir: but as to those deeds and writings which relate to terms for years, goods, chattels, or debts, they belong to the executor.

of an estate are pawned or pledged for money lent, such charters in the hands of the creditor are to be considered as chattels; and in case of his decease, they would go to his executor or administrator, because such personal representative would be entitled to the benefit accruing from the loan. *Noy, Max.* 50.]

Pusey v. Pusey,
1 *Vern.* 273.

[A bill was brought in Chancery, suggesting, that an antique horn with an old inscription had immemorially gone with the plaintiff's estate, and was delivered to his ancestors to hold their land by, and praying that it might be restored: the Lord Keeper was of opinion, that if the land was of the tenure called *cornage*, the heir was entitled to this monument of antiquity *at law*.]

1 *Inst.* 107. a.

4. *What Things shall go to the Wife of the Deceased, and not to the Executor.*

Doct. & Stud.
Dial. 1 cap. 7.
Co. Litt. 351.
Sid. 111.

The law looks upon husband and wife as one person, and therefore will not regularly allow the wife to have any property separate and distinct from the husband. Hence all the personal estate, as money, goods, &c. which were the wife's, and in her actual possession at the marriage, are actually vested in the husband; so that of these he may make any disposition in his lifetime,

time,

time, without her consent, or may by will devise them, and they shall, without any such disposition, go to the executors or administrators of the husband, and not to the wife, though she survive him.

But chattels real, such as leases for years, estates by statute merchant, staple, *elegit*, &c., though of these he may alone dispose, forfeit, or they may be extended for his debts; yet if he makes no (a) disposition of them in his life-time, they survive to the wife, and shall not go to the executors of the husband.

Co. Litt. 46. b.
351. Ro. Abr.
342.

(a) But, if the husband makes a lease

of part of the wife's *term*, reserving rent, the rent shall go to the executors of the husband; for as he had a power in his life-time to dispose of the whole, so he might have disposed of any part of it. Poph. 5. 97. Co. Litt. 300. 8 Co. 97. Vent. 259. — And what shall be said a disposition by him, so as to bar the wife, *vide tit. Baron and Feme*, letter (C).

So, of *choses in action*, as debts due to the wife by obligation, &c., though these are likewise so far vested in the husband, that during the coverture he may reduce them into possession; yet if he dies before any alteration made by him, they belong to the wife, and not to the executors of the husband.

Co. Litt. 351.
3 Mod. 186.

As to the wife's *paraphernalia*, which survive to her, and go not to the executors of the husband; these by the civil law are defined *bona quæ mulier ultra dotem adfert*, and are understood to be not only her necessary apparel, but also such jewels and other ornaments as are suitable to her degree and quality. Of these, by the civil law, the wife had such an absolute property, that she might dispose of them *in vitâ mariti invito marito*, nor could the husband devise them by will from her, nor were they liable to his debts or legacies.

Godolph. 130.
Swinb. 403.
Cro. Car. 344.

But herein our law differs, and prohibits the wife from making any disposition of them in the life-time of the husband. Also, our law distinguishes between things of ornament and mere (b) necessity; and as to matters of ornament, subjects them to the husband's debts, and even allows the husband power to dispose of them by will.

Ro. Abr. 919.
Cro. Car. 343.

(b) If the husband delivers his wife a piece of cloth to

make her a garment, and dies; although it is not made up in the life-time of the husband, yet the wife shall have it, and not the executor of the husband, because it was delivered to her for this purpose: but against a creditor of her husband, she shall not have more apparel than is convenient for her. Ro. Abr. 911. Harwell and Harwell.

And therefore where the daughter of an earl, who was married to Sir John Davies, (the king's serjeant at law,) usually wore a diamond chain, value 370*l.*, and Sir John devised the use of his jewels to his wife, during her widowhood, she giving security to leave the same to his daughter, at the day of her death, or second marriage, which should first happen; the widow marrying again, it was holden by two judges against two, that these being matters of ornament, the husband had a power of disposing of them by will, and, consequently, that the limitation annexed to them in the present case was good; but they seemed to admit, that if the husband had made no disposition of them, and there had been no (d) creditors of the husband, that they should have belonged to the wife. But the other two judges held, that there

Lord Hastings
v. Sir Archibald
Douglas, Cro.
Car. 343. Jon.
332. and Ro.
Abr. 911. S. C.
2 Vern. 245,
246. S. C.
cited, where
the husband
devised the
wife's jewels,
being of great
value, to the
wife for life,
the remainder

was

to his son; and the wife made no election to claim them as her *paraphernalia*, held, that her administrator

cannot make this claim; and there said, that although, where the husband dies intestate, or without disposing of the wife's jewels by will, the wife may claim them if there are no creditors, yet she cannot against a disposition of them by her husband by will. (d) As in trover against the Viscountess *Bindon*, for several jewels of considerable value; she, as to all, except a chain and bracelets, not exceeding the value of 160*l.* pleaded not guilty, and as to that she pleaded, that she was the wife of Viscount *Bindon*, and that she usually wore those jewels as ornaments of her body; and averred, that the executors had assets to satisfy his funeral expences, and all his debts and legacies besides these jewels; and on demurrer, she had judgment. Moore, 213. 2 Leon. 166. S. C. — Where the wife's *paraphernalia* being superfluities and ornaments, were in equity holden liable to the husband's debts; vide Pr. Ch. 295, 296., a good case. — But, where the wife's jewels and plate had been bought with her own pin-money, and the value did not amount to more than 500*l.* which was esteemed but little in respect of the husband's estate, they were holden not to be liable. Pr. Ch. 27.

2 Vern. 83.

Also, it has been holden, that if a woman by marriage-articles agrees that she shall have no part of the personal estate but what the husband gives her by his will, that this bars her of her *paraphernalia*.

5. *Where after Debts and Legacies paid the Executors shall have the Surplus to themselves, and are not to be Trustees for the next of Kin.*

Off. of Exec. 4.

By law the very naming an executor is a disposition to him of all the testator's personal estate; for he comes *in loco testatoris*, and is chargeable with his debts and legacies as far as he has assets; and, therefore, the law gives him the whole personal estate; the surplus of which, after he has executed his trust by payment of debts and legacies, belongs to himself, as a recompence for his labour and trouble.

Vern. 473.

2 Vern. 676.

Abr. Eq. 243.

|| (a) As, if the testator expressly declare, that the executor shall be only a trustee; or there be any thing in the will serving as an intimation of an idea, that the testator was not making a beneficial office, but merely a trust. *Pring v. Pring*, 2 Vern. 99. *Cordell v. Noden*, Id. 148. 1 Eq. Ca. Abr. 244. S. C. Pr. Ch. 12. S. C. *Graydon v. Hicks*, 2 Atk. 18. *Cook v. Duckenfield*, Id. 567. *Read v. Snell*, Id. 645. *Androvin v. Poilblanc*, 3 Atk. 300. *Dean v. Dalton*, 2 Br. Ch. Rep. 634. *Bennet v. Batchelor*, 3 Br. Ch. Rep. 28. 1 Ves. jun. 63. S. C. *De Mazar v. Pybus*, 4 Ves. 644. *Urquhart v. King*, 7 Ves. 230. *Selley v. Wood*, 10 Ves. 71. And this, though he neglect to declare the trust, *Bp. of Cloyne v. Young*, 2 Ves. 91.; or the trust declared fail, *Morice v. Bp. of Durham*, 9 Ves. 399. 10 Ves. 522. So, if the will contain a residuary clause, but the name of the residuary legatee be omitted, *Bp. of Cloyne v. Young*, *ubi supra*. *Lord North v. Purdon*, 2 Ves. 495. *Hornby v. Finch*, 2 Ves. jun. 78.; or the residuary clause be rased, and illegible, 2 P. Wms. 158.; or an ulterior disposition of the residue be reserved, but not made, *Mordaunt v. Hussey*, 4 Ves. 117. *Wheeler v. Sheer*, Mosel. 288. 302.; or the residuary legatee die in the testator's lifetime,

But, though the executor be entitled to the surplus of the personal estate undisposed of, yet, if there be any fraud in obtaining the executorship, or if it appear manifestly to have been the intention of the testator, that the executor should not have the surplus to his own use, a court of (a) equity may decree such executor a trustee for the next of kin to the testator, and that the surplus shall go according to the statute of distributions.

7

Nicholls.

Nicholls. Ambl. 769. Bennet v. Batchelor, 3 Br. Ch. Rep. 28.; or the testator has begun to make a further disposition, but broken off in the middle of the sentence, though the nature of such disposition, whether residuary or not, be unknown. Knewel v. Gardiner, Gilb. Eq. Rep. 184. 2 Ves. 100. S.C. cited. (Note, in this case the executor had a legacy.) For the proposition, that the appointment of executor gives him *every thing not disposed of* is not admitted in a court of equity. In the strongest way of putting it, it can only be *what the testator does not mean to dispose of*. By Lord Eldon in Dawson v. Clarke, 18 Ves. 254. The case of a lapse would seem to admit a distinction; though Lord Eldon is made to say in Dawson v. Clarke, that in that case the executor shall not take. Where indeed the whole residue lapses, there can be no doubt but he is excluded, Bennet v. Batchelor, *ubi supra*; but, if it be a lapse of a mere legacy, and there be no residuary legatee named, no intention on the face of the will to exclude the executor, it would seem to fall into the residue, and so become his property as the legal residuary legatee: for there can be no difference between a residuary legatee by operation of law and one by express designation; the rights of both must be the same. See Wilson v. Ivatt, 2 Ves. 166. Pratt v. Sladden, 14 Ves. 199. Dawson v. Clarke, 15 Ves. 417. and what is said by Lord Thurlow in 1 Ves. Jan. 67. — But the appointment of executors as trustees of part of the property, and giving them the appellation of trustees evidently with reference to that trust, will not exclude them from the residue. Batteley v. Windle, 2 Br. Ch. Rep. 31. Pratt v. Sladden, *ubi supra*.|| (b) But, if the ecclesiastical courts go about to oblige an executor to distribute the residue of a personal estate, a prohibition will be granted; for they have no jurisdiction to compel a distribution amongst the next of kin, but where the party dies intestate. 5 Mod. 247. Petit and Smith. Caverly v. Caverly, Mosely 49. 2 Ves. 29. The reason why they cannot compel a distribution is, because they cannot enforce the execution of a trust. 1 P. Wms. 549.

And this, it is said, was first done in the case of *Foster and Munt*, where the testator devised particular legacies to his children and grandchildren, and 10*l.* a piece to *A.* and *B.*, whom he made executors, for their care and pains; and the surplus of the personal estate, being 5000*l.* and upwards, the question was, Whether it should be a trust for the children, or go to the executors; and it was decreed a trust for the children.

Vern. 473.
Foster v.
Munt, Reg.
Lib. 1687. A.
fol. 25. Rach-
field v. Care-
less, 2 P. Wms.
158. 9 Mod. 9.
S. C. & S. P.
May v. Lewin,

2 P. Wms. 159. n. (1) S. P. || Tradition has erred extremely in its accounts of this case of *Foster v. Munt*. It has said, that the decree proceeded on the ground of fraud; whereas it went solely on the implied trust from the words of the will. See the words of the decree in the note on the case in Mr. Raithby's edition of Vernon's Reports. It has said it was reversed by the Lords Commissioners of the Great Seal, but afterwards affirmed in the House of Lords, but there is no trace of it on the Journals of that house. It has said, that it was the first case upon this point; but earlier cases have been found express upon it.||

Since this there have been several cases, where from the intention of the testator, in making strangers executors, and giving them legacies, they have been decreed trustees for the next of kin, and compelled to make distribution accordingly.

For which
vide 2 Vern.
148. 361.
648. 676.
[It is now a
settled rule

in equity, that if a *sole* executor has a legacy *generally* and *absolutely* given to him, be it by the will or a codicil, he shall be excluded from the residue; Joslin v. Brewett, Bumb. 112. Davers v. Dewes, 3 P. Wms. 40. Farrington v. Knightly, 1 P. Wms. 544. Vachel v. Jeffries, Pr. Ch. 170. Petit v. Smith, 1 P. Wms. 7., and this, though the legacy be specific; Randall v. Bookey, 2 Vern. 425. Southcot v. Watson, 3 Atk. 226. Martin v. Rebow, 1 Br. Ch. Rep. 154. Hollard v. Wood, 4 Ves. 70. or legacies be given to the next of kin; Bayley v. Powell, 2 Vern. 361. Wheeler v. Sheers, Mosel. 288. Andrew v. Clark, 2 Ves. 162. Kennedy v. Stainsby, stated in a note, 1 Ves. jun. 66. Griffiths v. Hamilton, 12 Ves. 310. Langham v. Sanford, 17 Ves. 451.; for the rule is founded rather on a presumption of intent to exclude the executor, than to create a trust for the next of kin; and therefore, if there be no next of kin, a trust shall result for the crown. Middleton v. Spicer, 1 Br. Ch. Rep. 201. The above rule is founded upon the objection, that you shall not intend, that a person having a part given to him, is to take the whole. This is the settled law, and it would be vain and improper now to question the propriety of it; but the principle upon which this doctrine has been introduced, that an executor having a legacy is a trustee, has

given so little satisfaction, that case upon case has occurred, paring down the application of it, until it is not easy to say upon what foundation it stands. *Per Lord Eldon*, in *King v. Denison*, 1 Ves. & Beam. 277-8. If therefore there be two or more executors, a legacy to one shall not exclude them from the surplus, for the testator might intend a preference to him *pro tanto*. *Colesworth v. Brangwin*, Pr. Ch. 313. *Johnson v. Twist*, cited 2 Ves. 166. *Buffar v. Bradford*, 2 Atk. 220. *Hawkins v. Mason*, Mosel. 20. 4 Br. P. C. 1. S. C. *Wilson v. Ivat*, 2 Ves. 166. *Griffiths v. Hamilton*, 12 Ves. 298. *Pratt v. Sledden*, 14 Ves. 202. So, where there are unequal legacies, whether pecuniary or specifick, to several executors, they shall not be excluded. *Brasbridge v. Woodroffe*, 2 Atk. 68. *Bowker v. Hunter*, 1 Br. Ch. Rep. 328. *Blinkhorn v. Feast*, 2 Ves. 27. *Secus*, where equal pecuniary legacies are given them. *Petit v. Smith*, 1 P. Wms. 7. *Carey v. Goodinge*, 3 Br. Ch. Rep. 110. *Southouse v. Bates*, 2 Ves. & Bea. 396. But see *Heron v. Newton*, 9 Mod. 11.] || But, whether *distinct specifick legacies of equal value* will have this effect, qu. though the language of *Lord Hardwicke* in *Southcot v. Watson*, 3 Atk. 226. treats specifick and pecuniary legacies as standing precisely on the same ground in questions of this nature: no case however to this purpose occurs in the books. See Mr. Cox's note in the case of *Farrington v. Knightly*, 1 P. Wms. 550. See also *Nisbett v. Murray*, 5 Ves. 149. The cases of *Shrimpton v. Stanhope*, cited in 3 Atk. 230. and of *Willis v. Brady*, *Barnardist*, Ch. Rep. 64. are not cases of distinct specifick legacies, but of specifick legacies bequeathed, jointly to husband and wife, and therefore do not bear upon this point, being similar to the case of a specifick legacy to a sole executor. If a legacy be given to one executor *expressly for care and trouble*, and no legacy to the other; they are both barred of the residue; for the one being clearly a trustee, the other must be so likewise; *White v. Evans*, 4 Ves. 21. *Sadler v. Turner*, 8 Ves. 617. *Milnes v. Slater*, Id. 295.; both taking jointly, they must be both trustees, or both take the residue beneficially between them. 12 Ves. 308. by *Lord Eldon*. But there is no rule of law which prevents the testator from dividing the executorship, and giving the one the office, the other the benefit; for the circumstance, that one has a legacy for his trouble, is no more than a presumption against the other. So thought the Master of the Rolls, and therefore admitted parol evidence on behalf of the co-executrix, to rebut that presumption, and upon the evidence held her entitled to the residue undisposed of. *Williams v. Jones*, 10 Ves. 77. In this case the learned judge is reported to have laid great stress upon the infancy of the co-executrix, and to have considered it as almost sufficient of itself, without any evidence, to justify the conclusion that the testator intended her to take beneficially, and not to be a mere trustee. Perhaps, this was going too far; for a testator may, if he thinks fit, appoint an infant a trustee, and the argument from the singularity of such an appointment, from the improbability of his intending it, is answered by the fact, that he has actually done so. *King v. Denison*, 1 Ves. & Beam. 275. In *Blinkhorn v. Feast*, 2 Ves. 27. *Lord Hardwicke* treated it as a circumstance strengthening other evidence; but not to be relied upon alone. ||

Abbr. Eq. 244,
245. *Hil.*
1697. *Lord*
Bristol v. Hun-
gerford. Pr.
Ch. 81. S. C.
2 Vern. 645.
S. C. 3 P. Wms.
in note [c.]
S. C. cited.
|| *Vernon* erro-
neously states
it to be a trust
for the heir at
law. *Peere*
Williams no-
tices this, and
gives the de-
cree from the
Register's
book. 10 Ves.
76. S. C.
cited by *M. R.* ||

As, where *A.* devised lands to be sold for payment of his debts, and willed, that the surplus should be deemed part of his personal estate, and go to his executors; and gave to his executors 100*l.* a-piece as a legacy; the question was, Whether the executors should have the surplus to their own use, or should distribute according to the statute of distributions? For the executors it was insisted, that the surplus should be part of his personal estate, and go to them; and that he meant it them to their own use; and his giving them a legacy of 100*l.* a-piece cannot alter the case; for the surplus perhaps might be nothing, and therefore he gave them the 100*l.* that they might at all events be sure of something, and not to exclude them from the benefit of the surplus; and this being a devise of the surplus, after debts and legacies paid, cannot be a trust in them; for then all their trust is performed when debts and legacies are paid. On the other side it was said, that the words in the will, that the surplus should be part of his personal estate, and go to his executors, were only intended to exclude the heir, who else would have it; and not to give any greater interest to his executors than they would have had otherwise. And of this opinion was my

Lord

Lord Chancellour, and decreed accordingly; which decree was affirmed in parliament.

But, as this construction has been made purely on the intention of the testator, so such intention must appear exceeding plain; otherwise the rule of law is to take place; as, where a man devised his library of books to *A.*, (except ten books, such as his wife should choose; as plays, romances, sermons, but not law books,) and made her executrix; it was holden that she should not by this devise be excluded from the benefit of the surplus of the personal estate.

Watson, 3 Atk. 229.]

So, where *A.* was executrix to *B.* her former husband, and after married *C.*, who by his will in 1686 devised to his wife the plate and goods she brought him in marriage, and two silver salvers in lieu of plate that had been exchanged away, and made her executrix and died, leaving a daughter by a former wife, and his wife *enseint* of a daughter; and there being no devise of the surplus of the personal estate, the question was, Whether she should take it as executrix to her own use, or liable to distribution; and my Lord Keeper decreed the surplus to the wife, as well for that this will was made before the case of *Foster and Munt*, as also for that in this case nothing is devised to the wife but what was her own before, and as she was executrix to her former husband; but principally because, where a wife is made executrix, it is to be presumed she was not made so to have barely an office of trouble, but of benefit to take the surplus.

444. pl. 58. *Martin v. Rebow*, 1 Br. Ch. Rep. 154.; unless the legacy to her, being specifick, consist of property, which was her's before marriage; for this may vary the rule. *Lawson v. Lawson*, 7 Br. P. C. 511.]

So, where *A.*, possessed of a long term for years, by will devised it to his wife for life, and after her death to the child she was then *enseint* with; and if such child died before it came to twenty-one, then he devised one third part of the said term to his wife, her executors and administrators; and the other two thirds to other persons, and made his wife executrix of his will, and died; and a bill was brought against her by the next of kin to the testator, to have an account and distribution of the surplus of his personal estate, not devised by the will: two questions were made; 1st, Whether the devise to the wife of one third part of the term was good, because it happened she was not then *enseint* at all, and so the contingency upon which the devise to her was to take place never happened? the other question was, Whether this term, being part of the personal estate, and expressly devised to her for life, with such other contingent interest on the death of the supposed *enseint* child before twenty-one, should shut her out from the surplus of the personal estate, which belonged to her as executrix; and so the surplus go in a course of administration to be distributed among the next of kin? As to the first point, my Lord Keeper delivered his opinion, that though the wife was not *enseint* at the time of the will, yet the devise to her of such third part of the term was good; and as to the other

Abr. Eq. 245.
Trin. 1704.
Griffith and
Rogers, Pr.
Ch. 231. S. C.
[Newstead v.
Johnstone,
2 Atk. 45.
Southcot v.
Watson, 3 Atk. 229.]

2 Vern. 675.
Hill. 1711.
Ball v. Smith.
[This case hath
been over-
ruled, and it is
now settled,
that a wife, ap-
pointed execu-
trix, is, as to
the residue,
precisely in
the situation of
any other exe-
cutor; Lake v.
Lake, Ambli.
126. Godsall
v. Sounden,
2 Eq. Cas. Abr.
being speci-
fic. Law-

Abr. Eq. 245.
Mich. 1711.
Jones v. West-
comb. 1 Pr.
Ch. 316. S. C.
Gillb. Equ.
Rep. 74. S. C.

(a) [See acc.
Lady Gran-
ville v. Duchess
of Rutland,

1 P. Wms. 114. Nourse v. Finch, 1 Ves. jun. 356. Hoskins v. Hoskins, Pr. Ch. 263.]

Hill. 1716.
Batchelor and
Searle, Gilb.
Eq. Rep. 125.
Eq. Ca. Abr.
246. S. C. in
totidem verbis.
2 Vern. 736.
S. C., but not
so well re-
ported.

point (a), dismissed the plaintiff's bill, and so let in the executrix to the surplus of the personal estate, notwithstanding the devise to her of part as aforesaid.

So, the testator, being possessed of a personal estate to the value of about 2000*l.*, and being taken ill, makes his will in writing the very day before his death; and thereby devises several legacies to his relations; and amongst the rest gives the plaintiff his sister about 1000*l.* and gives 70*l.* to Mr. Searle and his wife, and their four children, to buy them mourning; and gives to his dear and most esteemed friend Mrs. Sarah Searle (one of the daughters of Mr. Searle, to whom he had made his addresses in way of marriage) 500*l.*, and gives his horse and furniture to one of the defendants by his christian name and surname; and his clothes to be disposed of by his executors; and then concludes, *as to the 700*l.* I am entitled to in the South-Sea Company, and the rest of my personal estate, I will that the same shall be sold for the payment of my debts and legacies; and I make Mr. John and Mr. Thomas Searle my executors, and dies.* The executors were two of the children of Mr. Searle, and entitled to their proportion of the 70*l.* devised for mourning; and one of them to the horse and furniture; but were no ways related to the testator. The surplus of the personal estate came to about 600*l.*, and the bill was brought against the executors to have an account thereof, and that it might be paid to the plaintiff, whose wife was the only sister and next of kin to the testator. For the plaintiff it was insisted, that the executors were mere strangers, no ways related to the testator; and that they had particular legacies left them for mourning out of the 70*l.*, and one of them had a horse and furniture expressly devised to him, and therefore it was not reasonable that they should go away with the surplus of the personal estate. On the other side it was insisted, that the defendants being executors, they represented the testator, that they stood in his place, and were entitled to whatever he left undisposed of; that this was the ancient law for many ages, and therefore the legal title being in them, they ought not to be defeated of it without a manifest intention of the testator to the contrary; that there appeared no such intent in the will, for they are not named either by the christian name or surname, or so much as by the name of their office till the very close of the will; nay, it was in proof, that the testator did not so much as consider whom he should make his executors till he had disposed of all the legacies; that the giving one of them his horse and furniture was only to exclude the other, who, by being executor with him, would have been equally entitled to it, and could not be counted a legacy to shut them out of the surplus, since it rather regarded the other executor than the plaintiff the next of kin; that they had it fully in proof, that the testator being asked, Whether he would not give his sister more? answered, he would not; that being asked, Who should have the surplus?

surplus? he said his will should stand as it was, and that he had a very great regard for the defendant's family, and was to have married their sister; and that these proofs being in affirmance of the disposition the law made for the executors might be read; and that several resolutions since the case of *Foster and Munt* had pared away the authority of that case, and therefore prayed that the bill may be dismissed. My Lord Chancellour was clearly of opinion, that the proofs being in affirmance of the disposition ought to be read; and said, that they were so full as to make an end of this case; that without a strong and violent implication (a), the executors ought not to be defeated of the *residuum*; that here was no such implication in this will but rather the contrary; that to make sense of the last clause, it must be construed a devise of the *South-Sea* stock, and the rest of the personal estate to his executors; for it is immediately followed by "*and I make John and Thomas Searle my executors*;" which could have no relation to the direction for sale, unless by giving them the surplus which should arise by sale; and as there appeared no strong or violent implication to induce any other construction, he could not give into so great a change of the law, but must decree for the executors; and accordingly did so.

[(a) In *Bowker v. Hunter*, 1 Br. Ch. Rep. 330. Lord Thurlowe is made to say, it must be an irresistible inference: but this was going too far; it is enough if there be a strong and

violent presumption. If there must be an irresistible inference, parol evidence could not be admitted. By Arden, M. R. 2 Ves. jun. 471. 4 Ves. 90. To the same effect by Grant, M. R. 14 Ves. 197.]

And as this doctrine of making the executor a trustee for the next of kin subsists only by the notions of a court of equity, which by implication, and contrary to the rules of law, gives the *residuum* to the next of kin; so the executors have been admitted by parol evidence to shew, that the testator intended the *residuum* for them, which has been thought reasonable, being only to rebut an equity, and oust an implication arising from the rule of equity.

vide 2 Vern. 252. The case of the Countess and Earl of Gainsborough, Abr. 230. S. C. and 2 Vern. 648. [Lady Granville v. Duchess of

Beaufort, 1 P. Wms. 114. S. C. *Petit v. Smith*, 1 P. Wms. 7. 5 Mod. 247. S. C. *Com. Rep. 3.* *S. C. Batchelor v. Searle*, 2 Vern. 736. *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 210. *Mallabar v. Mallabar*, Ca. Temp. Talb. 78. *Lake v. Lake*, 1 Wils. 313. *Ambl. 126.* *Brown v. Selwin*, Ca. Temp. Talb. 240. But parol evidence, it is said, ought in this case to be admitted with great caution. *Rachfield v. Careless*, 2 P. Wms. 160. *Duke of Rutland v. Duchess of Rutland*, *id.* 215. *Blinkhorn v. Feast*, 2 Ves. 28. *Nourse v. Finch*, 1 Ves. jun. 358., and restricted to what passed at the time of making the will. See the two last cited cases.] || But Lord Chancellour *Eldon* has declared the sum and sense of all the authorities to be, that all parol declarations, whether made *before*, or *at*, or *after* the making of the will, are admissible to rebut presumptions, though they are not all alike weighty and efficacious. Whether they consist of conversation with people who have nothing to do with the question, of declarations provoked by impertinent inquiries, or in whatsoever form they arise, they are *all* evidence, though entitled to very different credit, according to times and circumstances. In the degrees of such evidence, contemporary declarations are clearly of the greatest weight: next to such contemporary declarations, those which are made *after* the making of the will are the most efficacious; for a declaration *after* the will, as to what the testator had done, is entitled to more credit than one *before* the will as to what he *intended* to do, for that intention may very well be altered; but he knows what he *has* done, and is much more likely to speak correctly as to that, than as to what he *proposes* to do. *Trimmer v. Bayne*, 7 Ves. 517.]

As, where one not of kin, but a stranger, was made executor, and had considerable legacies given him; although it was de-

Abr. Eq. 245. *Littlebury v. Buckley.*

2 Ves. 95. S.C.
cited.

creed by Sir *Peter King*, in the mayor's court, in favour of the testator's two brothers, that the surplus should be distributed; yet, upon an appeal to the House of Peers, that decree was reversed, not barely as it stood upon the will, but that parol proof ought to be received in favour of the executor's title, consistent with the will; and the proof being full, as to the testator's frequent declarations, that his executor, though a stranger, should have the surplus, it was decreed accordingly.

Hil. 6 G. 2.
Hatton v. Hat-
ton. 2 Str. 865.
S.C. Fitzgib.
326. S.C.
1 Barnardist.
277. 329. S.C.
Hil. 6 G. 2.
Lady Osborne
v. Villiers.

So, in the case of *Hatton* and *Hatton*, where the wife was made executrix, and a considerable legacy devised to her; yet the proof being strong, that the testator intended the surplus to her own use, the same was decreed accordingly, both at the *Rolls* and in *Chancery*.

But, where *A.*, being possessed of a considerable personal estate, made his will, and thereby devised several legacies, but gave none to his executor; and the question was, Whether parol evidence ought to be admitted, to prove that the testator did not intend that the executor should have the residue of his personal estate, but that the same should go according to the statute of distributions? it was holden clearly, that no such evidence could be admitted, for that this would be to admit evidence not to oust an implication, but to contradict the rule of law, and what appeared on the face of the will.

(I) How the Personal Estate, after Debts paid, is to be distributed when the Party dies Intestate: And herein, of the Share the Husband or Wife are entitled to; and of the ascending, descending, and collateral Line, and Admission of the Half-Blood; and where the Distribution shall be *per Stirpes*, and not *per Capita*.

And. 410. 414.
Cro. Car. 62.
201. Jon. 228.
Style, 456.
Hob. 83. 191.
Lev. 233. Car-
ter, 125.

IT hath been already observed, that before the statute 22 & 23 Car. 2. c. 10. the ecclesiastical courts had no jurisdiction to compel distribution of intestates' estates; for though by the 31 E. 3. st. 1. c. 11. and 21 H. 8. c. 5. they had authority to grant administration to the widow or next of kin; yet, having once granted it, they had executed their authority; and the administrator, coming in the place of the executor, had the whole personal estate of the intestate, after debts.

Raym. 499.

Yet after it had been solemnly adjudged in the common law courts, that the ecclesiastical courts could not compel a distribution, it seems that when they were under deliberation, whether they would grant administration to the wife or next of kin, and to which of the next of kin, they used to treat with the parties, and consider what sum the overplus was like to amount to; and how that ought, by their rules, to be distributed; and they would prefer him to the administration,

tion, that would before-hand perform such distribution by payment of money, and by giving securities to persons to whom it was appointed.

But because it was found very inconvenient for any administrator to pay before he received, for it was hard for him to know what he might undertake before he had possession, and the judge could not have a perfect knowledge of the true value of the overplus, to guide him in the measure of his distribution till after the administration ended, and the account of the estate taken; (a) to remedy these inconveniences, and to compel a just and equal distribution of the estates of intestates,

Raym. 499.
(a) My Lord North observes, that though publick inconveniences were urged to the parliament by the civilians, yet they had

another reason to desire that those methods might be changed; for the allotting of distributions in this manner was but a barren jurisdiction that could not be drawn out in length; all disputes were ended *uno flatu* without appeal, and the accounts of administrators were never contested, when there was no adversary concerned to demand a share in the overplus upon taking them. Raym. 499.

By the 22 & 23 Car. 2. c. 10. § 3. it is enacted, “ That the ordinaries and judges respectively shall and may, and are enabled to proceed and call such administrators to account for and touching the goods of any person dying intestate, and, upon hearing and due consideration thereof, to order and make equal and just distribution of what remaineth clear (after all debts, funerals, and just expences of every sort, first allowed and deducted) amongst the wife and children, or childrens’ children, if any such be, or otherwise to the next of kindred to the dead person, in equal degree, or legally representing their stocks, *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down; and the same distributions to decree and settle, and to compel such administrators to observe and pay the same, by the due course of his majesty’s ecclesiastical laws. Saving to every one, supposing himself or themselves aggrieved their right of appeal as was always in such cases used.”

§ 5. “ Provided always, That all ordinaries, and every other person, who by this act is enabled to make distribution of the surplus of the estate of any person dying intestate, shall distribute the whole surplusage of such estate or estates, in manner and form following; that is to say, one third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead, other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life-time, by portion or portions equal to the share, which shall by such distribution be allotted to the other children, to whom such distribution is to be made: and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life-time, by

“ portion not equal to the share which will be due to the other
 “ children by such distribution as aforesaid; then so much of
 “ the surplusage of the estate of such intestate to be distributed
 “ to such child or children as shall have any land by settlement
 “ from the intestate, or were advanced in the life-time of the
 “ intestate, as shall make the estate of all the said children to
 “ be equal, as near as can be estimated; but the heir at law,
 “ notwithstanding any land that he shall have by descent, or
 “ otherwise from the intestate, is to have an equal part in the
 “ distribution with the rest of the children, without any consi-
 “ deration of the value of the land which he hath by descent,
 “ or otherwise, from the intestate.”

§ 6. “ And in case there be no children, nor any legal repre-
 “ sentatives of them, then one moiety of the said estate to be
 “ allotted to the wife of the said intestate, the residue of the said
 “ estate to be distributed equally to every of the next of kindred
 “ of the intestate, who are in equal degree, and those who legally
 “ represent them.”

§ 7. “ Provided that there be no representations admitted
 “ among collaterals after brothers and sisters’ children; and in
 “ case there be no wife, then all the said estate to be distributed
 “ equally to and amongst the children; and in case there be no
 “ child, then to the next of kindred in equal degree of or unto
 “ the intestate, and their legal representatives as aforesaid, and
 “ in no other manner whatsoever.”

§ 8. “ Provided also, To the end that a due regard be had to
 “ creditors, that no such distribution of the goods of any person
 “ dying intestate be made till after one year be fully expired
 “ after the intestate’s death; and that such and every one, to
 “ whom any distribution or share shall be allotted, shall give
 “ bond with sufficient sureties in the said courts, that if any
 “ debt or debts truly owing by the intestate shall be afterwards
 “ sued for and recovered, or otherwise duly made to appear, that
 “ then and in every such case, he or she shall respectively re-
 “ fund and pay back to the administrator, his or her rateable
 “ part of that debt or debts, and of the costs of suit and charges
 “ of the administrator, by reason of such debt, out of the part
 “ and share so as aforesaid allotted to him or her, thereby to
 “ enable the said administrator to pay and satisfy the said debt or
 “ debts so discovered after the distribution made as aforesaid.”

§ 9. “ Provided always, That in all cases where the ordinary
 “ hath used heretofore to grant administration *cum testamento*
 “ *annexo*, he shall continue so to do, and the will of the deceased
 “ in such testament expressed shall be performed and observed
 “ in such manner as it should have been if this act had never
 “ been made.”

By § 4. it is provided also, “ That nothing in this act shall ex-
 “ tend to or prejudice the customs of *London* or *York*, or other
 “ places having known and received customs peculiar to them,
 “ but that the same customs may be observed as formerly.”

In the construction of this statute it being doubted, whether the
 husband

husband was entitled to administration to his wife, as before, so as not to be obliged to distribute the personal estate amongst the rest of kin to the wife; by the 29 Car. 2. c. 3. § 25. it is declared, "That neither this act nor any thing therein contained, shall be construed to extend to the estates of feme covert, who shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act."

Also, to (a) explain and ascertain what share the mother was entitled to upon the death of a child, where the father was dead, by the 1 Jac. 2. c. 17. it is enacted, "That if after the death of the father any of his children shall die intestate, without wife or children, in the life-time of the mother, every brother and sister, and the representatives of them, shall have an equal share with her."

(a) The reason of making the act was, because the mother might marry, and carry all away to another husband; but

the father surviving is entitled to the whole personal estate. Salk. 251. 1 P. Wms. 48, 49. Lord Raym. 684. Com. Rep. 96.

¶ Also, doubts having arisen upon the clause respecting the customs of *London* and *York*, it is enacted and declared by the st. 1 Ja. 2. c. 17. § 8. that that clause "was never intended nor shall be taken or construed to extend to such part of any intestate's effects, as any administrator by virtue only of being administrator, by pretence or reason of any custom may claim to have, to exempt the same from distribution, but that such part in the hands of such administrator shall be subject to distribution as in other cases within the said act."¶

In the construction of the above statute for distributing intestates' estates, the following opinions have been holden:

1. That the clause which says, that there shall be no representations among collaterals beyond brothers and sisters' children, must be intended brothers and sisters of the intestate, and not to admit representation when the distribution happens to fall out amongst brothers and sisters, though remote relations to the intestate; for the intestate is the subject of the act; it is his estate, his wife, his children, and by the same reason his brother's children, for he is equally the correlative to all.

Raym. 496.
Carter v.
Crawley, a
good argument
of Lord Chief
Justice North's
on this head.
[Caldicot v.
Smith, 2 Show.
286. Beeton
v. Darking,

2 Vern. 168. Pett v. Pett, Salk. 250. Ld. Raym. 571. S.C. Com. Rep. 87. S.C. 1 P. Wms. 25. S.C. Bowers v. Littlewood, *id.* 595.]

2. On that clause of the statute, which directs the distribution to every of the next of kindred of the intestate, who are in equal degree, it hath been adjudged in several books, that a brother or sister of the half-blood shall come in for a share with one of the whole blood, being as near a kin to the intestate. [And (b) this shall extend to a posthumous brother of the half-blood.]

Smith v. Tracey, Mod. 209.
2 Mod. 204.
S.C. 2 Jon. 93.
S.C. Vent. 316.
S.C. 2 Lev.
173. S.C.
2 Vent. 317.

Show. Parl. Cases, 108. Vern. 437. 2 Vern. 124. Carth. 51. S.P. adjudged. Show. 1, 2. S.P. Comb. 112. Clift. 243. Holt, 258. pl. 2. (b) [Burnet v. Man, 1 Ves. 156.]

3. That where the statute says, that distribution shall be amongst representatives of persons deceased *pro suo cuique jure*;

Walsh v.
Walsh, Eq.

by

Cas. Abr.
249. pl. 7.
Prec. Ch. 54.
pl. 53. Bowers
v. Littlewood,
1 P. Wms. 595.
Davies v.
Dewes, 3 P.
Wms. 50.
Lloyd v.
Tench, 2 Ves.
213. Durant
v. Prestwood,
1 Atk. 454.
Stanley v. Stanley, *id.* 455. Janson v. Bury, Bunb. 159.

by this it is meant, that distribution shall be *per stirpes* and not *per capita*; so that if the father has two sons, and one of them dies in his life-time, leaving three children, and the father dies intestate, the surviving son shall have half the personal estate, and the other moiety shall be equally divided amongst the children of the dead son: yet, it hath been holden, that if *A.* has three brothers, and one dies leaving three children, another two, and the third five, and *A.* dies intestate, that in this case the distribution shall be *per capita*, and not *per stirpes*, and that all the children shall have an equal share; for the brothers being all dead, none take by way of representation, but all as next of kin.

Carth. 51.
Comb. 14. 112.
2 Show. 285.
407. Show. 2.
25, 26. Skin.
212, 218.
3 Mod. 58.
1 Vern. 403.

4. On the clause of the statute, which directs that no distribution shall be within a year after the death of the intestate, it hath been adjudged, that, if a person entitled to a distributive share dies within the year, yet it is such an interest vested in him as shall go to his executor or administrator; for the statute doth not make any suspension or condition precedent to the interest of the parties, but is a clause merely for the benefit of creditors. Also, this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c. which remains over, and not the executor of the first testator.

Carth. 52. and
vide 3 Mod. 59.
Skin. 212, 219.
S. P. but no
resolution.

5. It hath been holden, that, if the father dies intestate, leaving one child, this is not *casus omissus*; and, consequently, if there be a wife, that she shall have but a third part; and that, if the child die intestate, administration is to be granted to the next of kin to him, and not to the next of kin to the father.

Woodroffe v.
Winkworth,
Pr. Ch. 527.
Eq. Ca. Abr.
249. S. C. Blackborough v. Davies, 1 P. Wms. 41. 1 Salk. 251. S. C. 1 Ld. Raym. 684.
S. C. Com. Rep. 96. S. C.

6. It hath been resolved, that if one dies intestate, leaving a grandmother and uncles and aunts, the grandmother is entitled to the personal estate, in exclusion of the uncles and aunts.

Moor v. Bar-
ham, 1 P. Wms.
53.

[7. It hath been resolved, that if a person dying intestate leave a grandfather by the father's side, and a grandmother by the mother's side, his next of kin; these (grandfather and grandmother) shall take in equal moities by the statute of distributions, as being in equal degree: for though the grandfather on the father's side may, in some respects, be more worthy of blood, yet here dignity of blood is not material, in regard the brother of the half-blood shall take equally with the brother of the whole blood.

Evelyn v.
Evelyn,
4 Burn's E. L.
363. Ambl.
191. S. C.

8. It hath been resolved, that if a person dying intestate leave a grandfather and a brother, the grandfather shall not share the personal estate with the brother, but the latter shall take the whole; for the brother is nearer than the grandfather, there

being

being by our law but one degree between brother and brother, whereas there are two degrees between grandfather and grandson.]

9. It hath been resolved, that if a man die intestate, leaving a widow and one son, and afterwards the son die intestate, then the mother is delivered of a child whereof she was ensient at her husband's death: such posthumous child is entitled to a share of the son's personal estate.

115. S. C. 2 P. Wms. 446. S. P. Ball v. Smith, 2 Freem. 230. S. P. See Thellusson v. Woodford, 11 Ves. 139.

Wallis v. Hodson, in Chan. Hil. 14 Geo. 2. Barnard. 272. S. C. 2 Atk.

[It hath been resolved on the statute of *Ja.*, that if a man die intestate and without issue, leaving a wife, and several brothers and sisters, and his mother living, the mother shall have no more than an equal share of a moiety of the estate with the brothers and sisters. And though there should be no brother or sister, yet if there are the children of a deceased brother or sister, they shall take the same share with the mother which their parent would be entitled to.]

Keilway v. Keilway, 2 P. Wms. 344. 1 Str. 710. Gilb. Rep. 189. Stanley v. Stanley, 1 Atk. 455.

Where a person dies intestate, having personal property in different places, and subject to different laws, it is now settled, that the *lex domicilii*, not the *lex rei sitæ*, shall attach upon the property, and direct the succession to it. What shall be considered as the *domicil* of the party is rather a question of fact than of law.

Bruce v. Bruce, Dom. Proc. 15 April 1790. Hog v. Lashley, Dom. Proc. 7 Mar. 1792. Balfour v. Scott, Dom.

Proc. 11 Mar. 1793. Ommaney v. Douglas, Dom. Proc. 18 Mar. 1796. Bempde v. Johnstone, 3 Vez. jun. 300.

Upon this principle it was determined by the privy council in the case of *Burn v. Cole*, 7th April 1762, that where a testator domiciled in *England* died, the judge of the probate in the plantations was bound by the probate granted in *England*. The *lex domicilii* regulates testate as well as intestate succession.]

Ambl. 415.

(K) Of Advancement, and bringing into Hotchpot.

BY a custom, which has prevailed time out of mind in certain places, the wife and children of a person deceased are entitled to the writ *de rationabili parte bonorum*, on which writ they shall, according to the custom, recover their shares and proportions of the personal estate. But such children, as were reasonably advanced by the father in his life-time (a) with any part of his goods, shall have no farther share; for the words of the writ are, *nec in vitâ patris promoti fuerunt*. But yet such child being only in part advanced, may bring such advancement into *hotchpot*, or, as the civilians express it, into the *collatio bonorum*, and then such child will be entitled to an equal share with the rest.

Co. Litt. 176. b. Reg. 142. for the custom of London herein, vide tit. Customs of London. Mayn. 9. [(a) A provision by will is therefore no advancement, 2 P. Wms. 440. To be such it must result

from a complete act of the intestate in his life-time, by which he divests himself of all property in the subject, though it need not take effect in possession till after his death. *Ibid.*]

This advancement that will exclude a child must be by the father,

Swinb. 217.

||(a) Not even by a mother, *Holt v. Frederick*, 2 P.Wms. 356. father, and not by any other (a); nor will any fortune, though never so great, acquired by the child by his labour and industry, exclude him.

Swinb. 217. Also, such advancement as will exclude a child, unless he brings it into hotchpot, must be given directly to the child, and not to another for the benefit or advantage of the child; and therefore money given to bind a child out an apprentice, or laid out in his education, either at school or at an university, or on his travels, is no advancement.

Elliot v. Collier, 1 Ves. 15. ||Nor is money laid out in maintenance of a child an advancement. But whether maintenance and support of a daughter after marriage would be considered as an advancement, *qu.* ||
3 Atk. 529. S. C. In this case Lord *Hardwicke* ordered it to be charged as a debt due from the daughter to the father's personal estate.

Swinb. 217. So, if the father purchases for his child an advowson, or any other ecclesiastical benefice; or if he buys him any office civil or military (b), these are not such advancements as will exclude him from a distributive share.

||(b) *Vide contr.* as an advancement *pro tanto*, although the office be only at will, as a gentleman pensioner's place, or a commission in the army. So, an annuity is an advancement, the value of which may be calculated by the value at the date of the grant; or, if it has ceased, according to the payments received, at the option of the child. *Lord Kircudbright v. Lady Kircudbright*, 3 Ves. 55.||

2 Vern. 638. On the statute 22 & 23 Car. 2. c. 10., which expressly excludes every child advanced by the father, except the heir at law, from a farther share, unless he brings such advancement into the *collatio bonorum*, it hath been holden, that if the heir at law hath a settlement or provision made on him on his father's marriage, out of the *personal estate* (c), that upon the father's dying intestate, to entitle him to any more, he must bring such advancement into hotchpot.

as a second marriage, to pay the first son by the first wife 500*l.*; there was a son and several other children of the first marriage; the father died intestate; and it was holden, that the heir must bring the 500*l.* into hotchpot, although in nature of a purchaser under a marriage settlement, he not being by the statute of distributions distinguished from the other children of the intestate. (c) Be it the use of furniture only for his life, the law is the same; for it is an advancement *pro tanto*. Com. Dig. tit. Administration (H). Fitzg. 285. So it seems, that co-heiresses shall bring in such advancement, not being land, as they may have respectively received from their father, before they shall be entitled to their several distributive shares, agreeably to the general purport of the act, which is evidently to promote an equality as much as may be. 4 Burn's E. L. 344.||

Abr. Eq. 249. So, where the father, on his marriage, in consideration of a marriage-portion, covenanted to settle such an estate to the use of himself for life, remainder to his intended wife for life, remainder to the first and every other son of the marriage in tail male, remainder to trustee for 1000 years, in trust to raise portions for daughters in case there were no sons; that is to say, if but one such daughter, the sum of 5000*l.*, and if two or more, then the sum of 6000*l.* equally between them, payable at their respective ages of eighteen, or days of marriage, which should
first

&c. *Freeman v. Edwards*, 2 P.Wms. 435. S. C.

first happen, and 80*l.* maintenance in the mean-time; the wife died, leaving but one daughter; the father married again and had several children, and died intestate, the daughter by the first marriage not being above the age of eighteen; it was holden, that, in order to entitle her to share with the other children, she must bring this 5000*l.* into hotchpot.

If a father dies intestate, as to part of his personal estate, a child advanced by him in his life-time is not to bring such advancement into hotchpot, in order to have a distributive share of such part, whereof he died intestate.

Vachell v. Jeffereys, Pr. Ch. 170.

|| The provision in the statute applies only to the case of actual intestacy; and where there is an executor, and, consequently, a complete will, though the executor may be declared a trustee for the next of kin, they take as if the residue had been actually given to them. Therefore a child advanced in his father's life-time cannot in such case be called on to bring his advancement into hotchpot.

Watson v. Watson, 14 Ves. 324. per Master of the Rolls, Cowper v. Scott, 3 P. Wms. 119. Wheeler v. Sheer, Mos. 303.

If money be laid out by the intestate on the repairs of houses, which descend to his eldest son as heir, it is no advancement. Secus, if on houses given to the son by the intestate in his life-time.

Smith v. Smith, 5 Ves. 721.

Although the exception in the statute mentions only the heir at law, and in common parlance the heir at law is the eldest son, in relation to the intestate, and is only one person; yet shall not the customary heir, the youngest son, be compelled to bring into hotchpot the lands which have descended upon him: no law obliges him to do so, and the statute does not require it; for it speaks merely of such estate as a child hath by settlement, or by advancement of the intestate in his life-time.||

Lutwyche v. Lutwyche, Ca. temp. Talb. 276. Pratt v. Pratt, decreed at the Rolls contr. 2 Str. 936. reversed by Lord Talbot, Fitzg. 284.

[If a child, who hath received any advancement from his father, die in his father's life-time, leaving children, those children shall not be admitted to their father's distributive share without bringing their father's advancement into hotchpot. And the reason is, because they do not take in their own right, but as representing their father.

Proud v. Turner, 2 P. Wms. 560. || But grandchildren are not entitled, within the custom of Lon-

don, to a share of the orphanage part. Fowke v. Hunt, 1 Vern. 397. Northey v. Burbage, Pr. Ch. 470. Gilb. Eq. Rep. 136. S. C. 1 P. Wms. 341. S. C. Anon. 2 Salk. 426. 2 Show. 467.

A child, partly advanced, shall bring in its advancement only among the other children; for the wife shall have no advantage of it.]

Ward v. Lant, Pr. Ch. 182-4. Garon v. Trip-pet, Amb. 189.

(L) What shall be a *Devastavit*, either in Executors or Administrators: And herein, of the Order of paying Debts and Legacies.

1. *What Manner of Wasting will amount to a Devastavit.*

Off. of Exec.
156. Godolph.
203.

A *DEVASTAVIT* is a mismanagement of the estate and effects of the deceased, in squandering and misapplying the assets contrary to the trust and confidence reposed in them, for which executors and administrators shall answer out of their own pockets, as far as they had, or might have had, assets of the deceased.

Off. of Exec.
157.

Executors may be guilty of a *devastavit*, not only by a direct abuse by them, as by spending or consuming the effects of the deceased, but also by such acts of negligence and wrong administration as will disappoint creditors of their debts.

Off. of Exec.
157. Kelw.
59. 62., &c.
3 Leon. 143.

Therefore it hath been holden, that if the executor sells the testator's goods at an under-value, especially if he might have gotten more for them; or if this were done by him for his own advantage, and to defraud creditors, it is a *devastavit*, and he shall answer the real value.

6 Mod. 181.
per Holt C. J.

So, if an executor omits to sell the goods at a good price, and after they are taken from him, there the value of the goods shall be assets in his hands, and not what he recovers, for there was a default in him.

Ibid.

But if, without any omission of his, goods are taken out of his possession, and he does not recover so much in damages as the goods were really worth, and that happens not through any default of his, he shall answer for no more than he recovers. So, if the goods are perishable goods, and before any default in him to preserve them, or sell them at due value, they are impaired, he shall not answer for the first value, but shall give that matter in evidence to discharge himself. But, if one takes goods out of his possession, he must sue him that took them, to have an opportunity of discharging himself of answering more in assets than he recovers.

Off. of Exec.
158. Hob. 66.
And. 138. Cro.
Eliz. 43.
4 Leon. 102.
Godb. 29.

If the executor releases debts due to the testator, this shall charge him to the (a) value of the debt, though perhaps he did not receive near so much as was due. So, if he releases a cause of action, accruing either in the life-time of the testator, or in his own time, in right of the testator, this will be a *devastavit*.

(a) If an executor should release a debt of 100*l.* for one shilling, that will not bind a creditor; but in case there is no other creditor, save only the executor himself, there his assent will be binding on him; as if an executor will voluntarily release a debt, he shall not be relieved against it, though a creditor should. Vern. 455. per Lord Chancellor.

Hob. 167.

Brownl. 33.

Noy, 129. S.P.

|| So, of a bond

ex turpe causâ.

as against creditors.||

Also it is said, that if an executor pays money in discharge of an usurious bond, entered into by his testator, that this is a *devastavit*.

1 Ves. 254. And such payment will be a *devastavit* as well against legatees,

It is holden, that if an executor to an obligee in a penal bond, after the bond is forfeited, releases the penalty on receipt of principal and interest, this is a *devastavit*. But the contrary hereof is holden by three judges in (a) Cro. Car., for that the executor in this case does no more than what in equity and conscience he ought to do. But, if an infant executor gives such a release, it is void; but this it seems arises from the privilege of infancy.

If an executor takes an obligation in his own name, for a debt due by simple contract to the testator, this shall charge him as much as if he had received the money; for the new security hath extinguished the old right, and is *quasi* a payment to him.

bond due to his testator, and took a new bond with surety to himself for the debt; this, though a conversion at law, was holden to be none in equity. *Armitage v. Metcalf*, 1 Ch. Ca. 74. Max. Eq. 27. So, if an executor, for the benefit of the testator's estate, invest it in the funds, or transfer stock from one fund to another, it is no conversion. *Waite v. Whorwood*, 2 Atk. 159.||

So, if the executor sues a person by trover and conversion, in which he has a right to recover; and afterwards he and the defendant come to an agreement that he shall pay the executor such a sum at a future day, and the party fails, this is a *devastavit*; and he shall answer *ad valorem*.

S. C. cited, and said to have been affirmed in a writ of error in the House of Lords, and a case cited in Vernon by Lord Chancellour, which he said was adjudged when Pemberton was chief justice, where an executor of an obligee accepted a note drawn upon a goldsmith for the money; the goldsmith accepted the bill, and before payment, failed; the executor afterwards brought an action upon the bond, and this matter being given in evidence, was adjudged a good payment. ||This is most probably the case of *Vernon v. Boverie*, 2 Show. Rep. 296. See also *Cooksey v. Boverie*, *Ibid.*||

So, if an executor submits the debts, or whatever he is entitled to in right of the testator, to arbitration, and the arbitrators award him less than his due; this, being his own voluntary act, shall bind him, and he shall answer for the full value.

||A submission to arbitration by an executor or administrator is in general considered as a reference, not only of the cause of action, but also of the question, whether or not he has assets; and therefore if an arbitrator, under a reference between *A.* & *B.* administrator, award that *B.* shall pay a certain sum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no assets; for this is equivalent to determining, as between these parties, that he had, and therefore he may be attached for non-payment.

But a submission to arbitration by an executor or administrator, is not of itself holden to be an admission of assets; and therefore if upon such a submission, the arbitrator simply award a certain sum to be due from the testator's or intestate's estate without saying by whom it is to be paid, the executor or administrator is not personally liable to the payment of the sum awarded, nor can he be attached for the non-payment of it.||

If

Off. of Exec.
158. (a) Cro.
Car. 490.
Kniveton v.
Latham,
W. Jones, 403.
[Ca. Temp.
Hardw. 226.
and see 4 Ann.
c. 16. § 13.]
Off. of Exec.
158. Yelv. 10.
||Qu. But,
where an exe-
cutor deli-
vered up a

the debt; this,
Armitage v. Metcalf, 1 Ch.
Ca. 74. Max. Eq. 27. So, if an executor, for the benefit of the testator's estate, invest it in the funds, or transfer stock from one fund to another, it is no conversion. *Waite v. Whorwood*, 2 Atk. 159.||
2 Lev. 189.
Norden v.
Levit, 2 St. T.
Jon. 88. S. C.
adjudged.
6 Mod. 94 &
Vern. 474.

S. C. cited, and said to have been affirmed in a writ of error in the House of Lords, and a case cited in Vernon by Lord Chancellour, which he said was adjudged when Pemberton was chief justice, where an executor of an obligee accepted a note drawn upon a goldsmith for the money; the goldsmith accepted the bill, and before payment, failed; the executor afterwards brought an action upon the bond, and this matter being given in evidence, was adjudged a good payment. ||This is most probably the case of *Vernon v. Boverie*, 2 Show. Rep. 296. See also *Cooksey v. Boverie*, *Ibid.*||

Off. of Exec.
71. 159.
3 Leon. 51.

Worthington
v. Barlow,
7 T. R. 453.
Barry v. Rush,
1 T. R. 691.

Pearson v.
Henry, 5 T. R.
6.

2 Lev. 40.

If an executor neglects to pay interest, and afterwards acknowledges a judgment for principal and interest, this is a *devastavit*, unless he shews want of assets to pay interest, &c.

Per Holt C. J.
12 Mod. 573.

¶ If an executor by his delay in commencing the action has enabled the debtor of his testator to protect himself under the plea of the statute of limitations, this is a *devastavit*.

Goodfellow v.
Burchett,
2 Vern. 299.

Where an executor had lost a bond for money due to his testator, the Court of Chancery was inclined to charge him with the debt: but for the present directed only, that he should prosecute a suit instituted by him against the obligor with effect, in order to recover the money, and respited judgment in the mean time.

Powell v.
Evans, 5 Ves.
839. Lowson
v. Copeland,
2 Br. Ch. Rep.
156.

If an executor neglect to call in money lent by his testator on bond, and the obligor become bankrupt, the executor will be personally answerable for it; and cannot protect himself by shewing that he made application to the obligor for payment by an attorney.

Crosse v.
Smith, 7 East,
246.

If an acting executor has once received and fully had under his controul assets of his testator applicable to the payment of a bond debt, he is responsible for the application of it to that purpose; and in an action on the bond cannot protect himself under the plea of *plena administravit*, by shewing that such application had been disappointed by the misconduct of his co-executor, to whom he had paid over the money for the purpose of satisfying the debt; for he is liable for the consequences of such misconduct as much as if it had been by that of any other agent.

2 Fonbl. Eq.
Tr. 185. 2d.
Edit. Bird v.
Lockey,
2 Vern. 744.
Littlehales v.
Gascoigne,
3 Br. Ch. Rep.
73. Franklin
v. Frith, *Id*.

If an executor retain money in his hands for any length of time, which, by application to the court, or vesting in the funds, he might have made productive, he shall be charged with interest for it. By vesting it in the (a) funds, provided it be in the 3 *per Cents*. (b) he is not answerable for the fall of the stocks; nor, if he put it out on real security (c), which at the time there was no ground to suspect, is he responsible for the loss of it, though he did so without the indemnity of a decree.

433. Perkins

v. Baynton, 1 Br. Ch. Rep. 375. (a) *Ex parte* Champion, cited in *Hutcheson v. Hammond*, 3 Br. Ch. Rep. 147. and *Franklin v. Frith*, *ubi supra*. *Cowper v. Douglas*, 2 Br. Ch. Rep. 231. (b) He is protected if he lay it out in the 3 *per Cents*., because he does that which the court would order him to do, that fund being adopted by the Court as the more equal and lasting. *Howe v. Earl of Dartmouth*, 7 Ves. 137. *Holland v. Hughes*, 16 Ves. 111. *Hancorn v. Allen*, 1 Dick. 498. (c) By Lord Harcourt C. 1 P. Wms. 141.

Newton v.
Bennett, 1 Br.
Ch. Rep. 359.
Perkins v.
Baynton, *Id*.
375. Treves
v. Townshend,
Id. 384.
Browne v.
Southouse,
3 Br. Ch. Rep.
107. Hall v.

If an executor has merely retained money in his hands, which, either in compliance with the express directions of the will, or from his general duty, even where the will is silent, he ought to have laid out, if there be nothing more proved, he shall be charged with interest only at the rate of 4*l. per cent*. To charge him at a higher rate of interest a special case is necessary: there must be proof of something else than mere negligence (a). Compound interest has been given (b), in a case of wilful violation of the will, which prohibited retainer, and directed accumulation. (c) And in a late case in the House of Lords, an admi-

Administrator was charged with the full legal interest on a sum retained by him undistributed, during the whole period of reversion, though twenty years had elapsed before an effectual suit for an account had been commenced; and the account was also ordered to be taken with annual rests, and interest charged on the annual balances.

Case, 4 Ves. 620. *Pocock v. Reddington*, 5 Ves. 794. *Rocke v. Hart*, 11 Ves. 58. *Ashburnham v. Thompson*, 13 Ves. 402. & cited in 1 Madd. 303. *Tebbs v. Carpenter*, 1 Madd. 30. (a) *Mosley v. Ward*, 11 Ves. 581. (b) *Raphael v. Boehm*, 11 Ves. 92. 13 Ves. 407. (c) *Stackpoole v. Stackpoole*, 4 Dow's P. C. 209.

And the estate of an executor under such a direction to accumulate, who becomes a bankrupt, shall be charged in like manner with interest at 5 *per cent.* and annual rests.

But an executor shall not be charged with interest at all upon a balance retained in his hands under a fair misapprehension that he had a just claim to it.

Neither shall an executor pay interest merely on the ground of his having called in a debt which bore interest; for he has an honest discretion to call in any debt which he thinks in hazard.

Where there were arrears of rent on a lease, and the tenant becoming insolvent, the executor had released the arrears, and given him a sum of money to quit the possession; the executor was allowed both, it appearing that he had thus acted for the benefit of the estate.

If *A.* bequeath all the surplus of his personal estate after payment of his debts and legacies to *B.*, and several creditors, although barred by the statute of limitations, commence actions against the executor; on his refusal to plead the statute, a court of equity will not, in favour of such residuary legatee, compel him to plead it.

An executor shall not be charged with a *devastavit* for converting the goods of the testator to his own use, if he has paid the debts of the testator in such order as the law appoints to the value of the goods with his own money. Nor shall he be so charged, if he has paid money of his own in satisfaction of a debt of an inferior nature, where he has retained the assets in his hands; for this does not change the property of the assets, but they remain as against a creditor of a debt of a superior degree in the same plight they were before, and may be seized on execution in specie at such creditor's suit as the goods of the testator, notwithstanding such payment of a debt of an inferior degree.||

2. Where it will be a Devastavit to pay Debts of an inferior Nature before those of a superior; and the Order in which Debts are to be paid.

The better to consider the order which the law prescribes for the payment of debts, and the duty enjoined executors and administrators in discharging themselves of the assets of the

Hallett, 1 Cox, 134. Forbes v. Ross, 2 Cox, 116. 2 Br. Ch. Rep. 430. S. C. Seers v. Hinde, 1 Ves. jun. 294. Piety v. 13 Ves. 38. Ashburnham v. Thompson, 13 Ves. 402. & cited in 1 Madd. 303. Tebbs v. Carpenter, 1 Madd. 30. (a) Mosley v. Ward, 11 Ves. 581. (b) Raphael v. Boehm, 11 Ves. 92. 13 Ves. 407. (c) Stackpoole v. Stackpoole, 4 Dow's P. C. 209.

Dornford v. Dornford, 12 Ves. 127.

Bruere v. Pemberton, 12 Ves. 386.

By Lord Thurlow C. 1 Br. Ch. Rep. 361.

Blue v. Marshall, 3 P. Wms. 381.

Lord Castleton v. Lord Fanshaw, 1 Eq. Ca. Abr. 305. Pr. Ch. 190. S. C. 15 Ves. 498. S. P.

1 Saund. 307.

1 Saund. 218.

Off. of Exec. 131.

deceased, which they must observe at their peril, it is necessary to take notice, that these debts are divided into three sorts: 1. Debts by record. 2. Debts by specialty. 3. Debts by simple contract.

Off. of Exec. Debts by record, which are to have the first (a) precedence, are again divided into debts due to the crown, debts by judgments obtained in any court of record, and debts by recognizances, statutes merchant or staple.

131. (a) [This is not quite correct: funeral and testamentary charges are in the first place to be paid. Off. of Exec. 137. 2 Bl. Comm. 511.]

2 Inst. 32. Off. Of these the highest in its nature is the king's debt, and his prerogative to be (b) preferred before other creditors arises from the regard the law hath to the publick good beyond any private interest.

132. (b) But it is said, that if there be a debt owing to the king, equity will order it to be paid out of the real estate, that other creditors may have satisfaction of their debts out of the personal assets. Vern. 455.

Off. of Exec. Therefore if an executor, whose testator was indebted by matter of record to the king, be sued by judgment, or any other creditor, he may plead in bar, that his testator died so much indebted to the king, (c) shewing how; and that he hath not assets above the value of that debt; and this will be a good plea. So, if a creditor pursues his remedy by suing out execution upon a statute merchant or staple, the executor upon setting forth this matter will be relieved on an *audita querela*.

132. (c) In debt upon an obligation against an executor, who pleaded, that the testator, *tempore mortis sue*, was indebted to the king for the office of sheriffship; and because it was not averred, that it was *verum & justum debitum & minime solutum*, it was demurred in law, and without argument (because an injunction was served out of the exchequer) adjudged for the plaintiff. Cro. Ja. 182. Wodell v. Hungate. But, where in debt against an executor, he pleaded that the testator entered into a bond in such a penalty to J. S., conditioned to pay so much money, which was not yet paid, beyond which he had not assets; and there was a special demurrer to this plea, because the defendant did not aver (as he ought) that the bond was entered into by the testator *pro vero & justo debito*, the court held the plea good without such an averment; for it shall be intended the bond was given for a just debt, and the obligation itself shall be sufficient to charge the executor, though the testator never received any money thereon. Lake v. Raw, Carth. 8. If the debt be not a just one, the other side may shew it in his replication. Further v. Further, Cro. Eliz. 471. Phillips v. Echard, Cro. Ja. 8. 35. Palmer v. Lawson, 1 Lev. 260. 1 Sid. 333. S. C. Williams v. Fowler, 1 Str. 410. Robinson v. Corbett, 1 Lutw. 662.

Off. of Exec. But the debts due to the crown, which are to have a precedence, must be understood of debts by matter of record; and therefore, sums of money due to the king upon wood-sales, sales of tin, or other his minerals, for which no specialty is given, are not to be preferred to the subject's debt by matter of (d) record.

(d) But, it seems, that if the king's debt, and likewise that of a subject be both inferior to debts of record, the king shall be preferred. || It hath been holden, that a debt upon simple contract to the king shall be paid before a debt by bond to a subject, although he was himself the administrator. Rex v. Burnett, Hil. 1681. Exch. Law of Wills, 434.||

Off. of Exec. So, of amercements in the king's courts baron, courts of his honours which be not of (e) record; also of fines for copyhold estates, or money for which strays within the king's manors, or liberties, are sold; these are not debts by record.

133. (e) But as to fines and amercements in the king's courts of record, there is no doubt but they are debts of record. Off. of Exec. 134, 135.

Also,

Also, whatever accrues to the king by an attainder or outlawry is to be considered as a debt by single contract before office found; for though the debts due to the person outlawed, or attainted, were by matter of record, and although the outlawry and attainder are upon record, yet the king's title also must appear on record, which cannot be before office found.

Also, it is said, that the arrearages of rent due to the king, whether it be a fee-farm rent, or rent reserved on a lease for years, are to be considered as a debt by simple contract.

Next to the king's debts on record, are judgments (a) to be paid; for these in regard of the solemnity of them are of greater (b) notoriety than recognizances or statutes; for though these likewise be of record, yet, as they are entered into by the private consent and agreement of the parties, they are not esteemed securities of as high a nature in the eye of the law, as judgments, which are presumed to be given *invité*, though voluntarily acknowledged by the party.

those of every court of record in the kingdom; for it is founded upon this, that the judgments of all courts, upon matters or persons within their jurisdiction, are conclusive so long as they are in force, and the parties are bound to yield obedience to them; and the obligation to obedience follows the assets in the hands of the executor or administrator. *Ca. temp. Talb. 221.* The judgments of inferior courts have indeed so far the advantage, that of them the executor is bound to take notice at his peril, 3 P. Wms. 117. *Off. Ex. 139.*; but of a judgment of any of the superior courts he is not bound to take notice unless it be docketted according to the statute 4 & 5 W. & M. c. 20.; for if it be not docketted, it is no other than a judgment in a foreign country, a mere simple contract debt, *Walker v. Whitter, Dougl. 1.* *Lickey v. Hayter, 6 T. R. 384.*, and, of course, not pleadable against a demand on simple contract. *Steel v. Yorke, 1 Bos. & Pull. 307.* (a) [That is, judgment obtained against, or confessed by the testator; not the executor; for to these, this priority doth not extend; *Off. of Exec. 137.*; nor will it prevail against certain debts by particular statutes, as the forfeitures for not burying in woollen, 30 Car. 2. c. 3.; money due from the overseers of the poor, 17 Geo. 2. c. 38. § 3.; for letters to the post-office, 9 Ann. c. 10. § 30., &c.] (b) An executor shall discharge a subsequent judgment before a prior statute, because of the notoriety of it. 4 Co. 59. — But, if the statute be extended, whether the judgment creditor may enter on the consuee, *Q. & vide 2 And. 157. Cro. Eliz. 734. 822.* It is said to have been decreed at the *Rolls*, that mortgages were to be paid in the first place, and then judgments, and then recognizances; but that upon appeal to the House of Lords it was adjudged, that mortgages were not to be preferred to other real incumbrances; but that mortgages, judgments, statutes, and recognizances should take place according to their priority, and as they stood in order of time. 2 Vern. 524. But for this, and the order in which debts must be paid in equity, and the difference between legal and equitable assets, *vide Abr. Eq. 141., &c. 235., &c.*

Therefore if a *scire facias* be brought against an executor on a judgment against his testator, he cannot plead *plene administravit*; for a judgment being to be paid next to the king's debt, the executor ought to shew that he laid out the assets in discharging the king's debt, or in satisfying some other judgment; otherwise it might be, that he administered the assets in discharging statutes, recognizances, or debts on specialty; which he could not do before a debt on a judgment.

Salk. 296. pl. 5. 4 Mod. 296. S. C. and S. P. and there held, that such a plea is good on a general, though not on a special demurrer. — And by the *Off. of Exec. 137.* it is said, that an executor may, to such a *scire facias*, plead generally, that he hath fully administered, without shewing that he did administer in payment of debts of as high a nature; but yet that must be proved upon the evidence, else the trial will fall out against the executor.

Off. of Exec. 136. (a) But, if the judgment be satisfied, and only kept on foot to pleading that (a) wrong other creditors; or if there be any defeazance of the judgment yet in force, the judgment will not avail to keep off other creditors from their debts. is kept on foot by fraud and covin, *vide* 8 Co. 132. 9 Co. 108. Ro. Abr. 801. Sir W. Jon. 91. Vaugh. 103, 104. Saund. 336. 2 Saund. 48. 2 Keb. 591. Mod. 33. Lev. 281. Sid. 333. Salk. 298. 4 Mod. 63. 2 Mod. 36. Ld. Raym. 283. Carth. 429. 12 Mod. 153. 229. Comb. 444. 449. Litt. Entr. 158.

Vern. 143. It has been holden, and seems now agreed, that a decree in a court of equity is equal (b) to a judgment at law; and that the filing of a bill in equity is of equal force to the filing of an original at law, to prevent the alienation of assets; and therefore where an executor, though without notice of a decree, paid a debt due by specialty, he was decreed to pay it over again out of his own pocket.

3 Lev. 355. 2 Vern. 37. 88. [Pr. Ch. 179. 188. Bunb. 48. Ca. temp. Talb. 217. 2 Atk. 385.] Though the contrary is holden, Ro. Abr. 377. Stil. 38. (b) [That is, in the course of administration of assets, but not so as to affect the lands of the debtor. 1 Ves. 496. 2 P. Wms. 621. However, there have been cases, where even decrees have been holden to bind lands, and where decrees are to hold and enjoy over. Ca. temp. Talb. 222.]

Off. of Exec. 138. Dyer, 80. As to statutes and recognizances, they are of an equal degree, and to be paid next to judgments; and therefore the executor, where there are several conuizees, may prefer a subsequent statute to a prior; for each statute equally affects the personal estate, though as to lands the first shall have precedence.

5 Co. 28. But, if the testator had entered into a statute for performance of (c) covenants, and none of them were broken, in an action of debt against the executor on a specialty, he cannot plead this statute; for perhaps the covenants may never be broken, and it would be unreasonable to allow the executor to ward off a just debt upon a contingency that may never happen. Harrison's case. Ro. Abr. 925. 2 Vern. 37. 88. Cro. Ja. 8. Cro. Car. 362. (c) Or for payment of money when an infant shall come of age. 5 Co. 28. & *vide* Ro. Abr. 925, 926.

Bothomly v. Ld. Fairfax, 1 P. Wms. 334. 2 Vern. 750. S. C. See Fothergill v. Kendrick, 2 Vern. 234. || A recognizance not enrolled shall be considered as a bond, and payable accordingly, the sealing and acknowledgment of it supplying the want of a delivery.

Hollingsworth v. Ascue, Cro. El. 355. 461. 494. 544. Moore, 405. S. C., but *contr.* and evidently referring to this report, it is laid down in the Touchstone, 58. that a statute so taken does not amount to an obligation. But Croke's Report is full and correct. So, a statute not regularly taken may be good as an obligation. ||

Off. of Exec. 41. Debts by specialty, as those by bonds, &c., sealed by the testator, are next to be paid. Also, it has been adjudged, that, if an action be brought against an executor on a simple contract of his testator's, he may plead that his testator entered into a bond payable at a future day, and this will be a good bar. (d) assets no further than the amount of the sum payable by the condition. Ca. temp. Hardw. 228.]

|| A con-

¶ A contingent security, for example, a bond to save harmless, shall not stand in the way of a debt by simple contract, as to the administration of assets. And, if subsequently to the payment of the simple contract debt (*a*), the contingency should happen, it seems reasonable that evidence of such payment should be admitted on the executor's plea of *plenè administravit* to an action by the specialty creditor.

160. (*a*) Allen, 40., but see Woodcock v. Hern, Goldsb. 142.

But, where the contingency has happened, although the debt consequent upon it has not been paid, it may be pleaded to an action by a simple contract creditor; as, where the testator had executed a bond to *A.* in 2800*l.*, conditioned to indemnify him against another bond for 800*l.*, which he had executed jointly with the testator to *B.* for the debt of the testator, in whose lifetime the 800*l.* had become due and were still unpaid; upon the executrix's disclosing these facts in a plea to an action of *assumpsit*, and stating that she had fully administered, except so much, which was subject to the satisfaction of this indemnity bond, it was holden to be a sufficient defence.¶

[The grantor's covenant in a marriage-settlement for him and his heirs, that the premises were free from incumbrances, shall rank equally with debts on bond.]

If two men are partners in trade, and one of them gives a bond to leave his wife 1000*l.*, and dies, and the other partner administers; if the wife would be paid out of the separate estate of the husband, on there being effects, she shall have a preference before other creditors; but, if there is no separate estate, and the wife would have satisfaction out of the partnership effects, then all the partnership debts must be first paid.]

Also, rent arrear and unpaid by the testator is equal to a debt by specialty; for this savouring of the realty, and maintained from receiving the profits of the land, the executor can no more wage his law against such a debt, than he can against a debt by specialty. *Ergo* it is more than a mere personality.

So, where debt was brought against an executor for rent reserved on a parol lease, after the lease was determined, and the executor pleaded that the testator entered into an obligation, and that he had not assets *ultra* 5*l.*, which were not sufficient to discharge this obligation; on demurrer it was resolved, that this rent, though reserved on a parol lease, was yet equal to an obligation; and that the contract still remained in the realty, though the term was determined, and no distress now.

Acton, Com. Rep. 67. Stonehouse v. Ilford, *id.* 145. S. P.]

Also, by the custom of *London*, if a citizen of *London* dies indebted by simple contract, such debt is equal to a debt by specialty, and shall bind the plaintiff, though a stranger, and no citizen.

Ro. Abr. 557. S. C. See Scudamore v. Hearne, Andr. 340.

Debts by simple contract are postponed to all (*a*) others, being

Toll. Exors.
282. Eccles v.
Lambert, as
cited in 2 Vern.
101. All. 40.
S. C. Sirgl. 37.
54. 73. S. C.
Hawkins v.
Day, Ambl.

Toll. Exors.
202. Cox v.
Joseph, 5 T. R.
307.

Parker v. Har-
vey, Vin. Abr.
tit. Executors,
(Q. a.) pl. 39.

Croft v. Pye,
3 P. Wms. 182.

Off. of Execc.
145. Ro. Abr.
927.

3 Lev. 267.
Newport v.
Godfrey,
4 Mod. 44.
2 Vent. 184.
S. C. adjudged.
Comb. 183.
Ver. 490.
Willett v.

Earle. Gage v.

Snelling's
case, 5 Co. 82.
b. Cro. Eliz.
409. S. C.
Noy, 53. S. C.

9 Co. 88. Off.
of Execc. 155.

Ro. Abr. 921.
5 Co. 82.

(a) It is said that debts due for servants' wages on the statute of labourers, shall be paid before debts by simple contract. Ro. Abr. 927. — If a man recovers a judgment or has a sentence in *France* for money due to him, the debt must be considered here only as a debt due on simple contract. 2 Vern. 540. Walker v. Whitter, Dougl. 1. — Also in equity it hath been ruled, that a voluntary bond shall not, in a course of administration, take place of real debts, though by simple contract; but shall, notwithstanding, be paid before legacies. Abr. Eq. 143, 144. 3 P. Wms. 222. Com. Rep. 255.

ing debts of an inferior nature; yet an executor is bound, as far as he has assets, to pay them, as much as any other debt; and therefore a simple contract creditor need not allege, that the executor had assets to satisfy debts of a superior nature, and his also; but, if the truth be, that the executor has only assets sufficient to satisfy such superior debts, he must plead it.

Keilw. 51.

Plow. 279.

2 And. 157.

Harman v.

Harman,

2 Show. 492.

pl. 457, 3 Mod.

115. S. C.

Edgecumbe

v. Dee, Comb. 35. not determined. 3 Lev. 113, 114. Vaugh. 94. [In the case of Harman v. Harman, as reported in Shower, and 3 Mod., the court agreed, that a judgment upon a simple contract debt may be pleaded in bar to an action of debt upon bond, and that it is no *devastavit* in an executor to pay a debt upon such a contract before a bond debt of which he had no notice; and they relied on the cases of Edgecumbe v. Dee, and Brooking v. Jennings, 1 Mod. 174., but it was adjourned; and afterwards, according to Comberbach, judgment was given for the plaintiff. But from a later case of Davis v. Monkhouse, Fitzg. 76. Bull. N. P. 178., it seems to be settled, that an executor may plead a judgment recovered on a simple contract to an action of debt on bond, unless he has notice of such bond, and that for the reason given in the text. But where an executor to an action of debt upon bond pleaded a judgment confessed on the preceding day on a simple contract debt, the plea was disallowed, because it did not aver that it was without notice of the plaintiff's demand, for in such case only is an executor excused in confessing a judgment. Sawyer v. Mercer, 1 T. R. 690.]

(b) But, where to a *scire facias* against executors, upon a judgment against their testator in debt, they pleaded, that before they had any consueance of this judgment, they had fully administered all their testator's goods, in paying debts upon obligations; upon demurrer it was adjudged a bad plea, for they at their peril ought to take consueance of debts upon record; and ought first of all (unless for debts due to the crown) to satisfy them; and although the recovery was in another county than where the testator and executors inhabited, it is not material. Cro. Eliz. 793. Littleton v. Hibbins, & vide 3 Mod. 115. Abr. 236. (c) It is said, the notice must be by action, 1 Mod. 174., [or bill in equity. 2 Vern. 37. 88. 3 P. Wms. 402. note. 2 Bl. Comm. 512. but *quæ*]

But, though the law requires that debts should be paid according to their superiority, as herein set forth, yet may an executor pay a debt on a simple contract before (b) a specialty, if he has no (c) notice of the obligee to ruin the executor, by keeping his bond in his pocket until he had paid away all the assets in discharging simple contract debts.

(d) For this vide Off. of Exec. 142. Dyer, 22. Ro. Abr. 926. Sid.

Also, (d) where there are several creditors in an equal degree, the executor may prefer which he pleases; and (e) may, when a creditor himself, retain assets against those who are in an equal degree with himself.

21. [As this power may be an inlet to fraud, the Chancery will sometimes interpose. 10 Mod. 496.] (e) || There is one exception to the rule that an executor *de son tort* cannot retain, and that is where he has become such by force of the st. 43 Eliz. c. 8. in consequence of a gift to him of the intestate's effects by an administrator, who has obtained the grant fraudulently; in which case he is, by the express provision of that statute, allowed to retain. Com. Dig. Adm. C. 2 H. Bl. 26. in note. Toll. Exec. 366. As an executor *de son tort* cannot, except in this case, retain, a defendant, to entitle himself to retain, must shew in his plea that he is rightful executor. Prince v. Rowson, 1 Mod. 208. 2 Mod. 51. S. C. Calverly v. Ellison, Sir T. Jon. 23. But a retainer may either be given in evidence on *plene administravit*, or pleaded specially. Loane v. Casey, 2 Bl. Rep. 965. Plumer v. Marchant, 3 Burr. 1383. Warner v. Wainsford, Hob. 127. Bond v. Green, 1 Brownl. 75. Shelly v. Sackville, Moore, 2. Anders.

24. S. C.

24. S. C. Bendl. 11. S. C. An executor or administrator may retain out of the assets a debt due in trust for himself. *Cockroft v. Black*, 2 P. Wms. 208. *Weeks v. Gore*, 3 P. Wms. 184. in note (B). *Rockelly v. Godolphin*, 2 Show. 403. *Skin*, 214. S. C. *Sir T. Raym.* 483. S. C. ||

[If a man has covenanted with *B.* and *C.* to leave by his will, or that his executors within six months after his death shall pay 700*l.* to them, in trust to pay the interest to his wife for life, then to be divided among his children, and in default of children, as he shall appoint; and bound himself, his heirs, &c. in a penalty for performance, and dies without issue, and intestate; if *B.* administers, he may retain assets against a bond creditor who sues him before the six months are elapsed.] *Plumer v. Marchant*, 3 Burr. 1380. || An executor taking in a bond and giving another in his own name for the same sum, may

retain. *Stamp v. Huthins*. *Moore*, 260. Cro. El. 120. S. C. 1 Leon. 3. S. C. Dy. 2. S. C. cited in marg. *Martin v. Alice Whipper*, Cro. El. 114. S. P. *Briers v. Goddard*, Hob. 250. S. P. But an executor appointed to sell land cannot retain the land, and pay so much as it is worth, and as much as testator appointed upon the sale, as he may in the case of goods; for his authority is only to sell the land; but in goods he has an interest. *Jenk.* 189. *Keilw.* 586. Though an administrator die before he appropriates the assets in the payment of his debt, yet his executor is entitled: 3 P. Wms. 184. in note, but an executor of an executor cannot, it seems, retain, unless he be also executor to the first testator. *Hopton v. Dryden*, Pr. Ch. 180. See *Croft v. Pyke*, 3 P. Wms. 183. where the point is discussed, but not decided. ||

|| Where *A.* being indebted in his individual capacity to a house in trade of which he was himself a partner, in a sum of money, the amount of which could not be exactly ascertained, covenanted to pay the firm all his then debts, and such other debts as should subsequently accrue; and afterwards died without having discharged the original debt, and having contracted further debts subsequent to the execution of the deed; it was holden, that his executors, two of whom were partners in the house of trade, could not plead either of these debts by way of retainer, or as an outstanding specialty debt. For the deed shewed no debt at law; and though a court of law has taken notice, as it had been urged, of a debt in trust; yet that was in a case where there was no difficulty of trial, where the amount of the debt was easily ascertained; but in the present case the debt constituted an item in a partnership account, and could not be ascertained without taking the account, and that could not be taken by a jury. ||

[But with respect to debts in equal degree, if a suit hath been commenced for any one, such debt shall be first paid; for after a suit begun, an executor (it hath been holden) may not excuse himself by any voluntary payments. Yet, it is said, that the executor, before notice of such suit, may pay any other creditor in equal degree, and then plead that he hath fully administered before notice. 2 Ch. Ca. 201. 2 Vern. 62.]

And it was holden by Lord *Cowper*, that pending a bill in equity (*a*) against an executor, or after a decree *quod computet*, an executor may pay any other debt of an higher nature, or of as high a nature, if there be *legal* assets; but, if he hath only *equitable* assets, then the court of Chancery will not indemnify him, and suffer him to prejudice and disappoint the first suitor. But he cannot do so, his Lordship added, after a final decree. *Br. Executors*, pl. 43. *Went.* 146. *Mason v. Williams*, 2 Salk. 507. *Smith v. Eyles*, 2 Atk. 385. *Worsley v. Earl of Scarborough*, 3 Atk. 392. (a) See

(a) See the case of *Dorston v. Earl of Oxford*, 3 P. Wms. 401. n. where a voluntary payment made by an executor of a debt in equal degree, pending a suit in equity, was allowed. — See too the case of *Waring v. Danvers*, 1 P. Wms. 295., where, after an action at law brought by one creditor, an executor confessed judgments to other creditors, and equity would not interpose.

Barker v.
Dumeres.
Barnardist.
Ch. Ca. 277.

Where a creditor sues an executor at law and in equity at the same time for the same demand, equity will not compel him to make his election in which of the courts he will proceed, in case the executor is attempting to prefer other creditors before him, by confessing judgments to them; but will merely restrain him from taking out execution upon the judgment without leave of the court.

For the distinction between *legal* and *equitable* assets, *vide* *supr.* (H.) Ca. 12mp. Talb. 220. 2 Vern. 435.

Where there are only *equitable* assets, the court of Chancery will direct the application of them according to that course which is most just, namely, to pay every creditor his share in proportion. So, where the assets are partly *legal* and partly *equitable*, although the court cannot take away the legal preference on legal assets, yet where one creditor hath been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets it will postpone him till there is an equality, in satisfaction to all the other creditors out of the equitable assets, proportionable to so much as the legal creditor hath been satisfied out of the legal assets.]

Tew v. Earl of
Winterton,
1 Ves. Jun.
451. 3 Br. Ch.
Rep. 489. S. C.

¶ If an annuity be secured by bond in bar of dower, the widow is entitled to be paid, in the first place, out of the personal estate, and in aid of that (a) is entitled to come upon such real estate as would have been liable to dower.¶

(a) This has been said to be by a very *subtle equity*.

3. Of paying Legacies before Debts; and therein of the Executor's Assent to a Legacy.

Off. of Exec.

26. Keilw. 128.

Dyer, 254.

[But, where

lands are devised for payment of debts and legacies, and the debts are such as land is not liable to satisfy, as debts by simple contract; there, it is said, the debts shall have no preference of the legacies; but, if there be not sufficient to pay all, they shall be paid in proportion. 2 Freem 270. So, if a man bind himself in an obligation to perform a certain thing, and devise divers legacies, and die, leaving only sufficient to satisfy the obligation if this should come to be forfeited; yet this obligation shall not be any bar of the legacies, because it is uncertain whether it will ever be forfeited: but the executor shall make a conditional delivery of the legacy, (to wit,) that if the obligation should be recovered against him, the legatee shall re-deliver the legacy. 1 Ro. Abr. 928.] (b) And therefore if the spiritual court go about to compel an executor to pay a legacy without security to refund, a prohibition shall go. Vern. 93.

Godolph. 148,
149. Off. of
Exec. 27.

And as the law makes it a *devastavit* in the executor to pay legacies before debts; so it prohibits the legatee from meddling with the legacy without the assent of the executor; and therefore it hath been holden, that if a legatee takes possession of the thing devised, without the assent of the executor, that he may have an action of trespass against him.

Off. of Exec.

29. Godolph.

But as it is the will of the testator which gives the interest to the

the legatee; so this matter of assent seems only a perfecting act for the security of the executor; and therefore the law does not require any exact form in which it is to be made. Hence any expression or act done by the executor, which shews his concurrence to the thing devised, will amount to an assent.

If *A.* devises a term to *B.* for life, remainder to *C.*, and the executor assents to the devise to *B.*, this will amount to an assent to the devise over to *C.*, and vest the interest in him accordingly.

If one is himself both executor and devisee, and he enters generally without claim or demonstration of election, he shall have the thing devised as executor, which is his first and general authority.

b. *Young v. Holmes*, 1 Str. 70.

So, where a man possessed of a long term devised to his wife for life, remainder to trustees for his son's life, &c., and made his wife executrix; it was holden, that the wife took the term wholly as executrix in the first place, till she agreed to the devise. But, it being proved that she said she would take the term according to the will, it was holden by the court to be a sufficient assent.

So, where in a like case the wife said, that the son was to have the estate after her; this was resolved to be a sufficient assent.

¶ So, where in a like case it was shewn that the executor had paid a charge of 50*l.* to which the legacy was subjected, it was holden to be sufficient proof of his assent.¶

Hence it hath been holden, that if a specifick legacy be devised, as three gowns, &c., and the legatee take money in satisfaction of them, that this amounts, 1*st.*, to a consent of the executor to the legacy or devise of them; and then it is a sale of them by the legatee or devisee to the executor for the money *eo instanti.*

¶ But, where *A.* devised a term to *B.* for life with remainder over, with a leasing power for twenty-one years, and made *B.* and two others executors, and *B.* entered and was possessed, and alone demised the premises for forty-two years, reserving rent to himself, his executors, &c. it was holden, that neither his entry on the land, nor his sole lease reserving rent as above, which was alike inconsistent with his interest as tenant for life, and his duty as executor, should be deemed an assent to the legacy; and that the lease should therefore take effect for the whole forty-two years out of the lessor's legal interest as executor.¶

See further tit. LEGACIES, (L.)

4. *What shall be allowed on account of Funeral Expences.*

An executor may lay out so much of the testator's assets as are necessary for defraying his funeral expences, before he has paid any of his debts or legacies.

And herein the executor is to be careful that the expences be moderate, and not exceeding the (a) degree and circumstances of the deceased; otherwise he may be guilty of a *devastavit*.

342. (a) Where the court of Chancery allowed 60*l.* as a reasonable sum, in defraying the funeral expences of a man of great estate and reputation in his country, and being buried there; but if he had been buried elsewhere, it seems his funeral might have been more private, and the court would not have allowed so much. Pr. Ch. 27.

1 Salk. 296. And, in strictness, it is said, that no funeral expences are
[In Comb. allowable against a creditor, except for the coffin, ringing of
342., Holt, the bell, parson, clerk, and bearers' fees, but not for pall or
Ch. J. is repre- ornaments.
presented to
have said, that 10*l.* is enough to be allowed for the funeral of one in debt.

Stag v. Punter, || "At law," says Lord Hardwicke, "where a person dies in-
3 Atk. 119. solvent, the rule is, that no more shall be allowed for a funeral
"than is necessary; at first only 40*s.*, then 5*l.*, and at last 10*l.* I
"have often thought it a hard rule, even at law, as an executor
"is obliged to bury his testator, before he can possibly know
"whether his assets are sufficient to pay his debts. But a court
"of equity is not bound down by such strict rules, especially
"when a testator leaves great sums in legacies, which is a rea-
"sonable ground for an executor to believe the estate is sol-
"vent." And in the case then before him, his Lordship, from
the circumstances, thought 60*l.* not too much for the funeral
expences.||

[(L. 2.) Where the Personal Estate shall be first ap-
plied in Discharge of Debts, &c. And herein
of marshalling the Assets.]

1 Cox's P. THE general rule is, that the personal estate of a testator shall
Wms. 291. in all cases be primarily applied in the discharge of his *personal*
Haslewood v. debt, (or general legacy,) unless he by express words or *manifest*
Pope, 3 P. intention exempt it. (a)
Wms. 324.
French v. Chi-
chester, 1 Br. P. C. 192. Fereyes v. Robertson, Bunb. 302. Walker v. Jackson, 2 Atk. 624.
Bridgeman v. Dove, 3 Atk. 202. Earl of Inchiquin v. French, Ambl. 33. and 1 Wils. 82.
Samwell v. Wake, 1 Br. Ch. Rep. 144. Duke of Ancaster v. Mayer, *id.* 454. Gray v. Minne-
thorpe, 3 Ves. 103. Brummel v. Prothero, *id.* 111. Manning v. Spooner, *id.* 117. Tate v.
Lord Northwick, 4 Ves. 816. (a) That it may be so exempted, see Bampffield v. Wyndham,
Pr. Ch. 101. Wainwright v. Bendlows, 2 Vern. 718. and Ambl. 581. Stapleton v. Colville,
Ca. temp. Talb. 202. Walker v. Jackson, 2 Atk. 624. Anderton v. Cooke, and Kynaston v.
Kynaston, cited in 1 Br. Ch. Rep. 456, 457. Holiday v. Bowman, cited in 1 Br. Ch. Rep. 145.
Webb v. Jones, 2 Br. Ch. Rep. 60. Burton v. Knowlton, 3 Ves. 107. Reade v. Litchfield, *id.*
475. Milnes v. Slater, 8 Ves. 305.

Cope v. Cope, So it shall be, although such personal debt be also secured by
2 Salk. 449. mortgage; and this, whether there be a bond, or covenant for
Howell v. Price, payment, or not.
1 P. Wms. 291.
Pockley v. Pockley, 1 Vern. 36. King v. King, 3 P. Wms. 360. Galton v. Hancock, 2 Atk. 436.
Robinson v. Gee, 1 Ves. 251. Earl of Belvidere v. Rochfort, 6 Br. P. C. 520. Phillips v. Phillips,
2 Br. Ch. Rep. 273.

So, lands subject to, or devised for payment of debts, shall be
liable to discharge such mortgaged lands either descended or de-
vised;

vised; (a) even though the mortgaged lands be devised expressly *(a)* *Bartholomew v. May*, 1 Atk. 487.
subject to the incumbrance. (b)
Marchioness of Tweeddale v. Earl of Coventry, 1 Br. Ch. Rep. 240. *(b)* *Serle v. St. Eloy*, 2 P. Wms. 386.

So, lands descended shall exonerate mortgaged lands devised. *Galton v. Hancock*, 2 Atk.

424. *Manning v. Spooner*, 3 Ves. 114. || Though, generally, a descended estate shall be applied in exoneration of a devised estate, yet, under a charge for payment of debts, it shall not be so, if the devised estate be expressly pointed out in aid of another fund provided for that purpose. *Donne v. Lewis*, 2 Br. Ch. Rep. 257. ||

So, *unincumbered* lands and *mortgaged* lands both being specifically devised, (but expressly "after payment of all debts,") shall contribute to the discharge of the mortgage. *Carter v. Barnardiston*, 1 P. Wms. 505. and 2 Br. P.C. 1.

But in all these cases, the debt being considered as the *personal* debt of the testator himself, the charge on the real estate is merely collateral. The rule therefore is otherwise, where the charge is on the *real* estate principally, although there be a collateral personal security (c); or, where the debt (although personal in its creation) was contracted originally by another. (d) *(c)* *Countess of Coventry v. Earl of Coventry*, 2 P. Wms. 222. *Edwards v. Freeman*, *id.* 437. *Wilson*

v. Earl of Darlington, 2 Cox's P. Wms. 664. note. *Ward v. Lord Dudley*, 2 Br. Ch. Rep. 316. *(d)* *Cope v. Cope*, 2 Salk. 449. *Bagot v. Oughton*, 1 P. Wms. 347. *Leman v. Newnham*, 1 Ves. 51. *Robinson v. Gee*, *id.* 251. *Parsons v. Freeman*, *Ambl.* 115. *Lacam v. Mertins*, 1 Ves. 312. *Perkyns v. Baynham*. 2 Cox's P. Wms. 664. note. *Shafto v. Shafto*, *ibid.* *Bassett v. Percival*, *ibid.* *Lawson v. Hudson*, 1 Br. Ch. Rep. 58. *Earl of Tankerville v. Fawcett*, 2 Br. Ch. Rep. 57. *Tweedell v. Tweddell*, *id.* 101. 152. *Billinghurst v. Walker*, *id.* 604. See *Barnes v. Crow*, 4 Br. Ch. Rep. 2.

|| The equity to have the personal estate applied in exoneration of the real, subsists only between the heir or devisee and the residuary legatee, and not against creditors or even against specifick or general legatees. || *Hamilton v. Worley*, 2 Ves. 65. 4 Br. Ch. Rep. 204. S.C.

It is a rule in equity, that where one claimant has more than one fund to resort to, and another claimant only one, the first claimant shall resort to that fund, on which the second has no lien. If therefore a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets, *so far* as the latter shall have exhausted the personal assets in payment of his debt; and legatees (e) shall have the same equity as against assets descended. *Lanoy v. Duke of Athol*, 2 Atk. 446. *Lacam v. Martins*, 1 Ves. 312. *Mogg v. Hodges*, 2 Ves. 53. *Trimmer v. Bayne*, 9 Ves. 209. *(e)* *Anon.* 2 Ch. Ca. 4. *Sagittary v. Hyde*, 1 Vern.

455. *Neave v. Alderton*, 1 Eq. Ca. Abr. 144. *Wilson v. Fielding*, 2 Vern. 763. *Galton v. Hancock*, 2 Atk. 436. *Culpepper v. Aston*, 2 Ch. Ca. 117. *Bowdman v. Reeve*, *Pre. Ch.* 578. *Tipping v. Tipping*, 1 P. Wms. 730. *Lucy v. Gardiner*, *Bunb.* 137. *Lutkins v. Leigh*, *Ca. temp. Talb.* 54.

So, where lands are subjected to the payment of *all* debts, a legatee shall stand in the place of a simple contract creditor, who has been satisfied out of personal assets. *Haslewood v. Pope*, 3 P. Wms. 323.

So, where legacies by will are charged on the real estate, but not the legacies by codicil, the former shall resort to the real assets upon a deficiency of the personal assets to pay the whole. *Hyde v. Hyde*, 3 Ch. Rep. 83. *Masters v. Masters*, 1 P. Wms.

Wms. 422. *Bligh v. Earl of Darnley*, 2 P. Wms. 620. || In *Masters v. Masters*, the real estate was charged by the will with the payment of the legacies *above mentioned*, and therefore it was holden it could not extend to the legacies in the codicil. It would have been otherwise if the charge had been with the payment of the legacies in general. But see *Norman v. Morrell*, 4 Ves. 1769.||

Clifton v. But from the principles of these rules it is clear that they cannot be applied in aid of one claimant so as to defeat the claim of another, and therefore a pecuniary legatee shall not stand in the place of a *specialty creditor*, as against land devised, (though he shall as against land descended): but such legatee (*a*) shall stand in the place of a mortgagee who has exhausted the personal assets, to be satisfied out of the mortgaged premises, though specifically devised; for the application (*b*) of the personal assets, in case of the real estate mortgaged, does not take place to the defeating of any legacy.

Lord Leigh, *Ambl.* 171. (*b*) *Oneal v. Mead*, 1 P. Wms. 693. *Tipping v. Tipping*, *id.* 730. *Davis v. Gardiner*, 2 P. Wms. 190. *Rider v. Wager*, *id.* 335.

2 Atk. 438. But none of the rules deducible from these cases subject any fund to a claim to which it was not before subject, but only take care that the *election* of one claimant shall not prejudice the claims of the others.

1 Ves. 312. note. || This case of *Robinson v. Tonge*, in which it was holden, that assets should not be marshalled as against a copyhold estate, has been over-ruled by Lord *Eldon*, in *Aldrich v. Cooper*, 8 Ves. 382. as irreconcilable with all principle. See too in *Tomlinson v. Ladbroke* at the *Rolls'* sittings after Hil. T. 1809. Toll. Exec. 422. note (i).||

Arnold v. A court of equity will not marshal assets in favour of a charitable bequest, so as to give it effect out of the personal chattels, it being void so far as it touches any interest in lands.

Chapman, 1 Ves. 110. *Mogg v. Hodges*, 2 Ves. 52. *Attorney General v. Tyndal*, *Ambl.* 614. *Makeham v. Hooper*, 4 Br. Ch. Rep. 153. *Foster v. Blagden*, *Ambl.* 704. *Hillyard v. Taylor*, *id.* 713. 2 Eden, 207. S. C.

Sharpe v. Ld. || A court of equity cannot marshal assets against judgment creditors, for they are to be paid in the first instance.

Scarborough, 4 Ves. 538. If it appears in any stage of the cause, that creditors by simple contract will be deprived of their debts by specialty creditors going against their fund, the court will of itself, though the bill do not call for it, direct the assets to be marshalled.

Gibbs v. Under a devise of real and personal estate in trust to pay debts and legacies, some of which were void under the statute of 9 G. 2. c. 36. as a charge of charity legacies upon the real and leasehold estates, and money on mortgage; on a deficiency of assets, the other legatees were preferred to the heir.||

Ougier, 12 Ves. 413. Where a legacy is given out of a mixt fund of real and personal estate payable at a future day, and the legatee dies before the day of payment; *quære*, Whether the court will marshal the assets so as to turn such legacy upon the personal estate, in which case it would be vested and transmissible; whereas as against the real estate it would sink by the death of the legatee?

Currie v. Pye, 17 Ves. 402. *Prowse v. Abingdon*, 1 Atk. 482. *Pearce v. Taylor*, Tr. Vac. 1790. before Ld. *Thurlow*. *Kiernan v. Fitzsimon*, 3 Ridgw. P. C. 16. || If a testator in his will order his trustees to possess themselves of his estates and *substance*, and to pay debts, this is a charge on the real estate, and the assets shall be marshalled to let in the legatees so far as the personal estate has paid towards the debts. *Foster v. Cook*, 3 Br. Ch. Rep. 347.||

As against real assets *descended*, it seems, that the wife shall stand in the place of creditors for the amount of her *paraphernalia*. But as against real assets devised, (a) *quære*.
 Corbet, 3 Atk. 369. Graham v. Londonderry, *id.* 393. (a) Probert v. Clifford, 2 Cox's P. Wms. 544. note, and Ambl. 6. Incledon v. Northcote, 3 Atk. 438. Aldrich v. Cooper, 8 Ves. 397.

Tipping v. Tipping, 1 P. Wms. 730. Snelson v.

(M) In what Cases an Executor may make himself liable *de bonis propriis*: And herein,

1. Where he shall be liable *de bonis propriis* by his false Pleading.

EXECUTORS are no farther chargeable than they have assets, unless they make themselves so by their (b) own act; as by pleading a false plea, *i. e.* such a plea as will be a perpetual bar to the plaintiff, and which of their own knowledge they know to be false.
 by default, upon executing a writ of enquiry, he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir; for he should have pleaded *plene administravit*, or specially what assets he had. 6 Mod. 308. *per Curiam*. Sir W. Jones, 87. That if an executor confesses or suffers judgment by default, he admits assets in his hands, and is estopped to say the contrary. [Rock v. Leighton, 1 Salk. 310. 1 Ld. Raym. 589. S. C. Com. Rep. 87. S. C. 3 T. R. 690. S. C. Skelton v. Howling, 1 Wils. 258. S. P. So, if he pleads only the general issue, and has a verdict against him. Ramsden v. Jackson, 1 Atk. 292. Erving v. Peters, 3 T. R. 685. For he can never avail himself of matters in a subsequent stage of the proceedings, which he might have pleaded in an earlier stage. Earle v. Hinton, 2 Str. 732. and cases *supr.* — In *assumpsit* against an executor, he pleaded *non assumpsit* and *plene administravit*; it was insisted, that if the plaintiff could prove assets unadministered, to any amount, he must have judgment for the whole. But Lord Mansfield said, the law had been understood to be so, and many cases decided to that effect; but that he thought it absurd and wrong, that the plaintiff should recover of the executor *more than the assets in his hands*; and the judgment was given accordingly. Harrison v. Beeches, Guildh. Tr. 1769, cited by Lord Kenyon, 3 T. R. 688.] An executor must defend himself by legal pleading, and cannot in these cases have any relief in equity. [Thus, where to three several actions an executor pleaded that he had no assets *ultra* 100*l.*, and judgment was had upon each action for 100*l.*, equity refused an injunction. Anon. 1 Vern. 119. So, where he had pleaded a false plea, by the mistake of his attorney, as alleged, and a verdict had passed against him, equity would not relieve him, though the merits had never been tried. Stephenson v. Wilson, 2 Vern. 325. However in the case of Robinson v. Bell, 2 Vern. 146., where the attorney had, by mistake, pleaded a different plea from that which he was directed to plead, and the executor had confessed a mortgage to the testator, which afterwards turned out to be worth nothing, upon which confession a verdict had been given against him, the court thought fit to relieve. And in that case Lord Commissioner Hutchins mentioned two instances where the court had interposed in behalf of executors after verdicts on *ne unques executor*. — Under the circumstances of the anonymous case above cited from 1 Vern. 119., the executor may now defend himself at law, without resorting to equity, by pleading to one action *plenè administravit præter* a certain sum, and afterwards to the others, though brought in the same term, the like plea of *plenè administravit præter* the same sum, and as to that sum that he had confessed it in the other action. Waters v. Ogden, Dougl. 452.]

Ro. Abr. 930. Godolph. 198. 1 Bl. Rep. 400. (b) If an executor suffers judgment to go against him

Therefore if an executor, being sued, pleads *ne unques executor*, and it is (c) found against him, the judgment shall be *de bonis testatoris si, &c. et si (d) non, de bonis (e) propriis*; for thereby he estrangeth himself from the testator, and the benefit of the will, and by his own falsity and folly hath made his own goods chargeable.
 46 E. 3. 10. Ro. Abr. 930. 933. Cro. Ja. 191. 671. Leon. 67. And. 150. (c) If upon a false plea judgment be given against

against an executor upon demurrer, and execution be awarded, the sheriff cannot return *nulla habet bona testatoris*, but is to return a *devastavit*, as if it had been found against the executor by verdict. Cro. Eliz. 102. (d) But, if there had been judgment against the testator, and the party who recovered had brought a *scire facias* on the judgment against the executor; in this case, though the executor had pleaded *ne unques executor*, and it had been found against him, yet he shall be chargeable *de bonis testatoris* only; for the prayer of the writ is for execution of the goods of the testator, by which he is estopped to demand any other. Ro. Abr. 933. Waldron v. Berrie. (e) As well of the debt as of the damages and costs. Ro. Abr. 950.

Cro. Ja. 671-2. So, if to an action brought against him he pleads a release made to himself, and it is found against him, this shall charge him *de bonis propriis*; for it is a falsity which (a) falls within his own knowledge. (a) Where the executor pleaded, that he performed a condition, which being found against him, it was holden, that he should be charged *de bonis propriis*. Moor, 69. *per* Dyer.

Yelv. 219. So, where an action of debt upon an obligation was brought against an administrator for 14*l.*, and he pleaded, that before notice of the action his administration was revoked; and that likewise before notice he delivered over 200*l.*, which he had of the intestate's, to the new administrator; the plaintiff replied, that the revocation was by (b) covin and fraud, which being found for him, it was holden, that he should recover absolutely from the administrator. Morgan v. Sock. Bulst. 187. S. C. (b) But, where to an action of debt against an executor he pleaded a former judgment had against him by another person, and that he had not assets more than sufficient to satisfy the judgment; and the plaintiff replied, that this judgment was had by covin, to defraud the other creditors; though it be found accordingly, and though this be a false plea; yet the judgment against the executor shall only be *de bonis testatoris*. Ro. Abr. 931. Borret v. Boys. [*Sed qu. de hoc?*]

Ro. Abr. 931. But, if an executor pleads, that such a deed is not the deed of his testator, or that a release was given to the testator; though these prove false, yet the judgment shall be *de bonis testatoris*; for of these the executor cannot be presumed to have so perfect a knowledge. Cro. Ja. 672. [If an executor pleads a former judgment had against him by another person, and no assets *ultra*, and the plaintiff reply *per fraudem*, and it be so found, yet shall the judgment be only *de bonis testatoris*. Bull. N. P. 144.]

Cro. Ja. 191. So, in debt upon a bond against baron and feme as administratrix, the defendant pleaded payment by the feme, after the death of the intestate, and it was found against him, and the judgment was, *quod recuperet* against them *de bonis testatoris, si tantum habent in manibus, & si non, pro misis de bonis (c) propriis*, and held well enough; for though the plea is false, yet the husband was a stranger to the intestate, and might not know whether the wife had paid it to the plaintiff or not. Johns v. Adams. (c) It was objected, that the judgment ought to have been *de bonis propriis* of the baron only, for that a feme covert cannot have any goods; but disallowed; for although a feme covert hath not any goods during the coverture, yet because the baron is charged only in respect of the feme, she might have goods if she had survived, and execution might be taken against her. Cro. Ja. 191-2; but for this *vide* Ro. Abr. 930-1. Cro. Car. 693. * — * If there be judgment against the husband and wife, executrix, and a return that the husband wasted, it shall be *de bonis suis propriis*. 1 Ro. 932. l. 25. — If a return be that the wife *dum sola* wasted, it shall be *de bonis propriis* of both. 1 Ro. 931. l. 5. R. Cro. Car. 519. See also 1 Ro. 930. l. 50. — If it be returned against a *feme covert*, executrix, and her husband, that sufficient goods have come to their hands, which they

they have wasted and converted to their own use, it is good; the conversion is not necessary, and may be rejected; and judgment shall be *de bonis propriis* of both. *Bellew v. Scott*, 1 Str. 440. *Morfoot v. Chivers*, *Id.* 631. *S. P.* *Smalley v. Kerfoot*, 2 Str. 1094. *S. P.*

So, if an action of covenant be brought against an executor, and the breach assigned be in the time of the executor; yet the judgment shall be *de bonis testatoris*; for it is the testator's covenant which binds the executor, as representing him, and therefore he must be sued by that name.

It is holden in *Shipley's* case, that if an action of debt on an obligation of 200*l.* be brought against an executor, who pleads fully administered; and the plaintiff replies assets, which are found by the jury to the value of 172*l.*, that a judgment to recover the entire debt and damages, and costs of the goods of the testator, *si, &c., et si non, tunc* the damages of his (a) proper goods, is goods; for that the defendant's bar being in effect, that he had not assets, the same amounted to a (b) confession of the debt, on which the plaintiff may take judgment immediately, though he cannot have execution until assets come to the hands of the executor.

goods of the executor for the delay; and the levying of the damages of the goods of the testator, when it appears they are not sufficient to satisfy the debt, is erroneous; for the testator's goods are to be charged with the debt and not the damages, if they are not sufficient to discharge both. *Lev. 7.* (b) That in an action on the case against an executor, who pleads *plene administravit*, the plaintiff must prove his debt, otherwise he shall recover but *1*d.** damages, though there be assets; for the plea only admits the debt, but not the quantity. *Salk. 296. per Holt Ch. J.*

But in the case of *Dorchester* and *Webb* it seems to be holden, that the plaintiff, upon a plea of *plenè administravit*, cannot have judgment of assets *in futuro*; for that this is such an acknowledgment of the want of assets, as will bar him in the same manner as if the plaintiff had denied that he had fully administered, which being found against him will bar him, and on which the plaintiff must always pay costs.*

after the plaintiff hath taken such judgment, he shall not, in a subsequent action against the executor, suggesting a *devastavit*, be allowed to go into evidence of assets having been in the defendant's hands before that judgment; for by so taking his judgment, he admits that the defendant hath fully administered to that time. *Bull. N. P. 169.* In a *scire facias* therefore on the judgment, he must not pray execution of assets generally, but of those only which have come to the executor's hands since the former judgment. *Mara v. Quin*, 6 T. R. 1. But, if the executor receive assets between the time of the plaintiff's suing out the writ in the first action and the judgment, the judgment will be amended by being made a judgment as of that term when the plaintiff could, at the soonest, have entered it up, unless the defendant can shew, that in point of fact some injustice will be done by it in the particular case. *Ibid.*]

But this matter came to be fully considered in the case of *Noel and Nelson*, where in debt against an executor he pleaded fully administered, whereupon the plaintiff prayed judgment of assets *in futuro*, and it was so entered; and after, upon a suggestion of assets, the plaintiff sued forth a *scire facias*, to which he pleaded no assets, and it was found against him, and judgment accordingly; and it was urged for error, that the plaintiff hereby had confessed the plea of fully administered, and then it

was

Hob. 188.
Cro. Ja. 647.
671. Hut. 35.
Brownl. 24.
Ro. Abr. 931,
932. Saund.
112.

8 Co. 134.
Mary Shipley's
case. Hob.
199. S. C.
cited. (a) That
if the executor
has not suffi-
cient goods of
the testator's
to satisfy both
debt and da-
gages, the da-
gages must be
levied of the

Cro. Car. 373.
* It is common
now, on such
plea, to admit
the truth of it,
and take judg-
ment *de bonis*
quando acci-
derint. [But

after the plaintiff hath taken such judgment, he shall not, in a subsequent action against the executor, suggesting a *devastavit*, be allowed to go into evidence of assets having been in the defendant's hands before that judgment; for by so taking his judgment, he admits that the defendant hath fully administered to that time. *Bull. N. P. 169.* In a *scire facias* therefore on the judgment, he must not pray execution of assets generally, but of those only which have come to the executor's hands since the former judgment. *Mara v. Quin*, 6 T. R. 1. But, if the executor receive assets between the time of the plaintiff's suing out the writ in the first action and the judgment, the judgment will be amended by being made a judgment as of that term when the plaintiff could, at the soonest, have entered it up, unless the defendant can shew, that in point of fact some injustice will be done by it in the particular case. *Ibid.*]

Lev. 286.
2 Saund 214.
Sid. 448.
2 Keb. 606.
671. Vent. 94.
S. C.

was as strong against him as if there had been a verdict, in which he should have been barred for ever. But it was resolved for the plaintiff; for he had a good cause of action, and probably did not know but that there were assets, and had done nothing amiss; for as soon as the executor denies assets by his plea, he rests satisfied, and makes only a reasonable prayer, that he may be paid when assets do come, as it is fit he should. And therefore they agreed *Shipley's* case to be good law; for when the executor pleads *riens en mains*, he confesses the debt, which is a good foundation for the judgment; but the want of assets at present hinders execution, which is therefore stayed till assets shall come.

2. *Where by his Promise to pay or discharge the Testator's Debts or Legacies, he makes himself liable.*

Cro. Ja. 47. If an executor, in consideration that a creditor to the testator will forbear to sue him for a certain time, promises to pay him his debt, this shall bind him; and an *assumpsit* lies against him on this promise, (a) without alleging that he hath assets. Co. 94. Ro. Abr. 921. — Note, that by the statute of frauds, 29 Car. 2. c. 3., such promise must be in writing. (a) It is said in 9 Co. 94. a., that though the plaintiff need not allege that the executor has assets, yet, if in truth there be no debt due from the testator, or if the executor had no assets at the time of the promise made, he may give these matters in evidence. — But the better opinion seems to be, that the plaintiff need not prove his having assets, and that forbearance is sufficient consideration to entitle him to the action. *Vide* Ro. Abr. 24. Cro. Ja. 273. 604. 643. 3 Leon. 67. 2 Lev. 20. 122. — But a promise by an administrator *durante minoritate* after the infant has come of age, will not bind such administrator. Cro. Car. 516. Ro. Abr. 910. Vaugh. 93. *supra* 489. See 38 G. 3. c. 87.

2 Lev. 3. So, in *assumpsit* the plaintiff declared, that *J. S.* devised a legacy to him, and made the defendant executor, and the plaintiff Davis v. Reyner, Vent. 120. S. C. intending to sue him for the legacy, the defendant, in consideration of forbearance, promised to pay him: the defendant pleaded *divers bonds and judgments, and null assets ultra*, upon which the plaintiff demurred, and had judgment without argument: for it is not material whether he had assets or no, for he is charged upon his own promise, in consideration of forbearance; and a forbearance of suit for a legacy is a sufficient consideration. || An action of *assumpsit* for a legacy, founded not upon any express assent of the executor, but merely on an implied assent on account of a sufficiency of assets, cannot be supported. Deeks v. Strutt, 5 T. R. 690. But an action may be maintained by the legatee of a specific chattel against an executor, after his assent to the bequest. Doe v. Guz, 3 East, 120. Barton's case, 1 Freem. 289. ||

Sid. 89. Scot So, if *A.*, together with *B.*, is bound to *C.* for the proper debt of *B.*, &c., and *A.* pays the money, and *B.* dies and makes v. Stephens, Lev. 71. S. C. *D.* his executor, and *D.*, in consideration that *A.* will forbear to sue him till such a time, assumes and promises to repay him; Ro. Rep. 27. S. P. *per* Croke. this consideration is good, though *D.* was liable in equity only. [Forbearance seems a good consideration for a promise by an executor to pay a debt of his testator. Reech v. Kennegal, 1 Ves. 125.]

(N) *What Actions Executors or Administrators may bring in Right of those they represent.*

AN executor stands in the place of his testator, and (a) represents him as to all his personal contracts, and therefore may regularly maintain any action in his right, which he himself might.

Cro. Eliz. 377.
Litch. 167.
Ro. Abr. 912.
Savill, 118.
133. Poph. 189.

Leon. 193. (a) But, if one enters into an obligation, conditioned to pay 20*l.* to such person as the testator shall by his last will appoint, and the testator makes no particular appointment, his executors cannot maintain an action for this 20*l.*; for though they are his assignees in law, yet the assignee here must be an assignee in deed, who shall take it to his own use; for the word *paying* carries property with it. Hob. 9, 10.

But it seems that executors could not at common law bring trespass for a trespass done to the testator; to remedy which, by the 4 E. 3. c. 7. reciting, That "whereas in times past executors have not had actions for a trespass done to their (b) testators, as of the goods and chattels of the same testators, carried away in their life, and so such trespasses have hitherto remained unpunished; it is enacted, That executors in such (c) cases shall have an action against the trespassors, and recover their damages in like manner as they whose executors they be should have had, if they were in life."

(b) || "This act does not speak of actions of trespass, though the instance put is proper for such an action; but it speaks

of actions for a trespass done to the testator's goods, and it enacts, that in such cases executors shall have an action against the trespassers; apparently using the word *trespass* as meaning a wrong done generally, and the trespassers as wrong-doers. It does not specify the nature of the action." Per Lord Ellenborough C. J. in *Wilson v. Knubley*, 7 East, 134. See also the words of *Lawrence J.* to the same effect, *Ibid.* So, by *Powell J.* 2 Ld. Raym. 974. "This statute is a remedial law, which has always been taken by equity, and whenever there is a matter of property in question, it is brought within the statute." (c) It hath been adjudged, that an executor may have an action of debt upon the statute 2 & 3 E. 6. c. 13. against a defendant, for not setting out tythes in his testator's time; for though it is a tort done to his person, yet it is maintainable within the equity of this statute. Vent. 30.

|| And by 25 E. 3. st. 5. c. 5. "Executors of executors shall have actions of debt, accompt, and of goods carried away of the first testator, and execution of statutes-merchant, and recognizances made in court of record to the first testator, in the same manner as the first testator should have if he were in life." ||

Also it was holden, that at common law there was no remedy for recovery of rent-arrear in the life-time of the testator; for the heir could not maintain an action of debt for it, because he had nothing to do with the personal contracts of his ancestor; nor the executor, because he could not represent his testator, as to any contracts relating to the freehold and inheritance. But this is remedied by the 32 H. 8. c. 37., by which executors and administrators are enabled to sue for and recover all such arrears of rent, &c., for which *vide* title DEBT, letter (C).

Co. Lit. 162. 2.

|| By 11 G. 2. c. 19. § 15. (which see, tit. RENT (H.)) the executors of tenant for life, on whose death any lease determined,

The provisions of this statute have,

by an equitable construction, been extended to the case of tenants in tail, whose leases are determined by their death. *Vide infra*, tit. *Rent* (H). shall, in an action on the case, recover of the lessee a rateable proportion of rent from the last day of payment to the death of such lessor.||

Cro. Eliz. 377.
Vent. 30. *vide*
tit. *Trover*
and *Conversion*.

Executors and administrators may bring trover for the goods of the deceased, though the defendant took the goods before probate or administration committed; for the probate and administration relate back to the death of the testator or intestate; and they may allege the possession in the testator or intestate; for though this be a possessory action, yet the law supposes the possession in the executor or administrator, as soon as the property is derived to them.

2 Lev. 26.
Vent. 175.
S. C. That
executors shall
take advantage
of covenants
in gross. Palm.
358. — But
covenants annexed
to the freehold and
inheritance, though
made with the testator,
his executors and
administrators, shall
descend to the heir.
And. 55. Skin. 305.
pl. 1. *vide* title
Covenant.

An executor, (and not heir or assignee,) for a covenant broken in the lifetime of the testator, shall have an action of covenant though it were a covenant real, which runs with the land, as he cannot of that have an heir, &c., and the damages shall be recovered by the executor, though not named, as he personally represents the testator.

Vent. 30.
1 And. 242.
1 Leon. 205.
S. P. *arguendo*.
So 7 H. 4. 6. b.
Br. Abr. tit.
Executors, 45.

But though an executor represents the testator as to his personal estate and contracts only, yet an executor may bring an ejectment for an ejectment in the life of the testator; for in this action damages as well as the possession of the lands are to be recovered. (a)

S. C. (a) So he may bring a *quare impedit* for a disturbance in the lifetime of the testator, and shall recover damages within the equity of the statute 4 E. 3. c. 7. Cro. Eliz. 207. 1 And. 241. S. C. 1 Leon. 205. S. C. 4 Leon. 15. S. C.

Carth. 90.
Shuttleworth
and Garret.
3 Mod. 239.
3 Lev. 261.

So, if a lord of a manor assesses a fine upon a copyholder for his admittance, and dies, his executor may bring an action for it; for it does not depend upon the inheritance, but is *quasi* a fruit failen.

Show. 35. Comb. 151. S. C. adjudged by three judges against *Holt*, C. J. Ld. Raym. 502. [Evelyn v. Chichester, 3 Burr. 1717. *acc.*]

Salk. 295.
King v. Ayloff,
by three judges
against *Holt*,

An executor may bring a writ of error to reverse an attainder of high treason of his testator; for he is privy to the judgment, and may have a loss thereby.

who held, that by the reversal the blood and land is restored, which is no advantage to him, and the goods were forfeited by the conviction of the testator, and not by the attainder. *Vide* 4 Bl. Comm. 387.

Doe v. Porter,
3 T. Rep. 13.

[So the executor of a tenant from year to year as long as both parties please, may maintain an ejectment, for it is a chattel interest which vests in him.]

(O) How such Actions must be laid : And therein of joining a Matter in Right of the Testator, and in their own Right, in the same Action.

AN executor cannot in the same action join a demand in his own right, with one in right of the testator; for the rights being of several natures, there must be several judgments.

¶ The funds too, to which the money and costs, when recovered, are to be applied, or out of which the costs are to be paid, are different; and the damages and costs being entire, it cannot be distinguished how much the plaintiff is to have as executor, and how much he is to take as his own. A count therefore (a) on an *indebitatus assumpsit* to A. as administrator cannot be joined with a count on an *insimul computasset* with him in his own name. But a (b) count in *assumpsit* to the plaintiff as executor, for money paid by him to the defendant's use, may be joined with a count on promises made to the testator. So, a count (c) upon a promise to the plaintiff as administrator for goods sold and delivered by him after the death of the intestate, may be joined with a count upon an account stated with him as administrator. For in both these cases the money to be recovered under each of the counts will be assets; and the whole being thus applicable to the estate of the testator, the counts may consequently be joined. But it must be averred that the duty accrued to the plaintiff as executor; for it is not enough to say that it accrued to him executor, or being executor. And therefore where (d) a count upon an account stated with the plaintiff executrix (not as executrix) was joined with a count on a promise to the testator, it was holden in error after judgment by *nil dicit*, and a writ of inquiry, and final judgment, that those two counts could not be joined.

Jackson, 3 Lev. 60. King v. Thom, 1 T.R. 489. Cockerill v. Kynaston, 4 T.R. 281. Thompson v. Stent, 1 Taunt. 322. Powley v. Newton, 6 Taunt. 453. 2 Marsh. 147. S.C. (d) Henshall v. Roberts, 5 East, 150.

If a bond or promissory note be given to one as executor, it has been holden, that he cannot join a count on such bond or note with a count on a debt due, or a promise made to the testator.

Pull, 7. But in King v. Thom, 1 T.R. 487. it was holden by Ashhurst and Buller, Js., that a count against the defendant as acceptor of a bill of exchange indorsed by the payee to the plaintiffs, surviving executors of J.S. in right of the plaintiffs as surviving executors, might be joined with counts for money had and received by the defendant to the use of the plaintiffs as executors, and on an account stated with the plaintiffs as executors.

So neither can several demands against an executor, some of them accruing in his representative character, and some in his own right, be joined in the same declaration, the pleas and judgments to such demands, and the funds out of which the costs are to come, being different.¶

And therefore, if in *assumpsit* against an administratrix, the plaintiff declares upon a sale of goods to the intestate for 200*l.*, and

(a) Rogers v. Cook, 1 Salk. 10. Carth. 235. S.C. 1 Show. 366. S.C. Hooker v. Quilter, 1 Wils. 171. S.P. 2 Str. 1271. S.C. & S.P. (b) Ord v. Fenwick, 3 East, 104. Foxwist v. Tremaine, 2 Saund. 207. (c) Cowell v. Watts, 6 East, 403. So, Bull v. Palmer, 2 Lev. 165. Sir Thos. Jon. 47. S.C. Mason v.

Betts v. Mitchell, 10 Mod. 316. Hosier v. Lord Arundel, 3 Bos. &

Hob. 88.

Herrenden v. Palmer.

and upon another sale to the defendant herself for 27*l.*, and that upon account the defendant was found indebted to the plaintiff in these sums, and promised, &c.; the declaration is naught, for the charge being in several manners, viz. in her own right, and as administratrix, it ought to have been by several actions.

|| So, a count for money had and received by the defendant as executor for the plaintiff's use, or for money lent to him as such, or on an *insimul computasset* of money due to him as such, cannot be joined with a count on a promise made by the testator. But a count on an account stated with an executor, as executor for money owing from the testator, may be joined with a count on a promise made by the testator. This indeed is the common way of declaring against executors to save the statute of limitations.

Jennings v.
Newman,
4 T. R. 347.
Rose v. Bowler,
1 H. Bl. 108.
Bridgen v.
Parkes, 2 Bos.
& Pull. 424.
Secar v.
Atkinson,
1 H. Bl. 102.

Wilson v.
Wigg, 10 East,
313.

To a count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors, administrators, and assigns, may be joined another count, charging them, that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one J. S. against whom breaches are alleged; and concluding, that so neither the testator, nor the defendants after his death, nor J. S. since the assignment to him, had kept the said covenant, but had broken the same.||

Kemp v. Andrews. Carth.
170. 1 Show.
188. S. C.
3 Lev. 290.
S. C. Martin
v. Crompe,
1 Ld. Raym.
340. 2 Salk.
444. S. C.

So, if A, B, and C. be possessed as joint merchants of goods, which come to the hands of J. S., and afterwards B. and C. die, A. alone may bring trover for these goods; for though between joint merchants there is no survivorship, yet the action in this case must survive, though the interest doth not; otherwise there would be a failure of justice, because the survivor and the executors of those who are dead cannot join in action, for that their rights are of several natures, and there must be several judgments.

5 Co. 32. laid
down as a rule.
Moor, 566.

If an executor brings an action of debt for any thing in right of the testator, it must be in the (*a*) *detinet* only.

Ro. Abr. 602, 603. S. P. (*a*) But, if in the *debet* and *detinet*, it is aided after verdict, by 16 & 17 Car. 2. c. 8. Frevin v. Paynton, 1 Lev. 250. 1 Sid. 379. S. C.

20 H. 6. 5. b.
Ro. Abr. 602.
S. C. (*b*) So,
if a man binds
himself to the

So, if an executor brings debt upon an obligation made to the testator, where the day of payment incurred (*b*) after the death of the testator, yet the writ shall be in the *detinet* only; for he brings the action as executor.

testator to pay him 100*l.* when such a thing shall happen, if it happens after the death of the testator; yet the writ of debt by the executor shall be in the *detinet* only. Ro. Abr. 602.— So, if a rent be granted to another for years, the executor of the grantee shall have debt, for the arrearages of this rent incurred after the death of the testator in the *detinet* only; for he had it as executor. Ro. Abr. 602.— So, if lessee for twenty years leases for ten years, rendering rent, and dies, his executor or administrator shall have debt for the rent incurred after the death of the testator in the *detinet* only. Ro. Abr. 603. Noy, 32. Cro. Car. 225. Lev. 250. 2 Keb. 407. Sid. 379. S. P. adjudged. — But in Sir T. Jon. 169. the contrary seems to be adjudged, and a diversity taken between things in possession; for as to things in action, the writ must always be in the *detinet*, as for the arrears of an account,

&c.

&c. and they shall not be assets till recovered; but in this case the reversion of the term being in the executor immediately by the death of the testator, it is assets for the whole value, and the shewing he is executor is only to entitle him to the term to which the rent is incident.

So, if in an account an executor recovers a debt due to his testator, in debt for the arrears thereupon, the writ shall be in the *detinet* only; for though the action is converted into a debt by the account, yet it is the same thing which was received in the life of the testator.

So, if *A.* be in execution upon a judgment for *B.*, and after *B.* die, and *A.* bring an *audita querela* against *C.* the executor of *B.*, and have a *scire facias*, and thereupon put in bail by recognizance in Chancery, according to the statute of 11 H. 6. c. 10.; and after upon this *audita querela* judgment be given against *A.*, and afterwards a *scire facias* issue against the bail, and after judgment the bail be taken in execution upon the recognizance, and the sheriff suffer him to escape, upon which escape the executor bring an action of debt (*a*); this action ought to be brought in the *detinet* only, and not in the *debet* and *detinet*; for this recognizance is in nature of the first debt, this being in a legal course. *detinet*, and that for the escape being founded upon the same record, it ought to pursue it.

But, if an executor takes an (*b*) obligation for a debt due to his testator by contract, in debt upon this obligation the writ shall be in the *debet* and *detinet*.

the testator for a certain sum, he shall have debt for this in the *debet* and *detinet*. So, if an executor recovers in trespass for goods taken out of his possession, in debt for the damages recovered, the writ shall be in the *debet* and *detinet*, for he need not name himself executor.

So, if an executor, having lands by an extent, upon a statute made to the testator, and naming himself executor, by deed leases them for three years, rendering rent, &c. if an action of debt is after brought by him for this rent, it must be in the *debet* and *detinet*, because it is founded upon his own contract.

So, an executor, being lessee for years of a rectory in the right of the testator, may have debt upon 2 & 3 E. 6. c. 13. for not setting out tithes in the *debet* and *detinet*, because founded upon a wrong in his own time; and by the statute it is given to the party grieved.

Also, executors and administrators may, if they were actually possessed of the goods of the deceased, declare that they were possessed as of their own goods and chattels, without naming themselves executors or administrators, because the violation is to the property actually in their own hands.

Dougl. 4. note. But, where the goods of the testator never were in the possession of the executors, they must declare in that character. And if the goods when recovered will be assets in their hands, they must sue for them in that character, whether the conversion happen before or after the testator's death.

Munt v.

Stokes, 4 T. R. 565.

King v. Thom,
1 T. R. 487.

(a) 44 E. 3. 16.

35 H. 6. 31.

(b) Cro. Ja. 10.

Wade v. Atkin-

son. (c) That

an adminis-

trator, in his

declaration, was likewise to shew in what place administration was committed to him. 25 H. 6.

31. — But this was ruled otherwise. Cro. Eliz. 283. Piers v. Turner.

[So, where executors pay money which they were not obliged to pay, and afterwards bring an action to recover it back, they must declare in their own right, and not as executors.]

If a bill of exchange be indorsed to *A.* and *B.* as executors, they may declare as such in an action on the bill against the acceptor.]

It was formerly (*a*) holden, that an administrator in his declaration ought to shew how he was administrator, and likewise to produce his letters of administration: also, it was (*b*) holden, that in action against an administrator, the plaintiff ought to shew by (*c*) whom administration was granted.

declaration, was likewise to shew in what place administration was committed to him. 25 H. 6. 31. — But this was ruled otherwise. Cro. Eliz. 283. Piers v. Turner.

Cro. Eliz. 838.

879. 907.

Style, 106.

(d) Where ad-

ministration

was granted by

an archbishop,

and not said,

whether as

ordinary, or

by virtue of his

prerogative,

yet held good.

Cro. Eliz. 6.

But afterwards this difference was taken, that where an administrator is plaintiff, he must shew by whom administration was granted to him, because it is that which entitles him to the action; and if granted by a (*d*) peculiar jurisdiction, ought not only to shew by whom, but must add this clause, *cui commissio administrationis prædict. de jure pertinuit*, which he need not do if the administration was granted by a bishop; for in such case it is sufficient to say, that it was granted to him by the bishop, *loci illius ordinarium*, because since the law takes notice of the general jurisdiction of a bishop over the whole diocese, it likewise takes notice of all acts done by virtue of that jurisdiction.

907. 4 Leon. 189. — Where the administrator set forth, that administration was committed to him by *J. S.* archdeacon of *Norfolk*, and did not say *loci istius ordinarium*; it was holden good on a general demurrer; for it is not necessary to shew the jurisdiction of an archdeacon more than of a bishop. Sid. 302. Lev. 192. — That the plaintiff need not set forth the authority of an archdeacon, because he is *oculus episcopi*, and is to commit administration *de jure ordinario*. 2 Ro. Rep. 124. 150. Cro. Ja. 556. Palm. 97. Style, 54. but for this vide Cro. Eliz.

431. Moor, 367. Leon. 312. Style, 236. 282. Jon. 1. 2 Mod. 65. Lutw. 9. 408. — And that such an omission will be aided after verdict. Show. 355. Mason and Hanson adjudged.

4 Mod. 133. S. C. 2 Ld. Raym. 1037.

4 Mod. 133. S. C. 2 Ld. Raym. 1037.

4 Mod. 133. S. C. 2 Ld. Raym. 1037.

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4 Mod. 133. S. C. 2 Ld. Raym. 1037.

Lit. Rep. 80.

Style, 282. 463.

Sid. 228.

J n. 1. Lutw.

301. (e) In 2

Vent. 84. it is

said, that the

plaintiff in his

declaration

must aver, that

the administra-

tion was committed to the defendant. But in Comb. 465. a case is cited to have been adjudged, Mich. 1698, that though such an omission be ill upon a demurrer, yet it is aided by the defendant's pleading over, whereby he admits himself a rightful and lawful administrator. [It is sufficient to state that the defendant is administrator. Holiday v. Fletcher, 2 Ld. Raym. 1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

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1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

1510. 2 Str. 781. S. C. 1 Barnard. 29. S. C. Wade v. Wadman, Barnes, 167.]

Cro. Eliz. 551.

592. Cro. Ja.

299. 409.

Bulst. 200.

Also, it was formerly holden absolutely necessary, that executors and administrators should (*f*) conclude their declarations with a *profert hic in curia literas testamentarias* or *literas administrationis*,

administrationis,

nistrationis, because these were the things which entitled them to the action. 3 Bulst. 223. Hob. 38. (f) That in a *scire facias* by an executor upon a judgment obtained by the testator, the *profert in curia*, &c. may be in the middle or end of the writ. Carth. 69.

But this is now but form, and aided after verdict by the express words of the statute 16 & 17 Car. 2. c. 8.; [which statute, by 4 Ann. c. 16., is extended to judgments by confession, *nil dicit*, or *non sum informatus*. And it is further enacted by this last statute, that this omission of a *profert* shall not impede the judgment, except the same shall be specially and particularly set down and shewn for cause of demurrer. Vent. 222.

¶ If a plaintiff declares as administrator, where he needs not; the want of *profert* cannot be objected even on a special demurrer. Crawford v. Whittall, Dougl. n.

If there are several executors named, one cannot sue alone, until the others have renounced. 4 T. R. 565.

¶ But if one of several administrators be sued, and judgment be had against him, without his pleading that there are others not named, such recovery, it seems, shall bind him and his companions. Farther v. Farther, Cro. Eliz. 471. 1 Sid. 334. S. C. cited by Windham J.

(P) Of Actions and Remedies against Executors and Administrators: And herein,

1. Upon what Contracts or Engagements of their Testators or Intestates Executors or Administrators are liable.

IT is clearly agreed, that executors and administrators, standing in the place of those they represent, shall be answerable for all their debts, (a) covenants, &c. as far as they have assets, and that the testator's covenants shall extend to them, though not (b) expressly mentioned. Off. of Exec. 117. Cro. Car. 187. Jon. 223. Yelv. 103. (a) But it is said that the testator cannot bind his executor where he is not bound himself; as, if he covenants that his executor shall pay 10*l*., no action lies for this. Cro. Eliz. 232. *Sed qu.* — If a father articles to pay *J. S.* 1000*l*. to build an house on lands of which he is seised in fee, and dies before the house is built, the heir may compel *J. S.* to build the house, and the father's executor to pay for it. 2 Vern. 322. Holt v. Holt. (b) That in every case where the testator is bound by covenant, the executor shall be bound by it if it be not determined by his death. 48 E. 3. 2. Bro. Covenant, 12. Cro. Eliz. 553. Dyer, 14. pl. 69. 2 Mod. 268. Same rule, and what shall be a determination, *vide* And. 12. Leon. 179. Moor, 74. pl. 204. Bendl. 150. Dyer, 257. Cro. Eliz. 157.

not bind his executor where he is not bound himself; as, if he covenants that his executor shall pay 10*l*., no action lies for this. Cro. Eliz. 232. *Sed qu.* — If a father articles to pay *J. S.* 1000*l*. to build an house on lands of which he is seised in fee, and dies before the house is built, the heir may compel *J. S.* to build the house, and the father's executor to pay for it. 2 Vern. 322. Holt v. Holt. (b) That in every case where the testator is bound by covenant, the executor shall be bound by it if it be not determined by his death. 48 E. 3. 2. Bro. Covenant, 12. Cro. Eliz. 553. Dyer, 14. pl. 69. 2 Mod. 268. Same rule, and what shall be a determination, *vide* And. 12. Leon. 179. Moor, 74. pl. 204. Bendl. 150. Dyer, 257. Cro. Eliz. 157.

And therefore where a man covenanted that *A.* should serve *B.* as an apprentice for seven years, and died, it was holden, that if *A.* departs within the term, a writ of covenant lies against the executor of the covenantor without naming. Bro. Covenant, 12.

If a man be bound to instruct an apprentice in a trade for seven years, and the master die, the condition is dispensed with, for it is personal; but, if he were likewise bound to find him with meat, drink, cloaths, and lodging, this the executors are obliged to perform. Sid. 216. Keb. 761. 820. Lev. 177. S. C.

Carth. 519. If *A.* leases to *B.*, and *B.* covenants to repair, &c., and he assigns to *J. S.*, who dies intestate; the premises being out of repair, the lessor may bring covenant against his administrator as assignee, and declare, that he made a lease to *B.* &c. *cujus status & residuum termini annorum, &c., devenit, &c., per assignationem* to the administrator.

Off. of Exec. 119. Salk. 297. pl. 6. The executor of a lessee for years must pay the rent reserved, though the rent be of greater value than the land.

Ro. Abr. 603. And if an action of debt be brought against an executor for the arrearages of a rent reserved upon a lease for years, and (a) incurred after the death of the testator, the writ (b) shall be in the *debet* and *detinet* (c), because the executor is charged of his own possession.

546. Bulst. 23. 2 Brownl. 206. Cro. Car. 225. Allen, 34. Mod. 186. 2 Brownl. 202. Palm. 116. S. P. (a) Where part incurred in the time of the testator, and part after his death, his executor may be charged in the *detinet* for the whole. Allen, 76. Stil. 118. (b) He may be charged in the *detinet* only, but then he shall answer only out of the testator's estate. Royston v. Cordrye, All. 42. Sty. 79. S. C. Helier v. Casebert, 1 Lev. 127. S. P. Hope v. Bague, 3 East, 6 S. P. (c) For though they have the land as executors, yet nothing shall be employed to the execution of the will, but such profits only as are above that which is to make the rent; and, therefore, so much of the profits as is to make or answer the rent, they shall take to their own use, and they shall be charged for it in the *debet* and *detinet*. Poph. 120. 5 Co. 31. Cro. Eliz. 712. — And if the land be not worth more than the rent, it is a good plea to such action in the *debet* and *detinet*; for in such case he is to be charged in the *detinet* only. Vent. 171. *per Curiam*; and for this *vide* Palm. 118. Sid. 266. Mod. 185. — But where they are to be charged upon a lease made to the testator, and have not the profits of the lease to answer it, they ought to be charged in the *detinet* only; as, where debt is brought against an executor of a lessee for rent incurred after assignment of the term. Poph. 120. Sid. 266. Lev. 127. 3 Mod. 327. So, if brought against him after waver of the term. Lev. 127. & *vide* Allen, 43.

Salk. 297. Off. of Exec. 119. But, though he is to be charged in the *debet* and *detinet*, yet the executor may plead that he has not assets, and that the land is of less value than the rent, and demand judgment, if he ought not to be charged in the *detinet* only; but so long as he hath assets he cannot wave the term, or say that it is of less value than the rent; but after he hath discharged himself of the assets, he may wave the possession by giving notice to the reversioner.

8 Co. 159. 536. (d) But it hath been holden, that if debt be brought against an administrator in the *debet* and *detinet*, for rent due before his time, where it should be only in the *detinet*, that this is aided after verdict, by 16 & 17 Car. 2. c. 8. Sid. 379.

Ro. Abr. 603. But, if an executor obliges himself to pay a debt due by contract by the testator; in debt upon this obligation, the writ may be in the *debet* and *detinet*, because the obligation makes it his own debt.

Sid. 398. (e) That it must be after a judgment against him, *vide* Ro. Abr. 603. 5 Co. 32. 2 Lev. 145. 1 Vent. 315. 321. Sid. 63. * — thereby charge him *de bonis propriis*.

* See 1 Saund. 217. Carth. 2. 2 Lev. 161. 209. Upon a judgment against husband and wife

wife executrix, if she survive, debt does not lie suggesting a *devastavit* by the husband; for though chargeable for the wasting by the husband, she shall not be charged *de bonis propriis* for costs recovered against the husband. R. 2 Lev. 161.

¶ And the executor may be charged in such case in the *detinet* Hope v. Bugue, only. And where a plaintiff, who had recovered judgment 3 East, 2. against a testator in his lifetime, had afterwards judgment of execution against the executor in *scire facias*, and upon that judgment sued the executor in debt in the *detinet*, suggesting a *devastavit*; it was holden, that the executor being fixed conclusively with assets by the last judgment, it was upon him on the plea of *non detinet* to prove the due administration of the assets. ¶

2. Of Personal Torts, which are said to die with the Party.

The taking up of an executorship is an engagement to answer all debts of the deceased, and all undertakings that create a debt, as far as there are assets; but doth not embark executor in the personal (a) trusts of the deceased; nor is he obliged to answer for his several injuries; for none can tell how they might have been discharged or answered by the testator himself.

Plow. 187.
Off. of Exce.
120. (a) For this reason, it seems that executors were not chargeable in

account, because not supposed to be comasant enough in the particular dealings of their testator, *vide tit. Account.* — Hence also it hath been holden, that if A. bails goods to B. to which C. hath a right, and B. dies, that the executors of B. must deliver these goods to C., and are no ways accountable for them to A., for they came to the possession by the law; and therefore must only deliver them to those persons in whom the law hath established the property. Ro. Abr. 607.

Hence it hath been established as a maxim, that *actio personalis moritur cum personâ*: and on this foundation it was formerly holden, that there was no remedy for the recovery of a debt due by simple contract by the testator, especially by action of debt; for herein the testator might have waged his law, of which benefit his executor is deprived.

Ro. Abr. 25.
9 Co. 86.
4 Co. 93. Cro.
Eliz. 121. 425.
And. 182.
Leon. 165.
Goldsb. 106.
Moore, 366.
Poph. 31.

But it is now agreed, that an (b) action lies against executors, where there is a duty as well as a wrong; and that they are answerable in those personal actions which arise *ex contractu*, and not *ex maleficio*; for that every contract implies a promise to perform it, in which the testator himself could not wage his law, because he could not make oath that he had discharged the duty before the *quantum* had been ascertained by a jury.

9 Co. 87.
10 Co. 77. b.
Cro. Ja. 293.
Vaugh. 101.
(b) That although debt on a simple contract cannot be reco-

vered against an executor by action of debt, yet it may by assumpsit. Lev. 200.

So, where in case against an executor the plaintiff declared, that he prosecuted an attachment of privilege against the testator; and that the testator, in consideration that he would forbear any further proceedings, promised to pay him 50l.; it was holden, that the action lay against the executor, this being such a contract as bound the testator himself.

Hob. 216.
Bidwell v.
Catton.

Also, it hath been resolved, that there is no difference between a promise to pay a debt certain, and a promise to do a collateral act,

Cro. Ja. 405.
417. 571.
Jon. 16.

Fawcett v. act, which is uncertain, and rests only in damages, as a promise
Carter. Palm. to give such a fortune with his daughter, to deliver up such
329. Cro. Ja. a bond, &c., and that wherever in those cases the testator him-
662. S. C. self is liable to an action, his executors shall be liable also.
Ro. Rep. 266.
Sander v. Esterlie, S. P.

Raym. 95. So, where a prohibition was prayed, because a parson libelled
Wilks v. Rus- in the spiritual court for tythes subtracted (a) by the testator
sel. Sid. 181. against an executor, upon this ground, that it was a personal
and Keb. 682. tort that died with the person; at least that the penalty given
S. C. So, Hale by the statute should not be recovered after the party's death who
v. Bradford, offended; the court denied the prohibition, and held, that the
Sir T. Raym. rule, that *quod oritur ex delicto & non ex contractu* should not
57. Lev. 39. charge the executor, did not extend to the case of tithes.
S. P. (a) So, where an ad-
ministrator to his son brought debt for tythes, it was moved in arrest of judgment, that this
action being given for the contempt and wrong done to the intestate, does not lie for the ad-
ministrator; the intent of the statute 2 & 3 E. 6. c. 13, being to give remedy only to the party
grieved. But it was resolved, that it lay for the administrator of the party grieved, that here
was a duty as well as a wrong. Vent. 30. Sir William Moreton and Hopkins. 2 Keb. 502. S. C.
Sid. 407. S. C. in which last book it is said, that it will not lie against the executor of him
who did the wrong. But *qu.* and *vide* Yelv. 63. 2 Inst. 650. Ro. Abr. 912.

Vide tit. Tro- Trover lies against executors, for this action is not merely *ex*
ver and Con- *maleficio*, which dies with the person, but here there is supposed
version. [Tro- an intention in the testator to restore the goods to the right
ver will not owner, for the law will not presume an intention of injury in any
lie against exe- person; and therefore the *maleficio* is in the executors, in not
cutors upon a making restitution accordingly.
conversion by
the testator, in
respect of the form of the plea. Hambly v. Trott, Cowp. 375.]

4 Mod. 403. And though the rule at common law, that a personal action
Salk. 12. 314. dies with the person, hath been construed equally to extend to
Ld. Raym. 40. wrongs and injuries done by or to the testator; such as assaults
973. 6 Mod. and batteries, breaches of trust, &c.; yet it seems, that an exe-
125, cutor in some cases may within the equity of 4 E. 3. c. 7. *de*
bonis asportatis in vita testatoris maintain an action for an injury
done to his testator; whereas, if it had been done by the testator,
it would have come within the rule of *actio personalis moritur*
cum personâ.

Jon. 173. And therefore, it hath been holden, that if a sheriff suffers
Poph. 189. a person in his custody on mesne process to escape, the executor
Latch. 167. of the party, at whose suit he was in custody, may maintain an
Noy, 87. action against him: because the body of the prisoner being a
Mason v. pledge for the debt, the executor might be otherwise without any
Dixon, Cro. remedy, which is an injury to the goods, and not to the person
Car. 297. S. P. of the testator (b): but in this case, if the sheriff died, the party
Ro. Abr. 921. could have no remedy against his executor.
S. P. 6 Mod. the same diversity. (b) So, an executor may charge another executor for a *devastavit*, to the
126. S. P. and injury of his testator; but at common law, the executor of an executor was not liable for a
devastavit of the first executor. Salk. 314. pl. 22. 4 Ld. Raym. 971. — [See *infra*, Div. 3.]

Williams v. So, where to a *fieri facias* the sheriff made a false return, *viz.*
Carey, 4 Mod. that he levied only so much, when in truth he had actually levied
403. Salk. more;

more; and the executor of the party brought an action for this false return; it was adjudged, that it lay; for this was not properly an injury done to the person of the testator, for then *moritur cum personâ*, but it was an injury to his estate.
12. S. C. adjudged. For by levying the goods a right was vested in the testator. Cro. Car. 297. S. P. but no resolution.

¶ So, the executor of a landlord may maintain an action against an officer for removing goods before the payment of a year's rent, for the testator had an interest in them, and the removing of them was a wrong to his estate. ||
Palgrave v. Windham, 1 Str. 12.

[Actions survive against an executor, or die with the person, either on account of the *cause of action*, or on account of the *form of action*. As to the former, where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labour, or property of another, or a promise of the testator, express or implied; where these are the causes of action, the action survives against the executor. But where the cause of action is a tort, or ariseth *ex delicto*, supposed to be by force and against the king's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water-course, escape against the sheriff, and many other causes of the like kind. — As to the latter — in some actions the defendant could have waged his law; and, therefore, no action in that form lies against an executor. (a) But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be *quare vi et armis, et contra pacem*, or where the plea must be that *the testator was not guilty*, can lie against the executor. Upon the face of the record the action ariseth *ex delicto*; and all private criminal injuries or wrongs, as well as all publick crimes, are buried with the offender.]
Cowp. 375. per Lord Mansfield.

his executor could not be sued. The writ was indeed abateable for that reason, if the executor chose to insist upon it; but, if he omitted to do so, and pleaded over, the debt was as necessarily and conclusively fixed by the judgment in that form of action, as if it had been demanded by an action, in which the testator could not have waged his law. || (a) This is perhaps too broadly stated. It is not true that in that form of action, which admitted of wager at law by the testator, if the executor

Vaugh. 97, &c. ||

3. Of Remedies against Executors, or Administrators of Executors.

It seems agreed, that executors or administrators of executors or administrators were not at (b) common law liable to the *de-vastavit* of those they represented, because they could not be supposed to know how their testators or intestates had disposed of the goods; and therefore this was esteemed *actio personalis quæ moritur cum personâ*.
Ro. Abr. 920. 2 Lev. 110. 133. 3 Keb. 462. 530. Vent. 292.

administrators were made liable as far as they had assets. 2 Mod. 293. Chan. Ca. 217. 2 Stra. 716. — And that in equity creditors and legatees may follow the assets into whose hands soever they come. Chan. Ca. 57. 2 Vern. 75.
(b) But in Chancery such executors and administrators may follow the

But it being found very inconvenient, that where an executor *de son tort* died, there could be no remedy at law against his executors or administrators; or that where a lawful executor made

made an alteration of the goods of the testator, and died, that creditors to the first testator should be disappointed of their debts, though such executor left sufficient assets;

Therefore by the act of 30 Car. 2. c. 7. creditors were enabled to recover their debts of the executors and administrators of executors in their own wrong; and this act by the 4 & 5 W. & M. c. 24. is made perpetual; and also by the last mentioned act, reciting, "That it had been a doubt (a) whether the 30 Car. 2. did extend to any executor or executors, administrator or administrators of any executor or administrator of right, who, for want of privity in law, were not before answerable, || nor could be sued for the debts due from or by the first testator or intestate, notwithstanding that such executors or administrators had wasted the goods and estate of the first testator or intestate, or converted the same to his or their own use;|| it is enacted and declared, that all and every the executor and executors, administrator or administrators of such executor or administrator of right, who shall waste or convert to his own use goods, chattels, or estate of his testator or intestate, shall from thenceforth be liable and chargeable in the same manner as his or their testator or intestate should or might have been."

||(a) In Holcomb v. Petit, 3 Mod. 113. it had been determined, that the administrator of a rightful executor was liable within this statute.|| [But in the case of Hammond v. Gatliffe, And. 252., the court strongly inclined to think, that an executor

de son tort is not liable for a *devastavit* committed by the first executor *de son tort*, either at the common law, or by these statutes.]

1 Saund. 219. Serjt. Williams's note, and the case of Skelton v. Hawling, Tr. 23 G. 2. K. B. There correctly stated from the Roll. 1 Wils. 258. S.C. See Hope v. Bague, 3 East, 5.

|| If a judgment be had against an executor, who afterwards dies, an action may be brought under the above statutes against his executor or administrator, suggesting a *devastavit* by the first executor; and the judgment is as conclusive upon the representative of the executor, that he (the executor) had assets to satisfy the judgment obtained against him, as it is upon the executor himself. Therefore if an action of debt, suggesting a *devastavit* by the first executor, be brought against his executor or administrator, he cannot plead that the first executor fully administered the goods of the first testator, or any other plea purporting that he (the first executor) had no assets to satisfy the judgment, any more than the executor himself could have done. For whatever act of the executor would have made him personally liable and chargeable with the payment of the demand *de bonis propriis*, will now, by virtue of these statutes make his estate liable in the hands of his executor or administrator. But such executor or administrator may himself plead *plenè administravit*, for the *devastavit* being only a simple contract debt, he is at liberty to shew that he has fully administered the effects of his testator or intestate.||

4. Where Executors and Administrators shall be excused from Costs.

Cro. Ja. 228. Yelv. 168. N. Bendl. 19. Brownl. 107.

Executors and administrators, when plaintiffs, pay no costs; for they sue in *autor droit*, and are but trustees for the creditors, and are not presumed to be sufficiently conuzant in the personal contracts

contracts of those they represent; and therefore are not comprehended within the statutes 23 H. 8. c. 15. 4 Ja. 1. c. 3. or 8 & 9 W. & M. c. 10. which give defendants costs.

Car. 289. Winch. 10. 70. Ro. Rep. 63. Sav. 133. Carth. 281. 4 Mod. 244. 3 Lev. 375. Skin. 400. Str. 682.

Keilw. 207.
Hut. 69. 79.
Cro. Eliz. 69.
503. Cro.

But, if executors or administrators bring an action in their own right, as for a conversion or trespass in their own time, they shall pay costs, although they name themselves executors, for this is but surplusage.

Savil. 134.
Hut. 79.
Dal. 9. Latch.
220. Vent. 92.
6 Mod. 94.

181. 7 Mod. 98. 118. But for this, and where the action shall be said to be in their own right, *vide tit. Costs*, letter (E).

So, an executor defendant shall pay costs in all cases, and the judgment is *de bonis testatoris, si, &c., & si non, tunc de bonis propriis*. Also when he is defendant, and there is judgment for him, he shall have his costs.

Plow. 183.
Hard. 165.
Cro. Eliz. 503.
Hut. 69.

¶ Where an executrix pleaded, 1st. *Non assumpsit*; 2d. *Ne unques executrix*; and 3d. *Plenè administravit*; and the issues on the two first pleas were found for the plaintiff, and the issue on the last for the defendant, it was holden, that the defendant was entitled to the general costs of the trial, the last plea being a full and complete answer to the action.

Edwards v. Bethel,
1 Barnew. and Alders.
254. *Vide* Hindsley v. Russell,
12 East, 232.
et supra, Vol. ii. 317.

If an action of assumpsit is brought by an administrator against an inhabitant of *Middlesex*, and the damages found are under 40s., the defendant is entitled to have that suggested on the roll in the same manner as if the action had been brought in the plaintiff's own right. What the consequence may be, whether only to protect the defendant from the payments of costs, or to subject the plaintiff to the payment of double costs to the defendant, *qu.*¶

Wase v. Wyburd,
Doug. 246.

A judgment was had against an administrator for costs *de bonis propriis*, and error brought that it ought to have been *de bonis testatoris, & si nulla bona*, then *de bonis propriis*. This was agreed to be error; but, whether this judgment for the costs might not be reversed without affecting the principal judgment was the question, they being distinct judgments. And it was holden by *Holt*, Chief Justice, that if judgment be given for recovery of dower and mesne profits and damages, it may be reversed for the one, and stand for the other. And he took this difference; if one part of the judgment be warranted by act of parliament, and the other by common law, it may be reversed for part, and stand for the other; but, if all be at common law, it must stand or be reversed in all. And in this case the judgment for the costs was reversed, and the principal judgment affirmed.

Trin. 6 Ann. in B. R. Hickman and Westbrook.

[In an action by an executor or administrator, the plaintiff not being liable to costs, the defendant was not allowed formerly to bring money into court; but now it is otherwise, and the effect of the rule will be not to make the plaintiff pay, but only lose his costs.]

2 Salk. 596.
2 Str. 796.

¶ Where

Zachariah
v. Page,
1 Barnew. &
Alders. 386.

¶ Where a person sued as executor, having obtained a regular probate, and was nonsuited at the trial upon evidence that the supposed testator was still alive; the court refused to allow the defendant's costs, it appearing from the affidavits on both sides to be still at least doubtful, whether the supposed testator were living or not.¶

5. *Executors and Administrators excused from putting in Special Bail.*

Cro. Ja. 350. Executors and administrators are not to be holden to (a) special
Yelv. 53. Cro. bail; for the demand is not on the persons, but on the assets of
Car. 59. Lit. the deceased; and it would be unreasonable to subject their per-
Rep. 2. sons to an execution for the debt of another.
(a) Although an attorney be plaintiff, and it was pretended he was entitled to have special bail by his privilege. Sid. 63.—
So, though the cause is removed from an inferior court to a superior; for this would encourage plaintiffs to commence their actions against executors in such inferior courts. 2 Lev. 204.
Sid. 418. Lev. 245. 268. 2 Jun. 82. Salk. 98. pl. 4.; but Lit. Rep. 81. cont.

Cro. Ja. 350. Hence it hath been holden, that if there be a judgment against
Goldsmith v. an executor for the debt *de bonis testatoris*, and for the damages
Platt. Cro. Ja. only *de bonis propriis*, he may bring error, and have a *supersedeas*,
59. S. P. Lit. without giving sureties, according to 3 Ja. 1. c. 8.; for though
Rep. 2. S. P. the words of the statute are general, yet it must be intended
Keb. 716. S. P. where judgment is against the defendant himself upon his own
bond, or where the judgment is general against executors; for it
would be unreasonable they should find sureties to pay the whole
out of their own estate.

1 Lev. 39. But upon a *devastavit* executors shall be holden to special bail.
1 Sid. 63. And herein the difference is, that upon a bare suggestion of a
Carth. 264. *devastavit*, an executor shall not be holden to special bail (b);
Comb. 206. but, where upon a judgment against him execution is taken
1 Salk. 98. out, and the sheriff returns a *devastavit*, upon an action of
¶(b) He may be debt upon this judgment the executor shall be holden to special
holden to bail bail.
in each case: in the last, by a
judge's order without any affidavit; in the first, not without an affidavit.¶

Mackenzie v.
Mackenzie,
1 T. R. 716.

[Where an executor hath personally promised to pay a debt or legacy, it seems, that he may be holden to bail on such promise.]

EXTINGUISHMENT.

WHEREVER a right, title, or interest is destroyed or taken away by the act of God, operation of law, or act of the party, this in many books is called an extinguishment. Co.Lit. 147. b.
Ro. Abr. 933.

But as it is a word of a large signification, and relative to other things elsewhere treated of, I shall here only consider it briefly as it regards the following matters, to which it seems to be most frequently applied.

- (A) Of the Extinguishment of Rents.
- (B) Of the Extinguishment of Copyholds.
- (C) Of the Extinguishment of Common.
- (D) Of the Extinguishment of Debts.

(A) Of the Extinguishment of Rents.

IF a lessor purchases the tenancy from his lessee, the lessor cannot have both the rent and the land; nor can the tenant be under any obligation to pay the rent, when the land which was the consideration thereof is resumed by the lessor into his own hands. And this resumption or purchase of the tenancy makes what is (a) properly called an extinguishment of the rent; that is, the rent can never become due or payable by the tenant, by virtue of the donation which created the tenancy, when the land or tenancy is conveyed to the lessor, in as absolute a manner as he was seised of the rent. Pollexf. 142.
(a) [That the rent in this case is extinguished. Vaugh. 199. But, if a rent be granted to A. for the life of B., and A. dies, living B., the rent is determined upon the death of A. equally as if granted to him for his own life; and in this case the rent is said more properly to be determined than extinguished. Vaugh. 199. — So, when either the rent or land is so conveyed, not absolutely or finally, but for a certain time, after which the rent will be again revived; this is properly called a suspension of the rent. Vaugh. 199.]

But, if the conveyance to the lessor was not absolute, but upon condition; or if it were only of a particular estate of shorter duration than the estate which the lessor had in the rent; in these cases, though there be an union of the tenancy and the rent in the same hand, yet because that union is but temporary, for upon the performance of the condition, or determination of the particular estate, the tenant is restored to the enjoyment of the land, and, consequently, the obligation to pay the rent revives; Bro. Extinguishment, 17.
Vaugh. 39.
199. Pollexf. 142. || The difference, which exists in point of law, between the acts in law de-

nominated *vives*; therefore the rent in such case is only *suspended*, and not
 Merger, Sus- extinguished.

Extinguishment, is well stated by Mr. Preston in the following extract from his late valuable elucidation of the abstruse doctrine of merger:—"Merger is the annihilation of one estate in another.—Suspension is a partial extinguishment, or extinguishment for a time.—Extinguishment is the annihilation of a collateral thing or subject in the subject itself out of which it is derived. A rent, a common, or a seignory, may be extinguished. That the estate in the rent, common, or seignory ceases, is the consequence of the extinguishment of the subject itself. When the subject ceases, the estate therein must also cease. Under the doctrine of merger the subject may continue after the annihilation of one estate in another: for notwithstanding the annihilation of the estate, the subject continues, and the effect of the merger is only to involve the time of one estate in the time of another estate, or at the utmost, to accelerate the right of possession under the more remote estate. Thus suspension and extinguishment, correctly taken, are applicable rather to the things themselves, than to the estates or degrees of interest therein.—Again, Suspension is merely for a time, because the party, whose interest is to be suspended, has a particular estate; or because he has a defeasible interest, so that the subject itself, or the estate therein may revive, when there shall be a separation of these interests, which, if they were absolutely united, would be extinguished."—"Lord Coke, in *Co. Litt.* 313. a., has accurately drawn the distinction, with the exception that he has omitted the durability of title. According to his Lordship, 'Suspence in legal understanding is taken when a seignory, rent, profit, appendre, &c. by reason of unity of possession of the seignory, rent, &c. and of the land out of which they issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awakened: and they are said to be extinguished when they are gone for ever, *et tunc moriuntur*, and can never be revived; that is, when one man hath as high and perpetual durable an estate in the one as in the other.'" *Prest. Conveyanc.* Vol. iii. p. 9, 10, 11.]]

2 Ro. Abr. 429. Also, if the lands demised be evicted from the tenant, or reco-
 Hob. 82. Cro. vered by a title paramount, the lessee is discharged from the pay-
 Eliz. 47. Co. ment of the rent from the time of such eviction; and this is also
 Lit. 148. b. called an extinguishment of the rent. But, notwithstanding such
 (a) Though the recovery or eviction, the tenant (a) shall pay the rent which be-
 lease was made came due (b) before the recovery; because the enjoyment of the
 by a disseisor, land being the consideration for which the tenant was obliged to
 for the lessee pay the rent, so long as the consideration continued, the obliga-
 came in under tion must be in force; there being the same reason that the tenant
 the sanction of should pay the rent for part of the time contracted for, as for
 a legal con- the whole term, if he had enjoyed the land so long.
 tract, and the time he held it was a sufficient obligation on him to pay the rent. 2 Ro. Abr.
 peaceable en- 429. Hob. 6. (b) But, if the tenant be ousted by a title paramount, before the day appointed
 joyment of the for the payment of the rent, such eviction entirely discharges the tenant from the payment of
 land during the any part of the rent. 10 Co. 128. a.

10 Co. 128. For the same reason, if part only of the land letten be evicted
 Ro. Abr. 135. from the tenant, such eviction is a discharge of the rent in pro-
 Dyer, 56. portion to the value of the land evicted.

Lit. § 222. If a man who hath a rent-service purchases part of the land
 out of which the rent issues, the rent-service is not extinguished,
 but shall be apportioned according to the value of the land; so
 that such purchase is a discharge to the tenant for so much of the
 rent only as the value of the land purchased amounts unto.

Lit. § 222, 223. But, if a man has a rent-charge, and purchases part of the land
 8 Co. 105. out of which the rent issues, the whole rent is extinguished, and,
 consequently, the tenant discharged from the payment of it.

Co. Lit. 147. But in this case, if the grantor by deed reciting the purchase
 had granted that the grantee should distrain for the same rent
 in the residue of the land, the whole rent-charge had been pre-
 served;

served; because such power of distress had amounted to a new grant.

But the law has carried this notion of extinguishment only to such cases where the grantee of the rent wilfully by his own act prevents the operation of the grant according to the original intention thereof; for if part of the land descends to the grantee of the rent-charge, the rent shall be apportioned according to the value of the land; for the grantee in this case is perfectly passive, and concurs not by an act of his to defeat the intention of the grant; and therefore it would be unreasonable and severe, that he should be punished without his default, or concurring in that act which extinguishes the rent.

Lit. § 224. Co.
Lit. 149. b.
Ro. Abr. 236.

Hence likewise it is, that if a man grants a rent-charge out of two acres, and afterwards the grantee recovereth one acre by title paramount the grant, the whole rent shall not be extinguished; because the law, that gives the remedy for the recovery of a man's right, will not prevent the prosecution of such right, by depriving the prosecutor of a greater profit than the thing recovered may amount to. But in this case there shall be no apportionment, but the grantee shall have the whole rent after he has recovered the one acre; because by the grant each acre is charged with the whole rent; and upon the recovery it appears, that the grantor had no interest in one acre, and, consequently, could not charge it; and therefore the grant being to be taken most strongly against him, the whole rent shall continue after the recovery, because the grant was originally for so much, and therefore shall issue out of that land which he had power to charge; whereas in the former case the grantor had, at the time of the grant, power to charge all the land; and therefore when part of the land, subject to such charge, comes to the grantee by act of law, it is reasonable at least that the charge should be apportioned.

Co. Lit. 148. b.

Also, a rent-charge may in some cases be apportioned by the act of the party; as, if the grantee releases part of his rent to the tenant of the land, such release does not extinguish the whole rent; so, if the grantee gives part of it to a stranger, and the tenant attorns, such grant shall not extinguish the residue, which the grantee never parted with, because such release or disposition makes no alteration in the original grant, nor defeats the intention of it, as the purchase of part of the land does, for the whole rent is still issuable out of the whole land according to the original intention of the grant.

Co. Lit. 148.
a. But Cro.
Eliz. 742.
seems *cont.*

Here also, as to the appointment of a rent-service by the purchase of the lessor of part of the tenancy, we must distinguish between services divisible in their own nature, as a rent, and such as are indivisible, as a horse, a hawk, &c. For in the last case, if the lord purchase part of the tenancy, there can be no apportionment of the service from the nature of the thing; and therefore such service is extinct, and the tenant discharged from the payment of it; for the whole tenancy being equally chargeable with the payment of such service, the lord by his own act shall

6 Co. 1. Bru-
erton's case.
Co. Lit. 149. a.
8 Co. 105.
Moor, 203.

not discharge part, and throw the whole burthen upon the residue, for his own private benefit and advantage.

6 Co. 1, 2.
Co. Lit. 149.

But, if such entire services were for the benefit of the publick, as knight-service and castle-guard, for the defence of the realm, or for the administration of justice; or, if such entire service were a work of charity or piety; in all such cases the tenant is still chargeable with the whole service; for there can be no apportionment, because the thing in its nature is indivisible; and the whole shall not be extinguished, because the publick has an interest in such services, and therefore shall not be prejudiced by the private transactions of the parties.

Co. Lit. 149. a.

So, where the tenure is by a service in its nature indivisible, as by a horse, or a hawk, &c., which are only for the private benefit or pleasure of the lord; yet, if part of the tenancy comes to the lord by descent, the service is not extinguished; because here is no consent or concurrence of the lord to the division.

2 Inst. 504. Ro.
Abr. 234. Cro.
Eliz. 651. 851.
Co. Lit. 148.
8 Co. 79.
Dyer, 326.
Hob. 177.
13 Co. 57, 58.
Moor, pl. 255.
260.

It was formerly doubted, whether a rent-service incident to a reversion could be apportioned, or was not utterly extinguished by a grant of part of the reversion; for since the reversion and rent incident thereto were entire in their creation, it was thought hard, that by the act of the lessor they should be divided, and thereby the tenant made liable to several actions and distresses for the recovery of them. But it was at length resolved, that the reversion, being a thing in its nature severable, the rent as incident to it may be divided too, because that being made in retribution for the land, ought from the nature of it, to be paid to those who are to have the land upon the expiration of the lease; and hence it is that the rent passes incidently with the reversion, without any express mention of it in the grant. Besides, the tenant has really no prejudice from such grant, because it is in his power, and it is his duty, to prevent the several suits and distresses by a punctual payment of the rent; and therefore he ought not to complain of a mischief which he wilfully brings upon himself: besides that, (a) formerly such grants could not take effect without the attornment and consent of the tenant. But on the other hand it would be extremely prejudicial, if upon such grants the rent should not be apportioned, because then the lord could not out of his estate make a provision for his younger children, or answer the contingencies of his family which are in view.

(a) Viz. before
the 4 & 5 Ann.
c. 16. § 9.

Co. Litt. 148. a.
Ro. Abr. 235.
Dyer, 5. a.
13 Co. 58.
Moor, pl. 255.

If lessee for life or years surrender part, or if he commit a forfeiture of part by making a feoffment, or doing waste, there can be no colour to construe these acts an extinguishment of the whole rent; but in these cases the rent shall be apportioned; because the rent is a retribution for the land, and therefore must necessarily cease according to the proportion of the land resumed by the lessor. For it were absurd, that the lessor should have both the land and retribution for it. But the whole rent is not extinguished, because from the nature of the contract the rent is to be paid in consideration of the enjoyment of the land, and therefore the tenant shall be obliged to pay the rent in proportion

to the land which he enjoys. So, if the lessor grant the reversion of part to the lessee, the rent shall be apportioned.

There seems to have been a variety of opinions, whether the lessor's entering wrongfully into part of the lands demised did not suspend the whole rent during such tortious entry, or whether the rent ought not to be apportioned; and it is now settled, that such tortious entry suspends the whole rent. For if any apportionment were allowed in this case, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so, by taking that which lies most commodiously for the tenant, render the remainder in effect useless, or put him to the expence to restore himself to such part by course of law. And therefore to prevent these inconveniencies, and that no man may be encouraged to injure or disturb his tenant, whom he ought to protect and defend, it hath been resolved, that such disseisin or tortious entry suspends the whole rent, and that the tenant or lessee is discharged from the payment of any part of it till he is restored to the whole possession.

(B) Of the Extinguishment of Copyholds.

AS to the extinguishment of copyholds it is laid down as a general rule, that any act of the copyholder's, which denotes his intention to hold no longer of his lord, and amounts to a determination of his will, is an extinguishment of his copyhold.

As, (a) if a copyholder in fee accepts a lease for years of the (a) Moor, 184. same land from the lord, this determines his copyhold estate; 2 Co. 16. b. or (b) if the lord leases the copyhold to another, and the copyholder accepts an assignment from the lessee, his copyhold is (b) But, if he takes a lease for years of the manor, extinct.

that is only a suspension of his copyhold during the term. Cro. Ja. 84. Sav. 70. — But in other books it is said to be extinguished, as in Cro. Eliz. 7., Moor, 185. And in 4 Co. 31. it is said, that the lessee may in this case re-grant the copyhold to whom he pleases. (c) 2 Co. 17. Leon. 70. And. 191. Gouls. 34. Ro. Abr. 510. S. C.

So, (d) if a copyholder bargains and sells his copyhold to the (d) Hut. 65. lessee for years of the manor, his copyhold is thereby extin- Jon. 41. S. C. guished; or (e) if he joins with his lord in a feoffment of the (e) Godb. 11. manor, his copyhold is thereby extinct; for these are acts which denote his intention to hold no longer by copy.

So, if a copyholder accepts to hold of his lord by bill under the lord's hand, this determines his copyhold: so, if he accepts an estate for life by parol, if there be livery, this is an extinguishment; otherwise not; for without livery nothing but an estate at will passes, which cannot merge or extinguish an estate at will.

If one seised of a manor in right of his wife lets lands by indenture for years; this doth not destroy the custom as to the wife; for (f) after the death of her husband she may demise it again by copy.

— If one seised of a manor in right of his wife lets lands by indenture for years; this doth not destroy the custom as to the wife; for (f) after the death of her husband she may demise it again by copy.

— So, if the copyholder hath the manor in execution. Co. Copyholder, 172.

Co. Litt. 148. b.
Bro. tit. Ex-
tinguishment,
48. Ro. Abr.
938. 4 Co. 52.
9 Co. 135.
3 Keb. 453.
497. Pollex.
142. 144. Vent.
277.

Hut. 81. Cro.
Eliz. 21. Jon.
41. vide tit.
Copyhold,
letter (K).

(a) Moor, 184.
2 Co. 16. b.
Godb. 11. 101.
(b) But, if he
takes a lease
for years of
the manor,

Cro. Ja. 84. Sav. 70. — But in
other books it is said to be extinguished, as in Cro. Eliz. 7., Moor, 185. And in 4 Co. 31. it is said, that the lessee may in this case re-grant the copyhold to whom he pleases.

(d) Hut. 65.
Jon. 41. S. C.
(e) Godb. 11.

And. 199.
Latch. 213.

Cro. Eliz. 459.
(f) So, if a
copyholder
internarries
with the feme

Copyholder, 172.

2 Sid. 82.

4 Co. 24. Cro.

Eliz. 252. ad-

judged; and

vide 2 Leon.

208. 4 Co.

26. b. Cro. Eliz. 103.

So, if a copyhold is in the hands of a subject, who after becomes king, the copyhold is extinct, for it is below the majesty of a king to perform such servile services; yet after his decease the next that hath right shall be admitted, and the tenure revived.

(C) Of the Extinguishment of Common.

Co. Litt. 122.

Hob. 235.

2 Co. 78.

Owen, 122.

4 Co. 37.

IF a commoner, who hath common appurtenant, purchases part of the land in which he hath such common, this is an extinguishment of the common. But, if such purchase had been made by one who had common appendant, this being of common right must be apportioned. Also, both common appendant and appurtenant shall be apportioned by alienation of part of the land to which the common is appendant or appurtenant.

Fort v. Ward,

Moore, 667.

Massam v.

Hunter, Yelv.

189. Cro. Ja.

253. S. C.

2 Brownl. 209.

S. C. Bradshaw

v. Eyre, Cro. El.

Vol. ii. 108.

¶ If a copyhold be enfranchised, the common which is claimed in right of it, is gone. Such commonage will not pass by the word "appurtenances" in the deed of enfranchisement; but the right to it must be expressly conveyed as a new grant. A court of equity (*a*) will indeed, under certain circumstances, decree a continuance of it when it is extinct at law.

Barwick v.

Matthews,

5 Taunt. 365.

1 Marsh. 50.

S. C.

If a copyholder has common in a waste without the manor of which his copyhold is parcel, he has it as annexed to the land, and not to his customary estate; and such common is not extinct by enfranchisement of the copyhold, but continues, though there be no words of re-grant.¶

(D) Of the Extinguishment of Debts.

13 H. 4. 1.

Ro. Abr. 470,

471. 604.

6 Co. 44.

Yelv. 38.

6 Co. 44. b.

2 Leon. 110.

IT seems to be agreed as a general rule, that a creditor's accepting a higher security than he had before, is an extinguishment of the first debt; as, if a creditor by simple contract accepts an obligation, this extinguishes the simple contract debt.

So, if a man accepts a bond for a legacy, he cannot after sue for his legacy in the spiritual court; for by the deed the legacy is extinct, and it is become a mere debt at common law.

So, if a bond creditor obtains judgment on the bond, or has judgment acknowledged to him, he cannot afterwards bring an action on the bond; for the debt is drowned in the judgment, which is a security of a higher nature than the bond.

But these cases must be understood where the debtor himself enters into these securities; and therefore, if a stranger give bond for a simple contract debt due by another, this does not extinguish the simple contract debt. But, if upon making the contract, a stranger gives bond for it, or being present, promises to give bond for it, and after does so, the debt by simple contract

is extinguished, the obligation being made upon, or pursuant to the contract.

But the accepting of a security of an inferior nature is by no means an extinguishment of the first debt; as, if a bond be given in satisfaction of a judgment. Cro. Ja. 649.
Brownl. 29.
Cro. Ja. 649.
650. Like

point adjudged, where it was pleaded, that an annuity was granted in discharge of a bond.

Also, the accepting of a security of equal degree is no extinguishment of the first debt; as, where an obligee has a second bond given to him; for one deed cannot determine the duty upon another. Cro. Eliz. 304.
716. 727.
Brownl. 74.
Litt. Rep. 58.
Cro. Car. 86.

1 Ld. Raym. 680. 1 Burr. 9.

Also, it is said to have been adjudged, that if the condition of an obligation be to pay 10*l.* at a day, which is not paid at the day, but after the day the obligee accepts a statute-staple from the obligor for the same debt, in full satisfaction of the obligation; yet this is not any satisfaction; for though the statute be a matter of record, and higher than the obligation, yet the obligation remains in force, and the obligee hath his election to sue the one or the other. 6 Co. 44.
Braithet's case
cited in Hig-
gen's case.
Ro. Abr. 47c.
Cro. Car. 86.
S. C. cited.

If an infant becomes indebted for necessaries, and the party takes bond of the infant; this shall not extinguish the simple contract; for the bond has no force. Cro. Eliz. 920.

Debts are also said to be extinguished where a creditor makes his debtor executor; for in this case he cannot sue himself. But where such debts remain assets, *vide tit. Executors and Administrators*, letter (A). Hob. 10.
Ro. Abr. 920.

So, where the obligor marries the obligee, this is said to be an extinguishment of the debt; for by the intermarriage they become one person, and cannot sue each other. But for this *vide tit. Baron and Feme*, letter (E).

EXTORTION.

EXTORTION is said by my Lord *Coke* to signify any oppression by colour or pretence of right, and in this respect it is said to be more heinous than robbery itself; as also, that it is usually attended with the aggravating sin of perjury. Co. Litt. 368. b.
10 Co. 102. a.
1 Hawk. P. C.
c. 68. Cro. Car.
438. 448.

But in a strict sense it is defined, the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due. Co. Litt. 368.
10 Co. 102.

By the common law, as also by the statute of Westm. 1. c. 26. 2 Inst. 209. it is declared and enacted to be extortion, for any sheriff or Co. Litt. 368.

other minister of the king, whose office anyways concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he receives from the king.

(a) 43 E. 3. 4.
b. 5. a.
2 Ro. Abr. 226.
(b) Moore, 523.
2 Inst. 209.
4 Inst. 274.

And this institution hath been thought so conducive to the good of the publick, that all (a) prescriptions whatsoever, which have been contrary to it, have been holden to be void: as, where (b) the clerk of the market claimed certain fees as due time out of mind, for the examination of weights and measures; this was adjudged to be void.

21 H. 7. 17.
Co. Litt. 368.

But the stated and known fees allowed by the courts of justice to their respective officers for their labour and trouble, are not restrained by the common law, or by the said statute of Westm. 1. c. 26., and, therefore, such fees may be legally demanded and insisted upon, without any danger of extortion.

21 H. 7. 17.
2 Inst. 176.
210. Staund.
P. C. 49.

And for this reason it is holden, that the fee of 20d., called the bar-fee, taken time out of mind by the sheriff for every prisoner that is acquitted, and the fee of a penny claimed by the coroner for every *visne*, when he came before the justices in eyre, are not within this statute; as also because they are due of course as perquisites, whether any thing be done by such sheriff or coroner, or not.

2 Inst. 210.
3 Inst. 149.
Co. Litt. 368.

Also, it seems that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *præmium* it would be impossible in many cases to have the laws executed with vigour and success.

Ro. Abr. 16.
Ro. Rep. 313.
Noy, 76. Jon.
65. Cro. Eliz.
654. Moore,
468. Cro. Ja. 103. 2 Burr. 924. 1 Bl. Rep. 204.

But it has been always holden, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made.

2 Ro. Abr. 32,
33. 57. Raym.
315. 2 Inst.
209.

This offence of extortion is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed; and there is a farther additional punishment by the statute of Westm. 1. c. 26., with regard to the persons to which the statute extends, by which it is enacted, "That no sheriff nor other king's officer shall take any
" reward to do his office, but shall be paid of that which they
" take of the king; and that he who so doth shall yield twice as
" much, and shall be punished at the king's pleasure."

Sid. 91. Rex
v. Cover.
(c) An in-
formation for
extortion
must set forth
the time

If an indictment of extortion charges *J. S.* with the taking of 50s. as bailiff of an hundred, *colore officii*, without (c) shewing for what he took it; this is good, at least after verdict; for perhaps he might claim it generally, as being due to him as bailiff, in which case the taking could not be otherwise expressed.

when the offence was committed. Rex v. Roberts, 4 Mod. 101, 103. — The Court of King's Bench will not quash an indictment for extortion or oppression, though erroneous, but oblige the party to plead or demur to it. Rex v. Wadsworth, 5 Mod. 13. — If the chan-
cellour

cellour and registrar of a diocese compel an executor to prove a will in the Bishop's court, knowing it had been proved in the Prerogative, and take fees, this is extortion at the common law, *Rex v. Loggen*. Stra. 73. — If a bailiff bargains for money to be paid him by *A.*, to accept *A.* and *B.* as bail for *C.* whom he has arrested, this is extortion at the common law. *Stotesbury v. Smith*, 2 Burr. 924. 1 Bl. Rep. 204. S. C. — As to fees, — A receiver of fee-farm rents can only take 4*d.* for one acquittance (though for several years), and if the party brings the acquittance ready written, he must sign it *gratis*; and if the party tenders his rent, and refuses to pay for the acquittance, the receiver cannot distrain for both. *Roberts v. Middleton*, Bunb. 348.

FAIRS AND MARKETS.

(A) Of the Right to a Fair or Market: And herein,

1. *How a Right to a Fair or Market must commence.*
2. *Of the Owner's Remedy for a Disturbance in the Enjoyment of them.*

(B) Of the Manner of holding Fairs and Markets: And herein,

1. *In what Place they are to be holden.*
2. *At what Time they are to be holden.*
3. *How long to continue.*

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.

(D) Of the Toll and other Duties which Owners of Fairs and Markets are entitled to: And herein,

1. *Where such Tolls, &c. shall be said to be reasonable and legally due.*
2. *What Persons are exempt from Payment thereof.*

(E) How far a Sale in a Fair or Market-overt changes the Property of a Thing sold therein.

(A) Of the Right to a Fair or Market: And herein,

1. *How a Right to a Fair or Market must commence.*

THE first institution of fairs and markets seems plainly to be for the better regulation of trade and commerce, and that merchants and traders may be furnished with such commodities

2 Inst. 220.

(a) *Vide* the 1 & 2 P. & M. c. 7. which assigns the reason of the decay of trade in cities and towns, to persons not selling their goods in fairs and markets, and enacts, that all country people shall sell in some open market, &c. But it does not prohibit inhabitants of one market town to sell in another. *Davis v. Leving*, 2 Lev. 89. *Lee v. White*, Dougl. 259. (b) [The reason why a fair or market cannot be otherwise claimed, is not merely for the sake of promoting traffick and commerce; but also, for the like reason as in the *Roman* law; for the preservation of order, and prevention of irregular behaviour. "*Jus Nundinarum oritur a principe, quia ubi est multitudo, ibi debet esse rector.*" *Per Wilmot J.* 3 Burr. 1812. 1 Bl. Rep. 580. *Vide* l. 1. ff. de *nund.* l. 1. *C. de nund. et mercat.*]

3 Mod. 127.
Sed vide R.
v. Marsden,
3 Burr. 1812.
1 Bl. Rep. 579.
3 Lev. 222.

And therefore if any person sets up any such fair or market without the king's authority, a *quo warranto* lies against him, and the persons who frequent such fair, &c., may be punished by fine to the king.

(c) Or by assise of nuisance, *quod permittat*, &c. as well as by *scire facias*, for which vide *Dyer*, 197.
276. 2 Inst. 406.

Also it seems, that if the king grants a patent for holding a fair or market, without a writ *ad quod damnum* executed and returned, that the same may be repealed by (c) *scire facias*; for though such fairs and markets are a benefit to the commonwealth, yet too great a number of them may become nuisances to the publick, as well as a detriment to those who have more ancient grants.

3 Lev. 220,
221. The
King v. Sir
Oliver Butler,
2 Vent. 344.
S. C.

So, where a writ of *ad quod damnum* is deceitfully executed; as where *J. S.*, intending to get a patent for a market every *Tuesday* in *Chatham*, which is within a mile and a half of *Rochester*, in which there is a market every *Wednesday* and *Friday*, took out a writ of *ad quod damnum*, which was executed the same day it bore *teste*, and thirty miles from *Rochester*, without notice to the mayor, &c. of *Rochester*; the patent obtained thereupon was repealed by *scire facias*.

2. Of the Owner's Remedy for a Disturbance in the Enjoyment of them.

|| See an admirable chapter on this subject in *Bract. lib. iv. c. 46. § 100.* and the very words of *Bracton* in

It seems clearly agreed, that if a person hath a right to a fair or market, and another erects a fair or market so near his, that it becomes a nuisance to his fair, &c., that for this detriment and injury done him, an action on the case lies; for it is implied in the (a) king's grant, that it shall be no prejudice to another.

Fleta, lib. iv. c. 28. § 13, 14. || 22 H. 6. 14. b. 41 E. 3. 24. b. 2 Ro. Abr. 140. (a) Where a patent is granted to the prejudice of the subject, the king of right is to permit him, upon his petition, to use his name for the repeal of it in a *scire facias* at the king's suit, to hinder multiplicity of actions upon the case. 2 Vent. 344. || And indeed it has been holden, that the person prejudiced by the patent may, upon the enrolment of it in Chancery, have a *scire facias* to repeal it, as well as the king. *Brewster v. Weld*, 6 Mod. 229. *Reg. v. Aires*, 10 Mod. 258. 354. S. P. ||

Also,

Also, although the new market be holden on a different day, yet an action on the case lies; for this, by forestalling the ancient market, may be a greater injury to the owner than if holden on the same day with his.

2 Saund. 172.
Yard v. Ford,
adjudged.
Mod. 69. S. C.
10 Mod. 258.
354.

If a man hath a fair or market, and a stranger disturbs those who are coming to buy or sell there, by which he loses his toll, or receives some (a) prejudice in the profits arising from his fair, &c., an action on the case lies.

Ro. Abr. 106.
2 Vent. 26. 28.
S. C. cited,
and admitted
to be law.

the plaintiff declared, that he was lord of the manor of, &c., and had a market, &c., and that all butchers, &c. ought to sell in the high street upon the stalls of the plaintiff, paying 1d.; and that the defendant was a butcher, and sold, &c. in his own house *occulte*; and the defendant pleaded, that he was an householder, and that time out of mind every householder in, &c. had used to sell, &c. in his own house. 8 Co. 127. cited, and held no good plea.

(a) In case,

So, if upon a sale in a fair a stranger disturbs the lord in taking the toll, an action upon the case lies.

9 H. 6. 45.
Ro. Abr. 106.
S. C.

¶ Where a grantee of a market, under letters patent from the crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged, that such uses operated as a bar to an action on the case, for a disturbance of his market. Such a length of possession was considered by *Eyre, C. J.* of C. B. who tried the cause, not as evidence to the jury, from which they might presume a grant of a market to the defendant, prior to the plaintiff's grant, but as a complete answer, or bar (b) to the action: he therefore nonsuited the plaintiff; and the Court, on a motion to set aside the nonsuit, were clearly of the same opinion.¶

Holcroft v.
Heel, 1 Bos. &
Pull.

Le Blanc J., who had been counsel for the plaintiff in *Holcroft v. Heel*, said that the ground on which that case went off was, that the court having intimated their opinion, that if the case went down to trial again upon the same facts, it would be left to the jury to find for the defendant, upon the ground of presumption of a grant after twenty-three uninterrupted uses of the market: the plaintiff's counsel said, that if it were to be left to the jury in that manner, with the recommendation of the court in favour of such a presumption, it would answer no purpose to go to trial again.

(b) But in
Campbell v.
Wilson,
3 East. 298.

(B) Of the Manner of holding Fairs and Markets: And herein,

1. In what Place they are to be holden.

THE king is the sole judge where fairs and markets ought to be kept; and therefore it is said, that if he grants a market to be kept in such a place, which happens not to be convenient for the country, yet the subjects can go to no other; and if they do, the owner of the soil where they meet is liable to an action at the suit of the grantee of the market.

3 Mod. 127.
See 2 Ro.
Abr. 140.

But, if no place be limited for keeping a fair by the king's grant, the grantees may keep it where they please, or rather where

Dixon v. Ro-
binson, 3 Mod.

108. said by where they can most conveniently ; and if it be so limited, they
 Ch. Just. So, may keep it in what part of such place they will.
 Curwen v.
 Salkeld, 3 East, 538. Rex v. Cotterill, 1 Selw. & Barnew. 67.

By the 13 E. 1. c. 5. " No fairs or markets shall be kept in
 " church-yards."

2. At what Time they are to be holden.

|| See the Pe-
 tition of the
 Commons,
 Rot. Parl.
 27 H. 6. vol. v.
 p. 152. No. vi.
 This is the first
 legislative en-
 actment to
 enforce a due
 observance
 of the Lord's

By the 27 H. 6. c. 5. Fairs and markets on the principal
 feasts, viz. *Ascension-day, Corpus-Christi-day, Whitsunday, Tri-
 nity-Sunday*, and all other *Sundays*, the *Assumption of our Lady*,
All-Saints, and *Good-Friday*, shall cease from all shewing of
 goods and merchandizes, necessary victuals only excepted ; upon
 pain of forfeiture of their goods shewed, the four *Sundays* in har-
 vest excepted ; and the fairs or markets, which are granted to
 be holden on these festivals, may be holden within three days
 before or after.

Day which is to be met with since the conquest. The long and laboured preamble ; the
 extreme anxiety discoverable in the body of the act to protect the interests of those who might
 be prejudiced by the prohibition, and to that end altering the course of prescriptions ; the
 exception of the four *Sundays* in harvest ; the postponement of the operation of the act to a
 distant day ; and the covered manner in which the crown perpetuates it, *ad proximum par-
 liamentum, et sic deinde, nisi, &c.* ; all these singularities and provisions shew that the mea-
 sure was considered as bold and hazardous. The church had at different times made some
 efforts to suppress this practice, but without any permanent effect ; *veruntamen tempore pro-
 cedente, plerique ut canes ad vomitum sunt reversi*, are the words of *M. Paris* after having
 spoken of an attempt of this sort. Hist. sub anno 1200. || See the statute 1 Car. 1. c. 1. and
 29 Car. 2. c. 7.

3. How long to continue.

By the 2 E. 3. c. 15. it is established, " That it shall be com-
 " manded to all the sheriffs of *England*, and elsewhere, where
 " need shall require, to cry and publish, within liberties and
 " without, that all the lords which have fairs, be it for yielding
 " certain term for the same to the king, or otherwise, shall hold
 " the same for the time they ought to hold it, and no longer,
 " that is to say, such as have them by the king's charter granted
 " them, for the time limited by the said charters ; and also they
 " that have them without charter, for the time that they ought
 " to hold them of right ; and that every lord, at the beginning
 " of his fair, do cry, and publish therein, how long the fair
 " shall endure, to the intent that merchants shall not be at the
 " same fairs over the time so published ; upon pain to be griev-
 " ously punished towards the king ; nor the said lords shall
 " not hold them over the due time, upon pain to seise the
 " fairs into the king's hands, there to remain till they have
 " made a fine to the king for the offence, after it be duly found,
 " that the lords held the same fairs longer than they ought, or
 " that the merchants have continued above the time so cryed
 " and published."

And by the 5 E. 3. c. 5., reciting, that by the above-men-
 tioned

tioned statute 2 E. 3., called the statute of *Northampton*, there is no certain punishment ordained against the merchants if they sell after the time, it is accorded, "That the said merchants, after the said time, shall close their booths and stalls, without putting any manner of ware or merchandize to sell there; and if it be found that any merchant from henceforth sell any ware or merchandize at the said fairs, after the said time, such merchant shall forfeit to our lord the king the double value of that which is sold, and to that end every man that will sue for our lord the king shall be received, and also have the fourth part of that which shall be lost at his suit."

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.

IF the king grants unto one a fair or market, he shall have, without any words to that purpose, a court of record, called a court of (a) *pie-powders*, as incident thereunto, for that is for advancement and expedition of justice, and for the supporting and maintenance of the fair or market.

2 Inst. 220.

(a) That it is as well incident to a fair as to a market, but there may be a court of

pie-powders by custom, without a fair or market, as there may be a market without an owner. 4 Inst. 272.—For the jurisdiction of this court, *vide* under tit. *Courts and their Jurisdiction in general*.

Owners and governors of fairs are to take care that every thing be sold according to just (b) weight and measure, who for that and other purposes may appoint a clerk of the fair or market, who is to mark and allow all such weights, and for his duty herein can only take his reasonable and just (c) fees.

(b) That according to *Magna Charta*, c. 25., there shall be but one weight and one measure

of corn, wine, beer and ale, and one yard throughout the whole realm; but for the several statutes regulating weights and measures, *vide* 14 E. 3. c. 12. 25 E. 3. c. 10. 27 E. 3. c. 10. 34 E. 3. c. 5. 13 Rich. 2. c. 9. 8 H. 6. c. 5. 7 H. 7. c. 4. 11 H. 7. c. 4. 12 H. 7. c. 5. the statute called 17 Car. 1. c. 19. and 22 Car. 2. c. 8. and *vide* *Dalt. Just.* c. 112. (c) For this *vide* 4 Inst. 274. Moore, 523.

Fairs and markets are such franchises as may be forfeited; as, if the owner of them hold them contrary to their charter, as by continuing them a longer time than the charter admits, by disuser, and by extorting fee and duties where none are due, or more than are justly due.

2 Inst. 220.

Finch. 164.

3 Mod. 108.

10 Mod. 355.

(D) Of Toll and other Duties which Owners of Fairs and Markets are entitled to : And herein,

1. *Where such Tolls shall be said to be reasonable and legally due.*

2 Inst. 222.

2 Jon. 207.

(a) Toll is a general word which com-

prehends all duties and payments at a fair or market, and therefore a grant to be discharged of toll discharges a man from piccage and stallage. Palm. 78. 2 Lutw. 1519. — Piccage is a sum of money paid for leave to dig the ground to erect a stall. Palm. 77. — Stallage is a sum of money paid for leave to erect a stall, or to remove a stall from one part of the fair to another. Palm. 77. [But piccage and stallage seem rather improperly called *tolls*. Toll can only be due by grant, custom, or prescription: it is not incident of common right to a fair; it will not pass under general words in a grant of a new fair, for custom will not support it in such a fair. *Holloway v. Smith*, 2 Str. 1171. It is certain and payable only on a sale, unless by special custom, by the buyer; but piccage and stallage are uncertain, payable whether the goods are sold or not, and the owner of the soil is entitled to them of common right. These are paid as a satisfaction for the use of the soil: toll, properly so called, goes only, though not necessarily, with the right of market; but the right of market and the right of soil are things totally distinct. Stallage and piccage go with the soil to the youngest son where it is borough-english, whilst the market descends to the heir at common law. || *Heddy v. Welhouse*, Moore, 474. *Mayor of Northampton v. Ward*, 1 Wils. 115. 2 Str. 1238. S. C. 2 Inst. 220. Trespass, therefore, will lie at the suit of the owner of the soil against any one who erects a stall without his licence, *Mayor of Northampton v. Ward*, 1 Wils. 107. 2 Str. 1238. S. C. *Mayor of Norwich v. Swan*, 2 Bl. Rep. 1116.; but he cannot, in such case, detain the goods, as damage feasant. The *Mayor of Launceston's case*, Cr. El. 75. *Sawyer v. Wilkinson*, *Id.* 627. *Wigley v. Peachey*, 2 Ld. Raym. 1589. *Austin v. Whiffred*, *Willes's Rep.* 623. ||

Hoddy v.

Wheelhouse,

Cro. Eliz. 558.

Moore, 474.

S. C. 2 Inst.

220. S. P.

Toll is a matter of private benefit to the owner of the fair or market, and not incident to it; therefore, if the king grants a fair or market, and grants no toll, the patentee can have none, and such fair or market is counted a free fair or market.

Anon. 7 Mod. 12. *Holloway v. Smith*, 2 Stra. 1171.

2 Inst. 220.

(b) That the

reasonableness

of every toll

must be deter-

mined by the

Also, if the king, at the time he grants a fair or market, grants a toll, and the same is (b) outrageous and excessive, the grant of the toll is void, and the same becomes a free fair or market.

mined by the discretion of the judge. 2 Inst. 222.

2 Inst. 221.

But the king, after he has granted a fair or market, may grant that the patentee may have a reasonable toll. But this must be in consideration of some benefit accruing from it to those who trade and merchandize in such fair or market.

2 Inst. 221.

Leight v. Pym,

2 Lutw. 1336.

No toll shall be paid for any thing brought to the fair or market before the same is sold, unless it be by custom time out of mind, and upon such sale the toll is to be paid by the buyer; and therefore my Lord *Coke* says, that a fair or market by prescription is better than one by grant.

And

And by Westm. 1. c. 31., touching them that take outrageous toll, contrary to the common custom of the realm in market-towns, it is provided, "That if any do so in the king's town, which is let in fee farm, the king shall (a) seise into his own hand the franchise of the market; and if it be another's town, and the same be done by the lord of the town, the king shall do in like manner; and if it be done by a bailiff or any mean officer, without the commandment of his lord, he shall restore to the plaintiff as much more, for the outrageous taking, as he had of him, if he had carried away his toll, and shall have "forty days' imprisonment."

But where by custom a toll is due upon the sale of any goods in a fair or market, and he who ought to pay it refuses, (b) an action on the case lies against him. [And this is the proper remedy where goods are fraudulently sold out of the market to avoid the tolls; for in such case there can be no distress.]

quasi a debt, for which debt or an *assumpsit* lies. [A claim of toll in specie for goods sold in a market is supported, it seems, by evidence of a right to toll for goods brought into the market, and there sold; without showing any right to toll for goods sold in the market, but not brought there. *Moseley v. Pierson*, 4 T. R. 104.]

¶ So, if a man sells goods by sample in a market, and refuses to pay the toll which he would have been liable to, had he sold them there in bulk, an action on the case lies against him for the injury to the market; for he has a benefit from the market, and therefore ought to pay the duties of it. But such an action will not lie against the buyer, for the mere act of buying by sample that which he knew at the time was not in the market. To support the action against him, actual fraud, or collusion with the seller to defraud the owner of the market of his toll, must be alleged and proved.

The king cannot grant a toll of things not brought into the market; and therefore a prescription for toll in respect of goods sold by sample in a market, though afterwards brought into the city to be delivered, cannot be supported.¶

4 Taunt. 520. reversing the judgment of B. R. 10 East, 476.

2. *What Persons are exempt from payment of Toll.*

If the king, or any of his progenitors have granted to any one to be discharged of toll, either generally or specially; this grant is good to discharge him of all tolls to the king's own fairs or markets, and of the tolls, which together with any fair or market have been granted after such grant or discharge; but cannot discharge tolls formerly due to subjects either by grant or prescription.

Also, the king himself shall not pay toll for any of his goods; and if any be taken, it is punishable within the statute Westm. 1. c. 31.

So, tenants in ancient demesne are free and quit from all manner of tolls in fairs and markets, whether such tenants hold in fee, for life, years, or at will.

(a) This must be intended upon office found. 2 Inst. 221.

Ro. Abr. 103, 104. 106. Blackey v. Dinsdale, Cowp. 661. (b) *Vide* 3 Lev. 400. Toll is

Moseley v. Pierson, 4 T. R. 104. The Bailiffs, &c. of Tewkesbury, v. Bricknell, 2 Taunt. 120. The Bailiffs, &c. of Tewkesbury v. Diston, 6 East, 438.

Kerby v. Whichelow, 2 Lutw. 1502. per *Powell J.* *Hill v. Smith*, 10 East, 476.

2 Inst. 221. for the writ to be quit of toll, *vide* F. N. B. 503. and *vide* 2 Show. 34. pl. 26.

2 Inst. 221.

4 Inst. 269. 2 Inst. 221. Ro. Abr. 321.

But

F. N. B. 228.

2 Leon. 191.

Cro. Eliz. 227.

2 Inst. 221.

Ro. Abr. 321.

322. — And

But this privilege does not extend to him who is a merchant, and gets his living by buying and selling, but is annexed to the person in respect of the land, and to those things which grow, and are the produce of the land.

And how this exemption must be set forth in pleading, *vide* 2 Lutw. 1144.

(E) How far a Sale in a Fair or Market-overt changes the Property of a Thing sold therein.

4 H. 7. 5. pl. 1.

Latch. 144.

2 Inst. 713.

(a) That the

law is now

settled, that a

sale in a fair

where no toll

is paid, is as effectual

to change the property

as in any other.

2 Inst. 714.

(b) The city of

London is a market-overt

every day in the week,

except *Sundays*, so that

a sale on any of

those days has the same

effect as if on a fair or

market-day in another

place. 2 Inst. 713.

Moore, 360. S. P.

2 Brownl. 288.

Godb. 131.

8 Co. 127. a. S. P.

[And in *London* every

shop, in which goods are

exposed publicly to sale,

is market-overt, for such

things as the

owner professeth to trade

in; but in the country,

the market-overt is con-

fined to the particular

place or spot of ground

set apart by custom for

the sale of particular

goods. See cases *supr.*

2 Bl. Comm. 449.

However, where the

transaction is perfectly

fair on the part of the

vendee, though the deal-

ing is out of the pre-

cincts of *London*, great

allowances shall be made

in analogy to the above-

mentioned customs. There-

fore, it seems, the prop-

erty of goods may be

changed, and effectually

transferred to the buyer,

by a *bonâ fide* sale, in ashop out of *London*,

and that whether the

shop-keeper is the vendor

or vendee, if the goods

are of the kind in

which he trades. *Harris v. Shaw*, Ca. temp. Hardw. 349. — But the custom of *London* doth not extend to the case of a pawn. *Hartop v. Hoare*, 3 Atk. 44. 1 Wils. 8. S. C. 2 Str. 1187. S. C.]

FOR the encouragement of trade, and to render contracts in fairs and markets secure, by the common law, every sale made in a (a) fair or (b) market-overt transfers a complete property in the thing sold to the vendee; so that however injurious or illegal the title of the vendor may be, yet the vendee's is good against all men.

is paid, is as effectual to change the property as in any other. 2 Inst. 714. (b) The city of London is a market-overt every day in the week, except *Sundays*, so that a sale on any of those days has the same effect as if on a fair or market-day in another place. 2 Inst. 713. Moore, 360. S. P. 2 Brownl. 288. Godb. 131. 8 Co. 127. a. S. P. [And in *London* every shop, in which goods are exposed publicly to sale, is market-overt, for such things as the owner professeth to trade in; but in the country, the market-overt is confined to the particular place or spot of ground set apart by custom for the sale of particular goods. See cases *supr.* 2 Bl. Comm. 449. However, where the transaction is perfectly fair on the part of the vendee, though the dealing is out of the precincts of *London*, great allowances shall be made in analogy to the above-mentioned customs. Therefore, it seems, the property of goods may be changed, and effectually transferred to the buyer, by a *bonâ fide* sale, in a shop out of *London*, and that whether the shop-keeper is the vendor or vendee, if the goods are of the kind in which he trades. *Harris v. Shaw*, Ca. temp. Hardw. 349. — But the custom of *London* doth not extend to the case of a pawn. *Hartop v. Hoare*, 3 Atk. 44. 1 Wils. 8. S. C. 2 Str. 1187. S. C.]

But this general rule, that a sale in a market changes the property, must be understood with the following restrictions:

2 Inst. 713.

1. That this sale in a market-overt shall not bind the king, although it bindeth all others, as infants, feme covert, idiots or lunatics, men beyond sea, or in prison, and whether they were possessed of them in their own right, or as executors or administrators.

5 Co. 83.

Bishop of

Worcester's

case. And.

344. S. C. and

S. P. Moore,

360. S. C. and

S. P. Poph.

84. S. C. and S. P.

2. That though all fairs and markets are overt, yet the sale must be in some open place, as in a shop, and not in a warehouse or other private part of the house, so that people who go along may see what is a-doing; and therefore if the shop-door or windows be so shut, that the goods cannot be seen, this alters no property.

in the shop, in which the goods are sold, the door must be open, and the goods must be seen by the people who go along.

Cro. Eliz. 454. S. P. 8 Co. 127. S. P.

5 Co. 83. Case

of market-

overt deter-

mined at the

Old Bailey, by

Popham,

Egerton, Anderson,

Brian, and others.

Poph. 84. S. C. and S. P.

Cro. Eliz. 454. S. C. and

S. P. by the name of the

Bishop of Worcester's

case. And. 344. S. C. and S. P.

3. The things bought must be of the nature and quality of those which the buyer deals in, and therefore if plate, &c. are bought in (c) a scrivener's shop in *London*, this alters no property, and the true owner may maintain trover for them.

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Moore, 360. S. C. and S. P. and there said that the law is the same, if horses are sold in *Cheapside*, or shop

goods

goods in *Smithfield*. Cro. Ja. 68, 69. Taylor and Chamber, S. P. adjudged. || A wharf, even in *London*, cannot be considered as a market-overt for articles brought there: and a sale by the wharfinger without the authority of the owner of goods lying there to a purchaser, who duly pays for them, will not change the property. *Wilkinson v. King*, 2 Campb. N. P. C. 335. || (c) And by the 1 Ja. 1. c. 21. it is enacted, that no sale, exchange, pawn, or mortgage of any jewels, plate, apparel, household stuff, or other goods of what kind, nature, or quality soever the same shall be, and that shall be wrongfully or unjustly purloined, taken, robbed, or stolen from any person or persons, or bodies politick, and which at any time hereafter shall be sold, uttered, delivered, exchanged, pawned, or done away within the city of *London*, or liberties thereof, or within the city of *Westminster* in the county of *Middlesex*, or within *Southwark* in the county of *Surry*, or within two miles of the said city of *London*, to any broker or brokers, or pawn-takers, by any ways or means whatsoever, directly or indirectly, shall work or make any change or alteration of the property or interest of and from any person and persons, or body politick, from whom the same jewels, plate, apparel, household-stuff, or goods were or shall be wrongfully purloined, taken, robbed, or stolen. *Vide supra*, *Bailment*, (B). || In trover against a pawnbroker for goods pledged with him, it appeared that the goods had been stolen from the plaintiff's house, and had been pawned by a woman, who had been tried for the felony, but acquitted on the absence of a material witness. Lord *Ellenborough* held that the action well lay, and the plaintiff had a verdict. *Parker v. Gillies*, 2 Campb. N. P. C. 336. notes. ||

4. The goods must be sold, and a valuable consideration actually paid for them. 2 Inst. 713.

5. If the buyer knows at the time of the sale that the vendor hath not the absolute property; this will not bar the right owner. 2 Inst. 713.
2 And. 115.
and 3 Co. 78.
b. S. P.

6. The sale must be without covin, or any combination between the buyer and seller to defraud the true owner. 2 Inst. 713.
2 And. 315.
and 3 Co. 78.
b. S. P.

7. If a sale be made of goods by a stranger in a market-overt, whereby the right of *A.* is bound; yet if the seller acquire the goods again, *A.* may take them again, because the seller was the wrong-doer, and he shall not take advantage of his own wrong. 2 Inst. 713.

8. There must be a sale and contract, and therefore a sale to a man of his own goods in market-overt bindeth not; and likewise a sale in market-overt by an infant of such tenderness of age, as it may appear to the buyer that he is within age, or by a feme covert, if the buyer know her to be a feme covert, unless for such things as she usually trades for or by the consent of her husband, bindeth not. 2 Inst. 713.
Perk. § 93.

9. The contract must be originally and wholly made in the market-overt, and not have the inception out of the market, and the consummation in the market. 2 Inst. 713,
714. 4 Taunt.
533.

10. The sale must not be in the night, but between sun-rising and sun-set; though a sale made in the night is good to bind the parties, but not a stranger. 2 Inst. 714.

Here also we must observe, that at common law there was no restitution of goods stolen on any prosecution whatsoever, except on an (*a*) appeal of larceny; but to remedy this inconveniency, and to encourage the prosecuting of felons. 4 H. 7. 5.
Fitz. Coron.
62. 460.
Staundf. P. C.
66. Hale's

P. C. 212. Latch. 144. (*a*) For this *vide* 2 Hawk. P. C. c. 23. § 53.

By the 21 H. 8. c. 11. it is enacted, "That if any felon or
" felons do rob, or take away any money, goods, or chattels,
" from any of the king's subjects, from their persons, or other-
" wise within this realm, and thereof the said felon or felons be
" indicted, *See 7208*
C27p2 C29p

Harris v.
Shaw, Ca.
Temp. Hardw.
349.

(a) [There hath been no writ of restitution sued out these 200 years.]

Kelynge, 35.

48. 2 Inst. 714.

(b) [If the goods are produced at the trial, and not restored, the

owner may recover them by action of trover. Loft. 88. And though they should not be the very identical goods stolen, yet if they are the produce of those goods, the prosecutor is entitled to them. *Ibid.* Noy, 128. Cro. El. 661. But, if stolen goods, before conviction of the felon, be sold *bonâ fide* in market-overt, the property is thereby changed; and though conviction revests the original ownership, and the owner has a right to restitution if he can find the possessor, and ascertain the specifick articles, yet he cannot maintain trover against one who was not in possession of them at the time of the conviction. Harwood v. Smith, 2 T. R. 759.]

*and hereby the line of the stealing is the conviction
the right of the owner is thereby lost*

“ indicted, and after arraigned of the same felony, and found
“ guilty thereof, or otherwise attainted, by reason of evidence
“ given by the party so robbed, or owner of the said money,
“ goods, or chattels, or by any other by their procurement, that
“ then the party so robbed, or owner, shall be restored to his
“ said money, goods, and chattels, and that as well the justices
“ of gaol-delivery, as other justices afore whom any such felon
“ or felons shall be found guilty, or otherwise attainted, by rea-
“ son of evidence given by the party so robbed, or owner, or by
“ any other by their procurement, have power by the said act
“ to award from time to time writs (a) of restitution for the
“ said money, goods, and chattels, in like manner as though
“ any such felon or felons were attainted at the suit of the party
“ in appeal.

Since this statute it hath been the practice to restore the goods stolen, upon the conviction of the offender, to the prosecutor of the indictment, notwithstanding any sale of them in a market-overt; but he can be restored to no goods but those mentioned in the indictment. (b)

As to changing the property of horses by a sale in a fair or market-overt, the same is provided against by the 2 & 3 P. & M. c. 7. and 31 Eliz.

But more especially by the 31 Eliz. c. 12., by which it is enacted, “ That no person shall, in any fair or market, sell, give, exchange, or put away any horse, mare, gelding, colt, or filly, unless the toll-taker there, or (where no toll-taker is paid) the book-keeper, bailiff, or the chief officer of the same fair or market, shall and will take upon him perfect knowledge of the person that so shall sell, or offer to sell, give or exchange any horse, &c., and of his true christian name, surname, and place of dwelling or resiancy, and shall enter all the same his knowledge in a book there kept for sale of horses, or else that he so selling or offering to sell, give, exchange, or put away any horse, &c., shall bring unto the toll-taker, or other officer aforesaid, of the same fair or market, one sufficient and credible person, that can, shall, or will testify and declare unto, and before such toll-taker, book-keeper, or other office, that he knoweth the party that so selleth, giveth, exchangeth, or putteth away such horse, &c., and his true name, surname, mistery, and dwelling place, and there enter, or cause to be entered in the book of the said toll-taker, or officer, as well the true christian name, surname, mistery, and place of dwelling or resiancy of him that so selleth, giveth, exchangeth, or

“ putteth

" putteth away such horse, &c., as of (a) him that so shall testify
 " or avouch his knowledge of the same person, and shall also cause
 " to be entered the very true price or value that he shall have
 " for the same horse, &c., and that no person shall take upon
 " him to avouch, testify, or declare, that he knoweth the party
 " that so shall offer to sell, give, exchange, or put away such
 " horse, &c., unless he do indeed truly know the same party and
 " shall truly declare to the toll-taker or other officer, as well the
 " christian name, surname, mistery, and place of dwelling and
 " resiancy of himself, as of him, of and for whom he maketh
 " such testimony and avouchment: and that no toll-taker, or
 " other person keeping any book of sales of horses in fairs or
 " markets, shall take or receive any toll, or make entry of any
 " sale, gift, exchange, or putting away of any horse, &c., unless
 " he knoweth the party that so selleth, giveth, exchangeth, or
 " putteth away any such horse, &c., and his true christian name,
 " surname, mistery, and place of his dwelling or resiancy, or the
 " party that shall and will testify and avouch his knowledge of
 " the same person so selling, &c., any such horse, &c., and his
 " true christian name, &c., and shall make a perfect entry into
 " the said book, of such his knowledge of the person and of the
 " name, &c., and also the true price or value that shall be *bona*
 " *fide* taken or had for any such horse, &c. so sold, given, &c.,
 " so far as he can understand the same; and then give to the
 " party so buying, &c. such horse, &c., requiring, and paying
 " two pence for the same, a true and perfect note in writing, of
 " all the full contents of the same, subscribed with his hand, on
 " pain that every person that so shall sell, &c. any horse, &c.,
 " without being known to the toll-taker, or other officer, or
 " without bringing such a voucher or witness, causing the same
 " to be entered as aforesaid, and every toll-taker, book-keeper,
 " or other officer of fair or market offending in the premises,
 " contrary to the true meaning aforesaid, shall forfeit, for every
 " such default, the sum of 5*l.*; but also that every sale, gift, &c.
 " of any horse, &c., not used in all points according to the true
 " meaning aforesaid, shall be void; the one half of all which for-
 " feiture to be to the queen's majesty, her heirs and successors,
 " and the other half to him or them that will sue for the same.
 " And by § 4. it is enacted, " That if any horse, &c. shall be
 " stolen, and afterwards shall be sold in open fair or market, and
 " the same sale shall be used in all points and circumstances as
 " aforesaid, that yet nevertheless the sale of any such horse, &c.
 " within six months next after the felony done, shall not take
 " away the property of the owner from whom the same was
 " stolen, so as claim be made within six months by the party
 " from whom the same was stolen, or by his executors or admi-
 " nistrators, or by any other by any of their appointment, at or
 " in the town or parish where the same horse, &c. shall be
 " found, before the mayor or other head officer of the same
 " town or parish, if the same horse, &c. happen to be found, in
 " any town corporate or market town, or else before any justice
 " of

(a) For this
vide Palm. 484.
 Jon. 163.

“ of peace of that county near to the place where such horse,
 “ &c. shall be found, if it be out of a town corporate or market-
 “ town; and so as proof be made within forty days then next
 “ ensuing, by two sufficient witnesses to be produced and de-
 “ posed before such head officer or justice, (who by virtue of
 “ this act shall have authority to minister an oath in that behalf,)
 “ that the property of the same horse, &c. so claimed, was in
 “ the party, by or from whom such claim is made, and was
 “ stolen from him within six months next before such claim of
 “ any such horse, &c., but that the party, from whom the said
 “ horse, &c. was stolen, his executors or administrators, shall
 “ and may, at all times after, notwithstanding any such sale or
 “ sales in any fair or open market thereof made, have property
 “ and power to have, take again, and enjoy the said horse, &c.,
 “ upon payment or readiness or offer to pay the party, that
 “ shall have the possession and interest of the same horse, &c., if
 “ he will receive and accept it, so much money as the same
 “ party shall depose and swear before such head officer or justice
 “ of peace, (who by virtue of this act shall have authority to
 “ minister, and give an oath in that behalf,) that he paid for the
 “ same *bona fide*, without fraud or collusion.”

FEES.

FEEES are certain perquisites allowed to officers who have to do with the administration of justice, as recompence for their labour and trouble; and these are either ascertained by acts of parliament, or established by ancient usage, which gives them an equal sanction with an act of parliament.

Of these there are several kinds; but we shall only consider those about which there hath been most controversy in our books, under the following heads:

- (A) In what Cases a Fee shall be said to be due.
- (B) How much shall be said to be due.
- (C) At what Time it shall be said to be due.
- (D) In what Court Fees are to be recovered.

(A) In what Cases a Fee shall be said to be due.

A T common law no officer, whose office related to the administration of justice, could take any reward for doing his duty, but what he was to receive from the king. Co. Litt. 368. 2 Inst. 176. 208, 209.

And this fundamental maxim of the common law is confirmed by Westm. 1. c. 26., which enacts, "That no sheriff, nor other (a) king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth shall yield twice as much, and shall be punished at the king's pleasure." (a) That this comprehends escheators, coroners, bailiffs, gaolers, the king's clerk of the market, au-

nager, and other inferior ministers and officers of the king, whose offices do any way concern the administration or execution of justice. 2 Inst. 209. — And according to my Lord Coke, by some opinions, it extends to the king's heralds, for they are the king's ministers, and were long before this act. 2 Inst. 209.

And so much hath this law been thought to conduce to the honour of the king and welfare of the subject, that all prescriptions whatsoever, which have been contrary to it, have been holden void; as where, by prescription, the clerk of the market claimed certain fees for the view and examination of all weights and measures. 4 Inst. 274. Moore, 523. 2 Inst. 209. 2 Ro. Abr. 226.

But it hath been holden, that the fee of 20d., commonly called the bar-fee, which hath been taken, time out of mind, by the sheriff, of every prisoner who is acquitted; and also the fee of one penny, which was claimed by the coroner of every visne, when he came before the justices in eyre, are not within the meaning of the statute, because they are not demanded of the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to them. 21 H. 7. 17. 2 Inst. 210. Stamf. P. C.

Also, it is holden by my Lord Coke, that within the words of the statute 34 E. 1., which are *nullum tallagium vel auxilium, per nos vel per hæredes nostros, in regno nostro, ponatur seu levetur, sine voluntate & assensu archiepiscoporum, episcoporum, comitum, baronum, militum, burgensium & aliorum liberorum com. de regno nostro*, no new offices can be erected with new fees (b), or old offices with new fees; for that is a tallage upon the subject, which cannot be done without common assent by act of parliament. 2 Inst. 533. [(b) But an ancient fee may attach on a modern act of parliament; such, for instance, as a fee on an oath taken before a justice of the

peace, or a judge at chambers; *per Heath J.* 2 H. Bl. 223.]

(c) But yet it is holden, that an office erected for the publick good, though no fee is annexed to it, is a good office; and (d) that the party, for the labour and pains which he takes in executing it, may maintain a (e) *quantum meruit*, if not as a fee, yet as a competent recompence for his trouble. (c) Moore, 808. Bishop of Sarum's case. (d) Hard. 351. Veale v. Priour, adjudged. (e) Where A.

was libelled against in the ecclesiastical court for fees, and upon motion a prohibition was granted; for no court has a power to establish fees; the judge of the court may think them reasonable, but that is not binding; but if in a *quantum meruit* a jury think them reasonable, they then become established fees. Salk. 333. Giffard's case.

2 Inst. 210.
[If an act of
parliament re-
cognizes a
right to a fee, the *quantum* may be ascertained by usage, though not of ancient date. Fleet-
wood v. Finch, 2 H. Bl. 226.]

All fees allowed by acts of parliament become established fees, and the several officers entitled to them may maintain actions of debt for them.

21 H. 7. 17.
Co. Lit. 368.
(a) Pr. Ch. 551.

Also, such fees as have been allowed by the courts of justice to their officers, as a recompence for their labour and attendance, are established fees; and the parties (a) cannot be deprived of them without an act of parliament.

|| But an act for this purpose has been lately passed, viz. st. 55 G. 3. c. 50. which has abolished all fees and gratuities paid or payable by any prisoner on his entrance, commitment, or discharge to or from prison; all fees or sums of money usually paid or payable to the clerks of assize and clerks of the peace, clerks of the court, or their deputies, by any prisoner charged with a felony, or as accessory thereto, or with any misdemeanor, against whom no bill of indictment is found by the grand jury, or who is acquitted, or discharged by proclamation for want of prosecution; and also the fee or gratuity claimed by the sheriff or under-sheriff for the *liberate* granted to a prisoner on his discharge. To the officers whose fees are thus abolished an allowance is made in lieu of them out of the county-rates; and the officer exacting them hereafter is incapacitated from holding his office, and guilty of a misdemeanor.||

Hob. 175. Ro.
Abr. 557. 559.
S.C. adjudged.

Where a fee is due by custom, such custom, like all others, must be reasonable; and therefore where a parson libelled in the spiritual court for a burying-fee due to him for every one who died in his parish, though buried in another; the court held this unreasonable, and granted a prohibition.

Burdeaux v.
Dr. Lancaster,
Salk. 332.
12 Mod. 171.
S. C. Topsall
v. Ferrers,
Hob. 175.

So, where a *French* protestant had his child baptised at the *French* church in the *Savoy*, and the vicar of *St. Martin's*, in which parish it is, together with the clerk, libelled against him for a fee of 2s. 6d. due to him, and 1s. for the clerk; a prohibition was granted: and in this case it was holden by *Holt*, that no fee could be due for christening but by custom, and that a custom for any person to take a fee for christening a child, when he does not christen him, is not good; and that the vicar, if he had a right to christen, should have libelled for that right.

(B) How much shall be said to be due.

10 Co. 102. a.
Co. Lit. 368.

HERE we must observe in general, that it is extortion for any officer to take more for executing his office than is allowed by act of parliament, or is the known and settled fee in such case.

But in this place we shall only take notice of the fees of sheriffs for executions, about which there seem to have been the most controversies in our books.

(b) In the
printed sta-

And for this purpose we shall recite the (b) 28 *Eliz. c. 4.*, by which it is enacted, "That it shall not be lawful to or for any
" sheriff,

“ sheriff, under-sheriff, bailiff of franchises or liberties, nor
 “ for any of their or either of their officers, ministers, servants,
 “ bailiffs, or deputies, nor for any of them, by reason or colour
 “ of their or either of their office or offices, to have, receive, or
 “ take of any person or persons whatsoever, directly or indi-
 “ rectly, for the serving and executing of any extent or execu-
 “ tion upon the body, lands, goods, or chattels of any person
 “ or persons whatsoever, more or other consideration or recom-
 “ pence than in this present act is and shall be limited and ap-
 “ pointed, which shall be lawful to be had, received, and taken;
 “ that is to say, twelve pence of and for every twenty shillings,
 “ where the sum exceedeth not one hundred pounds; and six-
 “ pence of and for every twenty shillings, being over and above
 “ the said sum of 100*l.*, that he or they shall so levy or extend,
 “ and deliver in execution, or take the body in execution for,
 “ by virtue and force of any such extent or execution whatso-
 “ ever; upon pain and penalty that all and every sheriff, under-
 “ sheriff, bailiff of franchises and liberties, their and every of
 “ their ministers, servants, officers, bailiffs, or deputies, which
 “ at any time shall directly or indirectly do the contrary, shall
 “ lose and forfeit to the party grieved his treble damages; and
 “ shall forfeit the sum of 40*l.* of good and lawful English money
 “ for every time that he, they, or any of them shall do the con-
 “ trary; the one moiety thereof to be to our sovereign lady the
 “ queen, her heirs and successors; and the other moiety thereof
 “ to the party or parties that will sue for the same by any plaint,
 “ action, suit, bill, or information, wherein no essoign, wager of
 “ law, or protection shall be allowed.

tutes, this act
 is called
 29 Eliz.; but
 by the parlia-
 ment roll it is
 the 28th, and
 so ought to be
 recited. Salk.
 331. Skin. 363.
 And this ob-
 servation is
 right, because
 the roll has
 been searched
 in a modern
 case, and
 found to be
 the 28th. [By
 7 Geo. 3. c. 29.,
 it is provided,
 “ That this act
 “ shall not ex-
 “ tend to
 “ allow any
 “ sheriff, &c.
 “ any pound-
 “ age, for
 “ taking the
 “ body of any
 “ person in
 “ execution
 “ upon any
 “ process at
 “ the suit of
 “ any sheriff,
 “ or other

“ officer or minister of the crown, upon any bail-bond entered into for the appearance of any
 “ person prosecuted, either for any duties due or payable to his majesty, or for any penalty
 “ inflicted by any act for the preventing of the clandestine running or receiving any custom-
 “ able or prohibited goods; or in any case where the sheriff, &c. would not be entitled to
 “ poundage if the proceedings were or had been carried on directly in the name of the
 “ crown.”]

“ Provided always, That this act, or any thing therein con-
 “ tained, shall not extend to any fees to be taken or had for any
 “ execution within any city or town corporate.”

In the construction of this statute the following points have
 been holden:

- [1. That under this statute, the sheriff cannot take any other charge but that for the poundage. Woodgate v. Knatchbull, 2 T. R. 148.
2. That an action lies against the sheriff for the penalty though the extortion were by the bailiff. *Ibid.*
3. That if the sheriff levy under a *f. fa.*, he is entitled to poundage, though the parties should compromise before he sells any of the goods. Alchin v. Wells, 5 T. R. 470.
4. That though the words of the statute are, that it shall not be lawful for the sheriff to take any more, or greater fee, than by the act is limited, &c., that herein by implication at least, if not by express words, a right is given the sheriff to demand those fees Moore, 853. pl. 1166. Probey v. Lumley, adjudged. Latch. 19.

Poph. 175.

Palm. 400.

Salk. 331. S.P. admitted; and *vide* Cro. Eliz.

335. 2 T. R. 155. 2 Str. 1262. || And he may maintain this action, notwithstanding the st. 43 G. 3. c. 46. § 5. empowers the levying of the poundage under the execution; for this was merely a boon to the plaintiff, and does not vary the rights of the sheriff. Rawstorne v. Wilkinson, 4 M. & S. 256. || (a) But he cannot take a bond for his fees, though he takes it for no more than the statute allows, and bring debt on that. Winch. 51, 52. Cro. Ja. 103. Cro. Car. 286.

Poph. 173.

Welden v. Vesey, Hil.

1 Car. 1.

Latch. 17, 18.

52. Palm. 399,

400. Bendl.

165. Noy, 75.

S. C. adjudged

by three

judges against

Cro. J. Cro.

Car. 286-7.

Lister and

Bromley, S.P.

adjudged.

Trin. 8 Car. 1.

1 Jones, 307. S. C. adjudged and affirmed on a writ of error. Salk. 331. S. P. admitted to be

law; and *vide* Cro. Eliz. 263-4.

Latch. 17, 18.

Poph. 173.

Palm. 399,

400. Dalt.

Sheriff, 527.

cont. Cro. Eliz.

263, 264. and

vide Brockwell

v. Lock, 5 Mod.

97. where an

action of debt

was brought

by the bailiff

of the palace

court of the

Bishop of

Rocheſter for fees, upon execution of a judgment in that court, pursuant to this statute; and after verdict for the plaintiff, the judgment was staid, although it was objected, that the proviso in the statute could not extend to it, being neither a city nor town corporate where the execution was made; nor was it within the reason thereof, because the bishop's jurisdiction is as large as his diocese; and the reason of the proviso, that no execution fees should be taken in cities and towns corporate, is from the narrowness of those jurisdictions, which renders executions in them more easy and less dangerous. Salk. 331. S. C. but no judgment.

Latch. 19. 52.

Poph. 175.

Salk. 331.

Dalt. Sheriff,

526. S.P. And

there said,

that the constant practice was so; and Noy, 27. Cooper and Iles, S. P. adjudged, for he shall answer for the escape, &c. and therefore ought to have the fees. (b) So, if the execution

of

fees mentioned in the statute; and, consequently, that he may, as in all cases where the statute creates a debt or duty, (a) maintain an action of debt for them: [but the action must be in the name of the sheriff, and not of the bailiff.]

5. It hath been adjudged, that the sheriff shall have a shilling *per* pound for the first hundred, and sixpence *per* pound for every other pound exceeding a hundred; and not sixpence for every pound where the whole debt happens to exceed a hundred pound; for by this construction the sheriff would have less where the debt was 199*l.* than if it were but 100*l.*, and the intention of the statute was to allow sheriffs such reasonable fees as would encourage them to discharge this branch of their duty so much favoured by the law, with vigour and success, who before were backward and intimidated, by reason of the dangers they run from escapes, &c., from engaging herein; and therefore it has been holden the most reasonable construction to allow them their fees in proportion to such danger.

6. It hath been resolved, on the proviso of the said statute, that it shall not extend to any fees to be taken for any execution within any city or town corporate; that this must be intended of executions on judgments given in those courts; and that therefore where a sheriff executes a judgment given in *Westminster Hall* in a city or town corporate, he is as much entitled to his fees, pursuant to this statute, as if the execution had been done in any part of the county at large; for herein the sheriff runs as great a risque, and his trouble is as great. But, where both the judgment and execution are within a limited jurisdiction, it cannot be presumed to be attended with equal difficulty; and therefore the proviso in the statute excludes them.

7. It hath been resolved, that the bailiff of (b) a liberty, who executes a judgment given in *Westminster Hall*, is entitled to the fees, within the words and meaning of the statute; and not the sheriff of the county, who directs his precept to him.

of a judgment in *Westminster* be in a city, which is a county of itself, the sheriff there shall have his full fees, for he is the proper officer to the courts above. *Latch.* 19. *Palm.* 401. *Dalt.* 527. *Cro. Eliz.* 263, 264.

8. It seems agreed, that if a sheriff makes an *extent*, and before the *liberate* a new sheriff is chosen, the new sheriff shall have the fees appointed by the statute. *Winch.* 50, 51. *per Hob. C. J.* *Dalt.* Sheriff; 526. *Vide*

stat. 3 *Geo. 1. c. 15. § 9.*, which directs an apportionment of the fees in such case between the precedent and subsequent sheriff.

9. It hath been resolved, that the statute does not extend to real executions, such as *habere facias seisinam*, or *possessionem* (a), but only to executions in personal actions. Also it is said, that the statute does not extend to executions upon statutes merchant, recognizances, &c., and that the act is to be understood of cases where the judgment *redditur in invitum*, and not by the voluntary confession of the party. * *Salk.* 331. *Peacock v. Harris.* (a) But he may take fees upon the execution of these writs by st. 3 *G. 1. c. 15.*

§ 16. which limits the sum, and directs that no sheriff, under-sheriff, deputy-sheriff, or their bailiffs, or the bailiff of any franchise or liberty, by reason of any writ of *habere facias possessionem aut seisinam*, shall take above 1s. *per* pound of the yearly value of any manor, &c. where the whole exceeds not 100*l.* *per annum*, and 6*d.* only for every 20*s.* above such yearly value. And by 8 *Geo. 1. c. 25. § 5.* no more is to be taken on an *extent* and *liberate*.

* Certainly the sheriff is entitled to his fees on a judgment by confession.

10. That for executing a *capias utlagatum*, or for a warrant to execute it, or for a return of it, no fee is due to the sheriff, because this is at the suit of the king. *Vildshire's case, Hetl.* 52. *Litt. Rep.* 65. *S.C.* 2 *Brownl.*

283. *S. P.* || In the case of *Graham v. Gill*, 2 *M. & S.* 294. it was contended that in an outlawy in a civil suit the sheriff was entitled to his poundage; but the point was not determined, the sheriff having no title to poundage, because he had not levied the money. ||

11. It seems to have been resolved, that upon a *capias ad satisfaciendum*, the sheriff shall have his fees for the (b) whole debt. Also, (c) if one in execution dies, and a *fieri facias* issues against his goods, the sheriff shall have his fees upon executing the *fieri facias*, for his trouble was as great as at first. *Salk.* 331. [(b) By st. 3 *Geo. 1. c. 15. § 17.* the sheriff shall not take poundage for executing

any *ca. sa.*, where part of the debt hath been paid, for any greater sum than what remains due to the plaintiff, who is to mark the same on the back of the writ, and the sheriff, &c. is guilty of extortion, and shall forfeit to the party grieved treble damages, and double the sum so extorted, and also 200*l.*] But that upon executing an *elegit* where perhaps the land is not worth 40*s.* it is unreasonable that the sheriff should have 6*d.* for every pound of the debt. *Cro. Ja.* 103. *per Curiam*, and *vide Salk.* 331, where, by *Treby*, Ch. J. in such case he shall have fees according to the sum levied, and not according to the debt recovered. — But this is denied by *Powel*, because the party might detain the land till he was satisfied the entire debt; and the plaintiff is, by having made his election, barred of all other executions. (c) *Vide Skin.* 363. pl. 7.

[By st. 3 *Geo. 1. c. 15. § 3.* Sheriffs levying debts, &c. (except post fines) due to the crown, by process of the pipe, or *levari facias*, shall have 12*d.* *per* pound for any sum not exceeding 100*l.* levied, and 6*d.* for every 20*s.* above that sum; and on process by *fi. fa.* and *extent*, shall have 1*s.* 6*d.* *per* pound for any sum not exceeding 100*l.* levied; and 1*s.* *per* pound above that sum; provided they answer the same on their accounts by a day to be fixed by warrant of the barons.

By § 13. No sheriff or other person employed in levying, &c. debts to the crown, shall take any fee except 4d. only for an acquittance; and if a sheriff, &c. demand or take any money for executing, or forbearing to execute such process, he forfeits treble damages and costs to the party aggrieved, and double the sum so extorted; which damages and penalties shall be given by the barons of the Exchequer in such summary way as they shall deem proper; provided the conviction be within two years after the offence committed. Nevertheless, by § 14., the sheriff may take such poundage and allowance as are given by this act, and such allowance as may be made by the Treasury or Exchequer for any extraordinary service to the crown.

R. v. Burrell,
Bunb. 305.
R. v. Thomas
Jetherell,
Parker, 177.
R. v. Palmer,
2 East, 411.

The sheriff may retain poundage, without waiting for an allowance of it in his account, and this upon an extent in aid. And his right to poundage may be determined upon motion.

|| But, where the sheriff had retained his poundage out of money levied by him upon an attachment for non-payment of money, the court directed him to refund it; there being no practice to warrant it; and they referred him to his action if he supposed himself entitled to it under the statute of 23 H. 6. c. 9. ||

R. v. Wade,
Skin. 12. Sir
T. Jon. 185.

The sheriff hath been allowed poundage out of a fine (imposed after conviction upon an indictment of battery in K. B.,) levied upon a *fi. fa.*; for the barons of the Exchequer always make such allowance after monies paid there by the clerk of the crown.]

|| By st. 57 G. 3. c. 91. the justices of the peace, those of *Kent* and *Lancaster* at their annual general sessions of the peace, and those of every other county, riding, division, city, town, liberty, or precinct in *England* and *Wales* at their general quarter sessions, are empowered to settle a table of fees to be taken by the clerk of the peace in their respective counties, &c. to be approved by the justices in the next sessions, and then laid before the judges of assize or the justices of the great sessions in *Wales*, who may ratify and confirm the table so made, or make such alterations therein as shall appear to be reasonable; and any clerk of the peace demanding or taking any other or greater fee or allowance than shall be contained in such table shall forfeit five pounds. ||

(C) At what Time it shall be said to be due.

Co. Litt. 368.
16 Co. 102. a.
(a) Salk. 330.
(b) So, where
on a motion
that an under-
sheriff might
attend for re-

HERE also we must observe, that it is extortion for an officer to take his fee before it is due; and therefore (a) where an under-sheriff refused to execute a *capias ad satisfaciendum* till he had his fee, the court held that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for (b) extortion.

fusing to execute a *fi. facias* till his shilling and pence were paid, the court would not grant the rule, but said it was extortion, for which he might be indicted. Salk. 331.

If a *habeas corpus ad subjiciendum* be directed to a gaoler, he must bring up the prisoner although his fees were not paid him; and he cannot excuse himself of the contempt of the court, by alleging, that the prisoner did not tender him his fees. Keb. 272.

Also, it is no excuse for not obeying a writ of *habeas corpus ad faciendum & recipiendum*, that the prisoner did not tender him his fees. March, 89.
Keb. 280.
2 Jon. 178.
but Keb. 566. cont.

But, if the gaoler brings up the prisoner by virtue of such *habeas corpus*, the court will not turn him over till the gaoler be paid all his fees; nor, according to some opinions, till he be paid all that is due to him for the prisoner's diet; for that a gaoler is not compellable to find his prisoner sustenance. But for this
vide Ro. Rep.
338. Co. Litt.
295. 9 Co. 87.
Plow. 68. a.
2 Ro. Abr. 32.
2 Jones, 178.

If a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers, before they allow it. Fitz. Coron.
294. 4 E. 4.
10 b. Pulton
de pace, 88. a.
56. Sid. 452.

If an erroneous writ be delivered to the sheriff, and he executes it, he shall have his fees, though the writ be erroneous. Keling, 25. 2 Jon.

332. *Alchin v. Wills*, 5 T. R. 470. *Rawstone v. Wilkinson*, Salk. 332.
Earle v. Plummer, 1 Salk.
4 M & S. 256.

It seems to be laid down in the old books as a distinction, that upon an extent of land upon a statute, the sheriff is to have his fees, so much *per pound*, according to the statute immediately; but that upon an *elegit* he is not to have them (a) till the *liberate*. Poph. 176.
Winch. 51.
S. P. and there
said, that the
sheriff cannot
take his salary,
appointed by

the statute, till a complete execution, viz. till the *liberate*; for the words of the statute are in the negative, and do not establish the fees, but only tolerate them. (a) And therefore if the conuzee sue an extent, and then refuse to sue the *liberate*, to the intent to defraud the sheriff of his fees, the sheriff may have his remedy by action on the case. Winch. 51. per
Hobart.

But, where the sheriff, having executed an *elegit*, brought an action of debt for his fees; and it was objected, that this was not within the statute, the execution not being complete, for the plaintiff could not enter, but must bring his ejectment; it was holden by *Holt*, that there was the same reason for fees for executing an *elegit* as an extent; for upon an *elegit* the sheriff returns, that he has taken an inquisition, extended the lands, and delivered them to the plaintiff; and that there is a *liberate* in the body of the writ of *elegit*, on the return of which the plaintiff may enter. For by the return he becomes tenant by *elegit*, and may maintain an ejectment, and assign his interest upon the land; but the defendant's continuing in possession after the return of the writ turns the plaintiff's estate to a right, and therefore he must enter to assign. And his being put to an ejectment is no reason, for in case of an extent upon a statute, where the *liberate* is distinct, he cannot enter by force. It is true he may without force, and so he may here. And *Powell* said, that extent generally is the word of the statute 28 Eliz. c. 4., and that an extent Tyson v.
Paske, 1 Salk.
333. 2 Ld.
Raym. 1212.

extent upon an *elegit* was an extent within the statute, as well as an extent upon a statute.

(D) In what Court Fees are to be recovered.

Lord Ranelagh v. Thornhill. Vern. 203. 2 Chan. Ca. 153. S. C. **A** SOLICITOR in Chancery may exhibit his bill for his fees for business done in that court; and so he may where the business is done in another court, if it relates to another demand the plaintiff makes in Chancery.

||It would seem, that a clerk in court may sue a solicitor by bill in equity, for an account of their dealings and transactions in that relation. Such has certainly been understood to be the practice; and where to a bill by a clerk in court against a solicitor, for payment of a certain sum, stated as the amount of the plaintiff's bill for fees and disbursements, there was a demurrer to the relief for want of equity, Lord Eldon thought himself fully authorized to overrule the demurrer. *Barker v. Dacie*, 6 Ves. 681. But, where the bill has been exhibited by a stranger, as by the executrix of a solicitor for business done by the testator, the demurrer has been allowed. *Parry v. Owen*, Ambl. 109. 3 Atk. 740. S. C.||

Vide 3 Leon. 268. 2 Ro. Rep. 59. Mod. 167. 2 Keb. 615. 3 Keb. 303. 441. 516. 4 Mod. 254. 5 Mod. 242. 10 Mod. 261. 440. 12 Mod. 583. Lord Raym. 703. Com. Rep. 18. pl. 11. But it hath been holden, that chancellours, registrars, and proctors, who are officers of temporal profit, and whose fees do not relate to the jurisdiction of the spiritual court, cannot sue for them in the spiritual court.

Salk. 333.
Ballard v.
Gerrard.

As, where the registrar in the ecclesiastical court libelled there for 4s. 6d. for his fees, and proceeded to excommunication; and the defendant suggested, that the office of registrar was a temporal office, and a freehold, and moved for a prohibition, which was granted; for the court hath no power to compel the party to pay fees to their officers, but they must bring their *quantum meruit*; or if the office be a freehold, they may bring an assise, for the denial of just fees is a disseisin; although it was objected, that this case differed from that of a proctor, because the registrar is a mere officer of the court, and the court may appoint a reasonable fee to the officers that attend them.

Salk. 330.
Goslin v. El-
fison.

So, a prohibition was granted to stay a suit in the archdeacon of *Litchfield's* court, against churchwardens for a fee for swearing them and taking their presentments, because no fees could be due but by custom, or for work done, in which case a *quantum meruit* lay.

Hil. 5 Ann.
Dean and
Chapter of
Exeter v.
Drue. Salk.
334. S. C.

Again, the dean and chapter of the cathedral church of *Exeter*, having the freehold and inheritance of the said church, had by prescription 10*l.* for every corpse that was buried in the said church; and the defendant's testator being buried there, without their licence, the defendant refused to pay the 10*l.*, for which they sued him in the ecclesiastical court: On shewing cause why a prohibition should not go, it was urged, that none can prescribe to have a burying-place in a cathedral church, for the parishioners have nothing to do with it, nor pay any tithes to it; but in the parish

parish church to which they pay tithes and other duties, there such a prescription may be good, and in the church-yard they have a right to be buried without any prescription. But the court held, admitting that no person could prescribe to bury in a cathedral church, and admitting that this fee, like that of 20*l.* which is usually paid for burying in the cathedral church of *Westminster*, is reasonable, yet it is not of spiritual cognizance, but is in nature of a licence, on which a *quantum meruit* may be brought, and the constant usage to pay so much given in evidence; and therefore the prohibition was granted.

FELONY.

WHOEVER becomes infamous by the commission of a crime which subjects him to a capital punishment, is said to be guilty of felony; which *ex vi termini*, says my Lord Coke, signifies *quodlibet crimen felleo animo perpetratum*, and can be expressed by no periphrasis or word equivalent, without the word *felonice*.

Spelm. Gloss. *verbo feloniam*.
Co. Litt. 391.
[Sir Wm. Blackstone
defines felony
to be an offence which

occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt. 4 Bl. Comm. 95. He therefore derives the word felony from the *Saxon* *fæo*, or *fæoh*, fee, or feud; and the *German* *lör*, price, as being a crime punishable with the loss of the feud or benefice. *Ibid.* But, as in petit larceny, the lands are not liable to escheat; and petit larceny hath always been ranked among felonies; a later writer seems inclined to derive it from *fælen*, in the sense of offending. 2 Wooddes. 510. It is to be observed, that the *Saxon* *fæo*, or *fæoh*, in its primitive sense, signified money or goods; that is, in a translated sense, an inheritance or feud. Lye's Sax. Dict. voc. *Feo*. Spelm. Gloss. *ubi supr.*]

Felony is included in (a) high treason, murder, robbery, burglary, rape, sodomy, &c., but for these we shall refer to their proper heads, and in this place chiefly consider it as a violation of a man's property, known by the name of larceny.

(a) And consequently a pardon of felony discharges an indictment

of high treason, if it wants the word *proditorie*. H. P. C. 11. 3 Inst. 151. 1 Hawk. P. C. c. 25. § 1.

For the better understanding whereof we shall consider,

(A) Of what Nature the Things taken must be, to constitute the Offence Felony.

(B) How far the Goods ought to belong to another.

(C) What shall be said to be a felonious and fraudulent Taking.

(D) What

- (D) What shall be said to be a carrying away.
 - (E) By whom the Offence may be committed.
 - (F) Of what Value the Goods must be : and herein of the Difference between Grand and Petit Larceny.
 - (G) Where the Offender is or is not excluded his Clergy.
 - (H) Where the Offender is to be transported.
-

(A) Of what nature the Things taken must be, to constitute the Offence Felony.

HERE it may be proper to take notice, that in the times of the military tenures every tenant was obliged to attend in the camp; and there being no provision made out of the publick stock for them, as there is now-a-days for our mercenary soldiery, it was necessary for every freeman to carry with him his own provision; which induced the necessity of a very severe and rigid justice upon all persons who should violate any man's property; otherwise camps would have been scenes of intolerable violence, and every man would have perished by his neighbour's sword, and not by his enemies. Hence was learned the institution of punishing theft by death, and thence derived into the civil state, which consisting of the same orders and conditions of men, it was necessary that the same measures of justice should be used both at home and in the camp; for they could not understand that a freeman should be punished otherwise in the camp than in the civil state, as they thought justice was the same, and could not alter with the distinction of countries and places; and therefore it is that in this punishment our law differs from the (a) *Roman* and *Mosaick* laws, which only oblige those sort of offenders to the restitution of four-fold; and custom hath approved the method; for should we admit a restitution from such profligate offenders, we should have no end of rapine and violence.

(a) S. P. C.
25. See Exod.
22.

(b) 12 Ass. 32. Hence we have the reason of the distinction between real and personal property, and why our law does not punish the stealing (b) of corn or grass growing, or apples on a tree, or (c) lead on a church or house with death; because these never came under the camp discipline; and therefore it was not necessary to guard this sort of property with such sanguinary laws, where the redress might be by a civil action.

(b) Bro. Coron. 77.
Cromp. 37.
18 H. 8. 2.
S. P. C. 25. b.
Mod. 89.
Allen, 83.
2 Keb. 875.
Vent. 187.

(c) But now by the 4 Geo. 2. c. 32. every person who shall steal or rip, cut or break, with intent to steal, any lead, iron bar, iron gate, iron palisadoe, or iron rail whatsoever, being fixed to any dwelling-house, out-house, coach-house, stable, or other building used or occupied

pied with such dwelling-house, or thereunto belonging, or to any other building whatsoever; or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house, or other building, shall be deemed and construed to be guilty of felony; and the court, before whom such persons shall be tried, shall and hereby have power to transport such felons for seven years; as also such persons who shall be aiding, abetting, or assisting in stealing, &c., or who shall buy or receive any such lead, &c. knowing the same to be stolen. [By 21 G. 3. c. 68., "Whoever shall rip, cut, break, or remove, with intent to steal any copper, brass, bell-metal, utensil, or fixture, being fixed to any dwelling house, out-house, coach-house, stable, or other building used or occupied with such dwelling-house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court-yard, fence, or outlet belonging to any dwelling-house or other building, or any iron rails or fencing set up, or fixed in any square, court, or other place, (such person having no title or claim of title thereto); or whoever shall be aiding, abetting, or assisting therein, or shall knowingly buy or receive the same, although the principal felon hath not been convicted of stealing the same, shall be guilty of felony, &c." By 25 G. 2. c. 10. stealing black lead in the mine is felony.]

But, if they are severed from the freehold, whether by the owner, or even by the thief himself, if he sever them at one time, and then come again at another time and take them, it is felony. Vent. 187.
1 Hawk. P. C. c. 33. § 21.

If a man take away a box of charters, this is not felony, because they are the muniments of the freehold, and relate to the estate at home, and not to the provisions that were used in supplying the camp abroad. 3 Inst. 109.
H. P. C. 66.
|| So, of a commission to settle boundaries.

R. v. Westbert, 2 Str. 1133. ||

But it is said, in (a) *Hale*, to be felony to take away an obligation for money. And the reason hereof may be, because securities might be taken to answer money at the camp from a neighbouring freeholder; and therefore there was the same reason they should be within this provision, as that other chattels should be protected by the obligation, being equally valuable. (a) H. P. C. 67.

But *per Hawkins*, the things taken ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment, on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or other *chose* in action. And the reason, he says, wherefore there can be no felony in taking away any such things, seems to be, because generally speaking they, being of no manner of use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore, need not be provided for in so strict a manner as those things which are of a known price, and every body's money. And for the like reason, it is no felony to take away a villein or an infant in ward. 1 Hawk. P. C. c. 33. § 22., for which are cited H. P. C. 66, 67.
3 Inst. 109.
Bro. Coron. 155. S. P. C. 25. b. Coron. 27.

|| By 8 H. 6. c. 12. § 3. it is ordered, that "if any record or parcel of the same, writ, return, panel, process, or warrant of attorney, in the king's courts of Chancery, Exchequer, of the one Bench or the other, or in his Treasury, be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by other person, by means whereof any judgment shall be reversed, that such stealer, taker-away, withdrawer, and avoider, their procurators, counsellours, and abettors, thereof indicted, and by process thereupon made, thereof duly convict by their own confession,

“ confession, or by inquest to be taken of lawful men, whereof
 “ the one half shall be of any court of the same courts, and the
 “ other half of other, shall be adjudged for felons, and incur the
 “ pain of felony : and that the judges of the said court, of the
 “ one Bench or the other, shall have power to hear and deter-
 “ mine such defaults before them, and thereof to make punish-
 “ ment as before is said.”

(a) Made per-
 petual by
 G. 2. c. 18.
 By 7 G. 2.

c. 22. If any
 person or per-
 sons shall
 falsely make,
 alter, forge, or
 counterfeit, or
 cause or pro-
 cure to be
 falsely made,
 &c. any ac-
 ceptance of
 any bill of ex-
 change, or the
 number or
 principal sum
 of any ac-
 countable re-
 ceipt for any
 note, bill, or
 other security
 for payment
 of money; or
 any warrant
 or order for
 payment of
 money, or de-
 livery of
 goods, with
 intention to defraud any person whatsoever; or utter, or publish as true, any false, altered,
 forged or counterfeited acceptance of any bill of exchange, &c. with intention to defraud,
 knowing the same to be false, &c. he or they shall be guilty of felony without benefit of clergy.

By the (a) 2 Geo. 2. c. 25. it is enacted, “ That if any per-
 son or persons shall steal, or take by robbery, any Exchequer
 orders or tallies, or other orders, entitling any other person
 or persons to any annuity or share in any parliamentary fund,
 or any Exchequer bills, Bank notes, *South Sea* bonds, *East*
India bonds, dividend warrants of the Bank, *South Sea* Com-
 pany, *East India* Company, or any other company, society,
 or corporation, bills of exchange, navy bills or debentures,
 goldsmiths’ notes for payment of money, or other bonds or
 warrants, bills or promissory notes for the payment of any
 money, being the property of any other person or persons, or
 of any corporation, notwithstanding any of the said particu-
 lars are termed in law a *chase in action*, it shall be deemed
 and construed to be felony, of the same nature and in the
 same degree, and with or without the benefit of the clergy,
 in the same manner as it would have been, if the offender
 had stolen or taken by robbery any other goods of like value
 with the money due on such orders, tallies, bills, bonds,
 warrants, debentures, or notes, or secured thereby, and re-
 maining unsatisfied; and such offender shall suffer such punish-
 ment, as he or she should or might have done, if he or she
 had stolen other goods of the like value with the money due
 on such orders, tallies, bonds, bills, warrants, debentures, or
 notes, respectively, or secured thereby, and remaining un-
 satisfied.”

[And by 5 Geo. 3. c. 25. § 17. and 7 Geo. 3. c. 50. § 2.
 “ Whoever shall rob any mail in which letters are sent or con-
 “ veyed by the post, of any letter, packet, or bag of letters, or
 “ shall steal and take from any such mail, or from any bag of
 “ letters sent or conveyed by the post, or from or out of any
 “ post-office, or house or place for the receipt or delivery of
 “ letters or packets sent, or to be sent by the post, any letter or
 “ packet, although such robbery, stealing, or taking shall not
 “ appear or be proved to be a taking from the person, or upon
 “ the king’s highway, or to be a robbery committed in any
 “ dwelling-house, or any coach-house, stable, barn, or any out-
 “ house belonging to a dwelling-house; and although it should
 “ not appear that any persons were put in fear by such robbery,
 “ stealing, or taking, yet such offenders shall be deemed guilty
 “ of felony, and suffer death without the benefit of clergy.”]

It is also from the strict discipline that was observed in the camp, that the distinction is raised concerning beasts that are *feræ naturæ*; for those that are for the provision of man, when reclaimed, are within the protection of the law, and it is felony to steal them, because they answered the use of the camp for their necessary food and sustentation; but dogs, cats, bears, foxes, monkeys, ferrets, and the like, that are not used for provision, may be stolen without any danger of death, for they are not within the inconveniency for which the law was provided.

But to steal hawks reclaimed is felony, (a) because they were used for the entertainment of noble and generous persons, and were carried into the camp for diversion there; and therefore were construed within the same provision.

Wherever it is felony to steal beasts, it is so in relation to the (b) young of such beasts, because they by right of accession follow the condition of the dams.

steal eggs of swans and hawks, but a particular punishment is prescribed by the statute 11 H. 7. c. 17. H. P. C. 68.

11 P. C. 66.
7 Co. 18.
3 H. 8. 3. b.
Crom. 36.
Dalt. c. 103.
3 Inst. 109.
Hawk. P. C.
c. 33. § 23.

3 Inst. 109.
(a) And this is
also made
felony by
37 E. 3. c. 19.

3 Inst. 109.
H. P. C. 68.
(b) But it is
not felony to

(B) *How far the Goods ought to belong to another.*

THE taking of goods, whereof no one had a property at the time, cannot be felony; and therefore he who takes away treasure trove, or a wreck, * waif, or stray, before they have been seised by the persons who have a right thereto, shall only be punished by fine, &c.

beating, &c. with intent to kill, or otherwise obstructing the escape of any person from such ship, or putting out false lights, with intent to bring any ship into danger, felony without benefit of clergy. 26 G. 2. c. 19.

3 Inst. 109.
H. P. C. 67.
Hawk. P. C.
c. 33. § 24.
* Plundering
shipwrecked
goods, or

If one takes fish in a river, or other great water, wherein they are at their natural liberty, he is not guilty of felony; but he who takes them out of a trunk or pond is guilty of felony, because being thus secured, the party hath the full dominion of them.

And for this reason there can be no doubt but that the taking of domestick beasts, as horses, mares, colts, &c., or of any creatures whatsoever, which are *domitæ naturæ*, and fit for food, as ducks, hens, geese, turkies, peacocks, or their eggs, or young ones, is felony.

But a man cannot commit a felony by taking (c) deer, hare, or conies in a forest, chase, or warren, or old pigeons being out of the house.

act for the more effectual discovery and punishment of deer stealers; and 5 Geo. 1. c. 15. an act by which such offenders are liable to transportation; and 9 Geo. 1. c. 22. commonly called the Black Act, made perpetual by 31 Geo. 2. c. 42. § 2. by which persons going armed, having their faces blacked, or disguised, and hunting deer, robbing any warren, fish-pond, &c. are guilty of felony, and excluded the benefit of their clergy.

Owen, 20.
3 Inst. 109.
H. P. C. 97.

H. P. C. 68.
3 Inst. 109.
Hawk. P. C.
94.

Hawk. P. C.
c. 33. § 26.
(c) Vide 3 W.
& M. c. 10. an

But a person, who takes any other creatures, though *feræ naturæ*, 3 Inst. 109.
7 Co. 17.

H. P. C. 86.
Hawk. P. C.
c. 33. § 26.

naturæ, if they be fit for food, and reduced to tameness, and known by him to be so, is guilty of felony: also, by the better opinion, it is felony to steal wild pigeons in a dove-house shut up, or hares or deer in a house, or even in a park, inclosed in such a manner, that the owner may take them whenever he pleases, without the least danger of their escaping; in which case they are as much in his power as fish in a pond, or young pigeons or hawks in a nest, &c., the taking of which seems agreed to be felony.

Hal. P. C. 68.
Hawk. P. C.
c. 33. § 27.

Also, the taking away of swans marked or pinioned, or those which are unmarked, if kept in a pond or private river, is felony.

Hawk. P. C.
c. 33. § 29.
and several
authorities
there cited.
See too Hick-
man's case,
O. B. 1785, in
6th edit. of
Hawk. P. C.
Append. first,
Sect. 13. note.

Also, it is said, that there may be felony in taking goods, the owner whereof is unknown; in which case the king shall have the goods, and the offender shall be indicted for taking *bona cujusdam hominis ignoti*. And it seems that, in some cases, the law will rather feign a property, where in strictness there is none, than suffer an offender to escape; and therefore it is said, that he who takes away the goods of a chapel, or abbey, in time of vacation, may be indicted in the first case for stealing *bona capellæ*, being in the custody of such and such; and in the second, for stealing *bona domûs & ecclesiæ*, &c., and *a fortiori* therefore it follows, that he who steals goods belonging to a parish church may be indicted for stealing *bona parochianorum*. And it hath been adjudged, that he who takes off a shroud from a dead corpse may be indicted, as having stolen it from him who was the owner thereof when it was put on, for a dead man can have no property.

Cro. Eliz. 536.
Moor, pl. 981.
Keilw. 70.

There is also a special case, in which a man may be guilty of felony in stealing goods, the absolute property whereof is in himself; as where one, who has delivered goods to a carrier or taylor, &c., afterwards, with an intent to charge such carrier or taylor, fraudulently and secretly takes them away.

(C) What shall be said to be a felonious and fraudulent Taking.

Keling, 24.
H. P. C. 61.
Hawk. P. C.
c. 33. (a) But
the bare inten-
tion to commit
was holden so
very criminal,

TO constitute an offence felony, it is not sufficient that there be a fraud and (a) intent to steal, unless there be also a taking, for all felony includes trespass, and every indictment for larceny must have both the words *cepit & asportavit*; and therefore if there be no trespass in taking the goods, there can be no felony in carrying them away.

that at common law it was punishable as felony, when it missed its effect through some accident, no way lessening the guilt of the offender. S. P. C. 17. And though at this day felony shall not be imputed to a bare intention to commit it; yet the party may be severely fined for such an intention. Lev. 46. Sid. 23. 5 Mod. 206. and by a statute 7 Geo. 2. c. 21. an assault with an intent to rob is felony, and punishable by transportation for seven years.

3 Inst. 103.
H. P. C. 61.

Therefore if a person finds goods, and converts them to his own use *animo furandi*, yet he is not guilty of felony.

So,

So, if a person who has a limited property in the goods, as, S. P. C. 25. 2.
 one who has goods delivered to him to keep; a carrier who has 3 Inst. 108.
 a box delivered to him to carry to a certain place; or a taylor
 who has cloth delivered to him to make into a suit of clothes;
 for here the party injured must seek redress by civil action, and
 must abide the folly of his own act in placing confidence in the
 person who was guilty of the breach of trust.

But, though if I send a box to the carrier, and the carrier sells 13 E. 4. 9, 10.
 it, this is not felony; yet, if the box be broke open, and the S. P. C. 25. a.
 goods in it carried away, it is (a) felony; for he hath property Kelyng. 35.
 in the box to carry it to the place appointed, but he hath no Ro. Abr. 73.
 property in the goods in the inside, for that I have reserved in (a) So, where
 my own power, having locked it up out of the power of the a weaver who
 carrier to whom it is sent; for no man hath property that is has received
 shut out from the command of the thing to which he pretends. silk to work,
 So, if a carrier carries the goods to the place, and then steals or a miller
 them, this is felony; because the property is determined when who has corn
 the goods are come to the place appointed; besides, it is for to grind, frau-
 publick convenience, that the inside of the box should be thus dulently and
 secured: otherwise the carrier might steal the things contained clandestinely
 in the box, and yet deliver the box itself, which would not be of take and em-
 very easy discovery. bezzle part, it
 is felony; for
 the possession
 of such part,

distinct from the whole, was gained by their own wrong, and in a manner more base than if they
 had been strangers. Hawk. P. C. c. 33. § 5.—[Where *A.* intending to go a distant journey,
 hires a horse, fairly and *bonâ fide*, for that purpose, and evidences the truth of such intention
 by actually proceeding on his way, and afterwards rides off with the horse, it is no theft;
 because the felonious design was hatched subsequent to the delivery, and the delivery being ob-
 tained without fraud or design, the owner parted with his possession as well as his property;
O. B. 1784, p. 1294, and thereby gave to *A.* dominion over the horse, upon trust, that he would
 return him when the journey was performed. *O. B.* 1786, p. 333, 334. But, if the delivery of
 property be obtained with a pre-concerted design to steal the thing delivered, although the
 owner, in this case, parts with the thing itself, he still retains, in law, the constructive pos-
 session of it. And where the delivery of property is made for a certain, special, and par-
 ticular purpose, the possession, except for such purpose, is still supposed to reside, unparted
 with, in the first proprietor. See several instances, 1 Hawk. P. C. c. 33. § 5. note 6th edition.]

He who has the bare charge of goods, as a shepherd has of Moore, 246.
 sheep, or a butler of plate, or that has only the special use of Poph. 84.
 goods, as a guest in an inn, and not the possession, may be Hawk. P. C.
 guilty of larceny, in fraudulently taking them away; for the of- c. 33. § 6. and
 fence comes as properly under the word *cepit*, and the fraud is note in 6th
 as secret, and the villainy more base than if it had been done edit.

If he who intending to steal goods obtains a delivery of them 3 Inst. 108.
 from the sheriff, by virtue of a replevin, or by way of execution H. P. C. 63.
 of a judgment obtained by imposition on a court, without any Kelyng. 43.
 colour of title, by false affidavits, &c., he may be indicted as Sid. 254.
 having feloniously taken them, for the law will not endure to Raym. 276.
 have its justice eluded by such shameful evasions.

Also he, who steals goods from one who had stolem them Hawk. P. C.
 from me, may be indicted as having stolen them from me; be- c. 33. § 9.
 cause in judgment of law both the possession and property of
 them was always in me; and for this cause, he that steals goods

in the county of *A.*, and carries them into that of *B.*, may be indicted in (*a*) either.

(*a*) But a pirate carrying to land the goods taken at sea by piracy cannot be indicted at law, as having taken the goods at land, because the original taking was not such, whereof the common law takes conusance. 3 Inst. 113. but for this *vide tit. Piracy*.

Kelyng. 24. It was formerly a doubt, whether a lodger, by reason of the special property he had in the furniture of his lodgings, could be guilty of felony in taking them away; but now by the 3 & Show. 50. 57. Hawk. P. C. c. 33. § 10. 4 W. & M. c. 9. it is enacted, "That if any person or persons [The offender must be a lodger at the time the larceny is committed. O. B. 1785. No. 74. The indictment also must set forth the name of the person by whom the lodgings were let. O. B. 1784. No. 747. And the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken. 1 Hawk. P. C. c. 33. § 10. note.]

See too 17 Geo. 3. c. 56. By the 7 Jac. 1. c. 7. it is enacted, "That if any sorter or kember, &c. of wool, or weaver of yarn, &c., shall embezzle it, &c., and shall be convicted before two justices of peace, he shall be whipped."

(*b*) The benefit of clergy was taken away from all felonies within this statute by 27 H. 8. c. 17. and restored by 1 E. 6. c. 12. but taken away again by 12 Ann. c. 7. from all such as shall be committed in a dwelling-house or out-house. (*c*) Extend not to choses in action. Dyer, 5. Hawk. P. C. c. 33. § 14. (*d*) If delivered by a servant to a servant to keep, it is within the statute; for the delivery of such servant is the delivery of the master. Hawk. P. C. c. 33. § 13. (*e*) Therefore a receiver, who receives his master's rents, and runs away with them; or, a servant, who being entrusted to sell goods, or to receive money due on a bond, sells the goods, &c. are not within the statute. Dyer, 5 pl. 2, 3. H. P. C. 62, 63. 3 Inst. 105. (*f*) Includes not the wasting or consuming of goods howsoever wilful it may be. H. P. C. 63. (*g*) Must be servant both at the time when the goods were delivered and when they were stolen. H. P. C. 63. (*h*) It hath been holden, that if a servant, who hath corn or money delivered to him by the master to keep, of his own head make the corn into malt, or melt down the money into plate, and then go away with it, he is not within the statute, because the property was altered. 5 H. 7. 16. a. Crom. 50. Dalt. c. 102. but *qu.* for *Hawkins* seems to be of a contrary opinion, and says, that it comes within the reason of those cases which have been adjudged within the statute; as where a servant makes up his master's cloth, delivered to him to keep, into a suit of clothes, or his leather into shoes, and then goes away with them. So, where the servant changed his master's money delivered to him to keep, from silver into gold, and then goes away with it. Hawk. P. C. c. 33. § 15.

[To the foregoing larcenies by breach of trust by lodgers and menial servants, the legislature has added two others, *viz.* by officers

officers or servants employed to transact the business of the bank of *England*, stat. 15 Geo. 2. c. 13. § 12.; and by officers or servants employed in the post-office, stat. 5 Geo. 3. c. 25. § 17. and 7 Geo. 3. c. 50.]

(D) *What shall be said to be a carrying away.*

ALTHOUGH the word *asportavit* be (a) necessary in every indictment for this species of felony, (b) yet the felony lies in the very first act of removing the property; for if the felon be caught in the act of carrying the goods away before he is out of the house, it is felony; for the act of the mind declared by subsequent facts makes the crime.

(a) 3 Inst. 108.
2 Vent. 215.
(b) 27 Ass. 39.
S. P. C. 26. a.
Bro. Coron.
107. Hawk.
P. C. c. 33.
§ 18.

Hence it hath been adjudged, that where a guest who had taken off the sheets from his bed with an intent to steal them, and carried them into the hall, but was apprehended before he could get out of the house, was guilty of larceny.

2 Inst. 109.
Dalt. c. 102.
Hawk. P. C.
c. 33. § 18.

So, where a person having taken a horse in a close, with an intent to steal him, was apprehended before he could get him out of the close.

3 Inst. 109.

So, if a person pulls off the wool from another's sheep, or strips their skins, with an intent to steal them, he is guilty of felony.*

Dalt. 21.
Crom. 36.
* By 14 G. 2.
c. 6. whoever

steals, or kills with intent to steal, any part of any sheep or other cattle, or assists in so doing, is guilty of felony, without clergy. — Ten pounds reward on every conviction to be paid by the sheriff in a month; on default he forfeits double the sum, and treble costs. — By 15 G. 2. c. 34. the word cattle in the above act declared to extend to bull, cow, ox, steer, bullock, heifer, calf, and lamb, as well as sheep, and to no other cattle whatsoever.

Also, where a person intending to steal plate, took it out of a trunk, wherein it was, and laid it on the floor, but was surprized before he could carry it away; it was adjudged felony.

Kelyng. 31.
[A man was
detected in
taking a bale

of goods in a waggon. It appeared that the bale lay horizontally, and that he had set it on its end. As it had not been removed from the *spot*, it was holden, on a case reserved, that it was not a sufficient carrying away. But where a man, with a felonious intention, had removed goods from the head to the tail of a waggon, it was adjudged to be a sufficient removal to constitute a carrying away. *O. B.* 1784. So, a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was holden to be a sufficient asportation. *O. B.* 1784. 1 Hawk. P. C. c. 33. § 18. note, 6th edition.]

(E) *By whom the Offence may be committed.*

ALL those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion*, idiots, and lunaticks, are not punishable by any criminal prosecution whatsoever, and consequently cannot be guilty of felony.

H. P. C. 10.
Hawk. P. C.
c. 1. But for
this *vide* the
heads of *In-*
fancy and Age,

and of *Idiots and Lunatics*. — * But a court and jury will, from circumstances, judge, whether he is or is not of discretion. See *Foster*, fo. 70, &c. the case of *William Yorke*.

Kelyng. 31.
S. P. C. 26.
Hawk. P. C.
c. 1. § 9.

Also, a feme covert is so much favoured, in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft in company with, or by coercion of her husband.

S. P. C. 65.
Hawk. P. C.
c. 1. § 11.

But, if she be guilty of treason, murder, or (a) robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole.

(a) But not if she be guilty of burglary with him. Kelyng. 31.

S. P. C. 65.
Hawk. P. C.
c. 1. § 11.
c. 33. § 19.

Also, a feme covert may be guilty of larceny, if she of her own voluntary act, or by the bare command of her husband, steal the goods of a stranger, but not if she steal her husband's, because a husband and wife are considered but as one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force and against her will, together with the goods of the husband.

(F) Of what Value the Things must be; and herein of the Difference between Grand and Petit Larceny.

(b) Hal. P. C.
69.

(c) Crom. 33.
Dalt. c. 99.

But if such necessity be

owing to his unthriftiness, it is far from being an excuse. Hawk. P. C. c. 33. § 20. — * This doctrine is now antiquated, the law of *England* admitting of no such excuse at present. Black. Com. 4 V. 31. and cites 1 Hal. P. C. 54.

A PERSON who steals the goods of another, let the value of them be never (b) so small, is guilty of felony; but it is (c) said to be no felony for one reduced to extreme necessity to take so much of another's victuals as will save him from starving.*

But here we must observe the difference between grand and petit larceny, which is again divided into simple and mixt larceny.

S. P. C. 27.
Crom. 33.
H. P. C. 71.
Hawk. P. C.
c. 33. § 31.

Simple grand larceny is the felonious and fraudulent taking and carrying away the personal goods of another, not from his person, nor out of his house, where the goods are above the value of twelve pence, but if of that value, or under, then it is petit larceny; if from his person, or out of his house, it is called mixt larceny, but hath no greater degree of guilt attending it at common law than simple larceny, for in both cases the offender was allowed the benefit of his clergy, but is at this time, in several instances, excluded by acts of parliament.

S. P. C. 24.
Crom. 36.
H. P. C. 70.

If two or more persons together steal goods above the value of 12*d.*, every one of them is guilty of grand larceny, for each person is as much an offender as if he had committed the fact alone.

S. P. C. 24.
Crom. 36.
H. P. C. 7.

Also, if one at several times steal several parcels of goods, each under the value of 12*d.*, but amounting in the whole to more

more, from the same person, and be found guilty thereof on the same indictment, he shall have judgment of death as for grand larceny.

c. 33. § 33. [But it is now settled, that the stealing must be to that amount at one and the same particular time.]

If one be indicted for stealing goods to the value of ten shillings, and the jury find specially that he is guilty, but that the goods are worth but ten-pence, he shall not have judgment of death, but (a) only as for petit larceny.

punished with the loss of life or lands, but only with the forfeiture of goods and whipping, or other corporal punishment. H. P. C. 70. Hawk. P. C. c. 33. § 36. It is now, by 4 G. I. c. 11. and 6 G. I. c. 23. punishable by transportation for seven years.

But this severity is seldom used,
Hawk. P. C.

Hetl. 66.
Hawk. P. C.
c. 33. § 35.
(a) Petit larceny is not pun-

(G) *Where the Offender is or is not excluded his Clergy.*

BY the common law a person guilty of any crime, which subjected him to the loss of life or member, was allowed his (b) clergy, except in high * treason and sacrilege.

knowledge hereof, *vide* 2 Hawk. P. C. c. 23. (b) None were entitled to this privilege but ecclesiasticks; but as the clergy were judges hereof, they extended this privilege to the clerk that set the psalm, the door-keeper, the exorcist, the subdeacon, the reader, &c., and as they extended it too far, it was necessary to restrain them; and therefore the temporal and ecclesiastical power joined in making the reading before the secular and spiritual judge the test of their being ecclesiasticks; for it was a strong presumption, in those times of ignorance, that a man was an ecclesiastick if he could read; and therefore the reading was before the secular judge; but the attestation, that he could read, was by the ordinary. — By the 21 Ja. I. c. 16. and 3 & 4 W. & M. c. 9., women (the better half of the human race. Fost. Cr. Law, 305.) shall have this privilege in such cases as men; but by 4 & 5 W. & M. c. 24. § 15. only once. — By the 1 E. 6. c. 12. a lord of parliament shall have this privilege, though he cannot read, without burning in the hand. — And by 5 Ann. c. 6., if any person, convict of such felony for which he ought to have his clergy, pray the benefit of that act, he shall not be required to read, but shall be punished as a clerk convict. — A person is not entitled to this privilege more than once. 4 H. 7. c. 13. — Where it may still, in certain cases, be allowed to one actually in holy orders, *vide* 28 H. 8. c. 1. 32 H. 8. c. 3. 1 E. 6. c. 12. — And how a former allowance thereof is to be proved and certified, *vide* 34 & 35 H. 8. c. 14. 2 & 3 E. 6. c. 33. & 3 & 4. W. & M. c. 9. — (*) But see Fost. Cr. Law, 190.

11 Co. 29.
2 Inst. 634.
For the more accurate

And therefore it may be laid down as a good general rule, that wherever a person is denied the benefit of his clergy, as he is in petit treason, murder, robbery, burglary, arson, &c., such denial must be grounded on some act of parliament, which excludes him from the benefit of it.

H. P. C. 232.
2 Hawk. P. C.
c. 33. § 23.

It is also a general rule, that where an offence is made felony by statute, it shall have the benefit of clergy, unless expressly excluded.

H. P. C. 230.
2 H. H. P. C.
330. 334. 335.
3 Inst. 39. 73.

Kel. 104. 2 Hawk. P. C. c. 33. § 24.

So, wherever a person is denied the benefit of the clergy in respect of a statute excluding it from the crime charged against him, the indictment or appeal, and the evidence thereon, must expressly bring his case within the words of such statute.

2 Hawk. P. C.
c. 33. § 25.

2 Hawk. P. C. c. 33. § 26. A statute, by excluding principals from their clergy, doth not thereby exclude the accessaries before or after, & *sic e converso*; and a statute generally excluding those who shall be found guilty of murder, robbery, or burglary, or other crime, without saying any thing of accessaries, shall be construed to intend principals only.

2 Hawk. P. C. c. 33. § 27. Where clergy is allowable, those who stand mute or challenge above twenty, or are outlawed, are as much entitled to it, as those who are convicted.

2 Hawk. P. C. c. 33. § 28. Also, a statute, by taking away clergy from those who shall be found guilty, doth not thereby take it from those who stand mute, or challenge above twenty, or are outlawed; but a statute taking it from those who shall be found guilty, extends as well to those who shall confess themselves guilty upon record, as to those who shall be found guilty by verdict.

But what we are chiefly to take notice of here are the several cases in which by statute the benefit of the clergy is taken away from this species of felony called larceny.

(a) Yet if the jury find the offender guilty under the value of 12d. he shall not have judgment of death, but only as of petit larceny. Hawk. P. C. c. 36. § 4. H. P. C. 75. And first by the 8 Eliz. c. 4. it is enacted, "That no person, who shall be indicted or appealed for felonious taking (a) any money, goods, or chattels from the person of any other, (b) privily without his knowledge, in any place whatsoever, and thereupon found guilty by verdict of twelve men, or shall confess the same upon his or their arraignment, or will not answer directly to the same, according to the laws of the realm, or shall stand wilfully, or of malice, or obstinately mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment or appeal outlawed, shall be admitted to his clergy."

(b) The offence must be laid to be done *clam* and *secretè*, in exact pursuance of the statute, otherwise the party shall have the benefit of his clergy. H. P. C. 75. Hawk. P. C. c. 36. § 3. — And therefore if a man takes off another's hat from his head and runs away with it, or comes into a shop and cheapens goods, and runs away with them without paying for them, it is not within the statute, nor indeed an offence indictable as a felony, but rather a trespass, unless the offender were either unknown, or immediately fled the country if he were known. Dyer, 224. 2 Ro. Rep. 154. H. P. C. 73. Raym. 275.

By the 1 E. 6. c. 12. and 2 & 3 E. 6. c. 33. horse stealers are excluded the benefit of their clergy, and by the latter of these statutes it is enacted, "That all persons feloniously taking or stealing any horse, gelding, or mare, shall not be admitted to the privilege of the clergy, but shall be put from the same in like manner and form as though they had been indicted or appealed for felonious stealing of two horses, two geldings, or two mares, of any other, and thereupon found guilty by verdict of twelve men, or confessed the same upon their arraignment, or stand wilfully or of malice mute."

* By 3 W. & M. c. 9. "If any one shall steal goods from any shop or warehouse belonging to a dwelling house to the value of 5s., he shall not be entitled to his clergy, *although no person shall happen to be within.*" Stat. 10 & 11 W. 3. c. 23., besides including *coach houses* and *stables*, does not make it necessary, that the

the shop or warehouse shall be belonging to the dwelling house, which is required by 3 & 4 W. & M. c. 9.; — and I the rather take notice of this distinction between the two laws, as Mr. Justice *Foster* has reported in his *Crown Law*, fol. 78., a decision at the *Old Bailey* in July 1751, that this statute does not extend to any warehouse which is a mere repository for goods, but only where merchants and traders deal with, and sell to their customers. It should seem however, that these distant warehouses were those expressly, which were intended to be protected by this statute; as the shop or warehouse belonging to a dwelling house was before protected by 3 & 4 W. & M. c. 9., and the more distant the warehouse, the more probable it is that it should be broke open. *

See Observations on the Statutes, p. 288. ed. 1766.

By the 10 & 11 W. 3. c. 23. (commonly called the *shoplifting act*,) “ All persons, who by night or day shall in any shop, warehouse, coach-house, or stable privately and feloniously steal any goods, wares, and merchandizes of the value of 5s., or more, though such shop, &c. be not broke open, and though the owner or any other person be not in such shop, &c., or that shall assist, hire, or command any person to commit such offence, being thereof convicted, or attainted by verdict or confession, or being indicted thereof shall stand mute, or challenge above twenty of the jury, shall be excluded from the benefit of the clergy.”

And by the 12 Ann. c. 7. it is enacted, “ That every person, who shall feloniously steal any money, goods or chattels, wares or merchandizes of the value of 40s., or more, being in a dwelling-house, or outhouse thereunto belonging, although such house or outhouse be not actually broken by such offender, and although the owner of such goods, or any other person or persons, be or be not in such house or outhouse, or shall assist or aid any person or persons to commit any such offence, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or shall peremptorily challenge above the number of twenty returned to be of the jury, shall be absolutely debarred of and from the benefit of the clergy, &c. *Provided*, that nothing in this act shall extend to apprentices under the age of fifteen years, who shall rob their masters as aforesaid.”

By the 22 Car. 2. c. 5. it is enacted, “ That no person who shall be indicted for feloniously cutting and taking, stealing or carrying away any cloth or woollen manufactures from the rack or tenter in the night-time, and thereupon found guilty by verdict of twelve men, or shall confess the same on arraignment, or will not answer directly to the same according to the law of the realm, or shall stand wilfully of malice mute, or challenge peremptorily above the number of twenty, or shall be upon such indictment outlawed, shall be admitted to the benefit of the clergy; and by the same act to steal or embezzle any of his majesty's sail, cordage, or any other his majesty's naval store, is excluded the benefit of the clergy.”

Vide 2 Hawk.
P. C. c. 33.
§ 72, 73, 74,
75, 76.

That all persons, who shall steal any goods out of any parish church, or other church or chapel, are in all cases excluded the benefit of the clergy.

(H) Where the Offender is to be transported.

[Though transportation was not established by legislative authority before 4 G. 1., yet long before that time, (probably from the original planting of colonies in the *West Indies*,) transportation was frequent, as appears from the introduction to Ke-lynge's Reports. *Per Gould J.* 2 H. Bl. Rep. 223.]

IT is enacted by 4 Geo. 1. c. 11. and 6 Geo. 1. c. 23. " That
" where any person or persons shall be convicted of grand or
" petit larceny, or any felonious stealing or taking of money,
" goods, or chattels, either from the person or in the house of
" any other, or in any other manner, and who by the law shall
" be entitled to the benefit of the clergy, and liable only to the
" penalties of burning in the hand or whipping, (except persons
" convicted for receiving or buying stolen goods, knowing them
" to be stolen,) it shall and may be lawful for the court before
" whom they were convicted, or any court, held at the same
" or any other place, with the like authority, if they think fit,
" instead of ordering any such offenders to be burnt in the hand,
" or whipt, to order and direct that such offenders shall be sent,
" as soon as conveniently may, to some of his majesty's colonies
" and plantations in *America* for the space of seven years; and
" that court before whom they were convicted, or any subse-
" quent court, with like authority as the former, shall have power
" to convey, transfer, and make over such offenders, by order of
" court, to the use of any person or persons who shall contract
" for the performance of such transportation to him or them,
" and his and their assigns, for such term of seven years; and
" where any person shall be convicted for any crimes, for which
" they are excluded their clergy, and the king shall extend his
" mercy to them upon condition of transportation to any part of
" *America*, and such intention of mercy be signified by a prin-
" cipal secretary of state, it shall be lawful for any court, having
" proper authority to allow such offenders the benefit of a par-
" don, to order and direct the like transportation to any person,
" who will contract for the performance thereof, of any such of-
" fenders; as also of any person convict of receiving or buying
" stolen goods, knowing them to be stolen, for the term of four-
" teen years, in case such condition of transportation be general,
" or else for such other term as shall be made part of such con-
" dition; and such person so contracting, and his assigns, shall
" have an interest in the service of the said offenders for such
" term of years; and if any such offender return into *Great*
" *Britain* or *Ireland*, before the end of his term, he shall be
" liable to be punished as any person attainted of felony, with-
" out the benefit of clergy, &c. Provided, that the king may
" pardon and dispense with any such transportation, and allow
" of the return of such offender, paying his owner, at the time,
" such sum as shall be adjudged reasonable by any two justices
" of the peace, where such owner dwells, and where any such
" offenders shall be transported, and shall have served their
" terms,

“ terms, such services shall have the effect of a pardon, as for the crimes for which they were transported.”

And it is further enacted, “ That every such person, to whom any such court shall order any such offenders shall be transferred or conveyed, shall, before such offenders shall be delivered to them, contract with such person as shall be appointed by such court, and shall give sufficient security, to the satisfaction of such court, for the transporting such offenders to some plantation in *America*, to be ordered by such court, and the procuring an authentic certificate from the governor, or chief custom-house officer, of the place of the landing of such offenders, &c., and their not returning by the wilful default of such contractor.”

And it is further enacted, by 6 Geo. 1. c. 23., “ That the court may nominate two or more justices of the peace, for the place where such offenders shall be convicted, who shall have power to contract with any person or persons for the performance of the transportation of such offenders, and to order such and the like security, as the said former act directs, to be taken by order of court, and to cause such felons to be delivered to such contractors; which said contracts and security shall be certified by the said justices to the next court, held with like authority, to be filed, &c.”

And it is further enacted, “ That all charges, in or about such contracts, &c., shall be borne by each county, &c. for which the court was held, and that the respective treasurers shall pay the same; and that all securities for transportation shall be by bond in the names of the clerks of the peace, &c., and the money recovered shall be to the use of the respective counties.”

And it is further enacted, “ That the persons so contracting, &c. may carry such offenders towards the sea-port, &c., and that if any person shall rescue such offenders, or aid them in making their escape, &c., they shall be deemed guilty of felony without clergy; and that if any felon ordered for transportation shall be afterwards at large within any part of *Great Britain*, without some lawful cause, before the expiration of his term, and be lawfully convict thereof, he shall suffer death without clergy, and may be tried before justices of assise, *oyer and terminer*, or *gaol-delivery*, for the county where he shall be apprehended, &c., or from whence he was ordered to be transported, &c., and that the clerk of assise, and clerk of the peace, where such orders of transportation shall be made, shall, on request of the prosecutor, &c., certify briefly a transcript, containing the tenor of every indictment, conviction, and order of transportation, to the justices of assise, &c., which shall be sufficient proof of such conviction and order of transportation.”

[It is provided by the 8 Geo. 3. c. 15. that where any offender shall be convicted without benefit of clergy, and the judge shall grant a reprieve, if the king shall afterwards pardon such offender

16 G. 2. c. 15.

24 G. 3. sess. 2.

c. 56. § 5.

on condition of transportation, and such intention shall be signified by a secretary of state to the judge recommending mercy, such judge may make an order for the immediate transportation of the offender, in like manner as if such intention had been signified during the continuance of the assizes at which the offender was convicted.

In consequence of the defection of the *American colonies*, the laws upon this subject have undergone considerable alterations, for which see the statutes of 19 Geo. 3. c. 74. 24 Geo. 3. sess. 2. c. 56. 25 Geo. 3. c. 46. 27 Geo. 3. c. 2. 28 Geo. 3. c. 24. 30 Geo. 3. c. 4. and 34 Geo. 3. c. 60.]

FELO DE SE.

Plow. 261.
Dame Hales's
case. (a) Yet
in some cases
it is considered

A PERSON who wilfully destroys himself is termed a *felo de se*, and is said to be guilty of the worst sort of (a) murder, as he acts against the first principle of reason, which is that of self-preservation.

as a different offence; and therefore if the king pardons all crimes, except murder, this offence shall be pardoned; for though in a strict sense it may be called murder, yet according to the common acceptance of words, the offence of a person who murders another, and that of *felo de se*, are considered as distinct offences, and as such are distinctly treated of by authors who have written of these matters; as Stam. P. C. 183, &c. Besides, the end of excepting murder seems to be, that the offender may be brought to justice, and that the law of God and Nature, which require blood for blood, may be satisfied; but the discharging of a chattel, or pardoning of a forfeiture, is not of any such consequence; also it hath been held by divines, that pardoning murder draws *periculum animarum* with it, as being contrary to the law of God, which requires blood for blood. The King v. Ward, Lev. 8. Sid. 150. Keb. 66. 548. S. C. adjudged. — It is also in common parlance taken as a distinct offence from other felonies; and therefore a grant of *bona & catalla felonum* will not carry the goods of a *felo de se*. Sid. 420. Vent. 32. Saund. 274. adjudged.

In treating of this Offence, it will be necessary to consider,

- (A) Where a Person shall be said to be a *Felo de se*.
- (B) Of the Manner of finding him such.
- (C) What he shall forfeit for this Offence.

(A) Where a Person shall be said to be *Felo de se*.

NO person can be *felo de se*, who is under the age of discretion, or *non compos* at the time he commits the fact; and therefore if an infant kill himself under the age of discretion, or a (a) lunatic during his lunacy, he cannot be a *felo de se*.
Crom. 30, 31.
H. P. C. 28.
3 Inst. 54.
(a) In 3 Mod.
100. it is said
to be the prevailing opinion, that a person who kills himself must be *non compos* of course, on this

this supposition, that it is impossible a man in his senses should do a thing so repugnant to nature and reason; but in Hawk. P. C. c. 27. § 3. this notion is justly exploded. 4 Bl. Comm. 189.

Not only he who deliberately kills himself, but also he who maliciously attempting to kill another happens to kill himself, is a *felo de se*; as if *A.* discharge a gun at *B.*, with an intent to kill him, and the gun burst and kill *A.*, or if *A.* strike *B.* to the ground, and then hastily falling upon him, wound himself with a knife which *B.* happens to have in his hand, and die; in both these cases *A.* is *felo de se*, for he is the only agent.

But, if a man be killed by hastily running on a knife or sword which a person assaulted by him, and driven to the wall, holds up in his defence, he shall not be adjudged a *felo de se*, but the other shall be judged to have killed him *se defendendo*.

If one person kills another, though by his desire and entreaty, yet the person so killed is not a *felo de se*, but he who killed him is as much a murderer as if he had acted out of his own head; for every assent of that kind is void, being against the laws of God and man.

But, if two persons agree to die together, and one of them, at the persuasion of the other, buys ratsbane, and mixes it in a potion, and both drink of it, and he who bought and made the potion survives, by using proper remedies, and the other dies, it seems the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.

(B) Of the Manner of finding him such.

NO person can be a *felo de se* before he is found such by some inquisition, which ought regularly to be by the coroner *super visum corporis*, if the body can be found.

But, if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by justices of the peace, who by their commission have a general power to enquire of all felonies; or in the *King's Bench*, if the felony were committed in the county where the said court sits; and such inquisitions are traversable by the executors, &c.

But it was formerly holden, that, with regard to the high credit which the law gives to inquests found before the coroner, no such inquest found before him could be traversed. But this has been ruled otherwise of late, and it seems now settled, that such inquest being moved into the *King's Bench* by *certiorari*, may be there traversed by the executor or administrator of the person deceased, or by the king or lord of the manor, &c. (a)

800. Skin. 45. ||(a) But no traverse can be taken to make a man *felo de se*; as, if the inquisition find that the party was *non compos mentis* at the time he did the act, neither the king, nor his grantee can traverse it. Anon. 1 Vent. 239. Fost. Cr. L. 266. ||

All inquisitions of this offence, being in the nature of indictments, ought particularly and certainly to set forth the circumstances

44 E. 3. 44.
44 Ass. 55.
Bro. Coron.
12. 14. Dalt.
c. 92.

Stamf. P. C. 16.
H. P. C. 28.
Pult. 119. b.
Crom. 28. cont.
3 Inst. 54.
Keilw. 136.

Moor, 754.
pl. 1041.
Hawk. P. C.
c. 27. § 6.

H. P. C. 29.
3 Inst. 35.

3 Inst. 55.
H. P. C. 20.
2 Lev. 152.
Hawk. P. C.
c. 27. § 12.

8 E. 4. 4. a.
Bro. Coron.
151. 2 Lev.
141. 152.
2 Keb. 859.
2 Jon. 198.
Vent. 278.
3 Keb. 564.
566. 604.

Salk. 377.

stances of the fact, as the particular manner of the wound, and that it was mortal, &c., and in the conclusion add, that the party in such manner murdered himself.

R. v. Parker,
2 Lev. 140.
||(a) So in R.
v. Aldenham,
2 Lev. 152. &
3 Keb. 604.
the inquisition

was quashed for omitting this conclusion. But it is not added in the inquisition set out in Hales v. Petit, Plowd. 255. a; nor in that of Toomes v. Etherington, 1 Saund. 353. In R. v. Warner, 1 Keb. 66. Twisden J. held it not necessary; and in Reg. v. Clerk, 1 Salk. 377. and 3 Mod. 101. the court of K. B. held the inquisition good without it.||

Vide 2 Lev. 152. Sid. 225. Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form.

259. Keb. 907.

3 Mod. 101. Salk. 377. Fitzgib. 6.

1 H. H. P. C.
415.

||If the coroner's inquest omit finding the goods of the *felo de se*, it may be supplied, it seems, by a writ of *melius inquirendum* directed to the sheriff.||

(C) What he shall forfeit for this Offence.

Stamf. P. C.
188, 189.
H. P. C. 29.
Plow. 243. 262.
Crom. 31. a.
3 Inst. 55.
19 H. 6. 47. a.
8 E. 4. 24. b.
Raym. 7.

A *FELO de se* forfeits all chattels real or personal which he hath in his own right, and also all such chattels real whereof he is possessed, either jointly with his wife, or in her right; and also all bonds, and other personal things in action, belonging solely to himself; and also all personal things in action, and, as some say, entire chattels in possession, to which he was entitled jointly with another, on any account, except that of merchandize. But it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed as executor or administrator.

Plow. 261.

But the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower.

5 Co. 110.
3 Inst. 54.
Saund. 362.
Sid. 150. 162.
2 Mod. 53.
3 Mod. 100. 241. cont. Lev. 8. Keb. 67, 68.

Also, no part of the personal estate is vested in the king before the self-murder is found by some inquisition, and, consequently, the forfeiture thereof is saved by a pardon of the offence before such finding.

Plow. 260.
5 Co. 110.
For process
from the

But, if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time such mortal wound was given, and all intermediate alienations are avoided.

crown-office against a debtor of *felo de se*, vide Saund. 273.

FEOFFMENT.

AS all property in lands began by occupancy, so it seems the first method of transferring property was by investiture; Spelm. Gloss. 510. for as no man could originally appropriate, but by settling himself in the possession and application of it to his own use, so no man could transfer but by a solemn and publick delivering over the possession, and the ceremony used in such act of delivery is in our law called livery and seisin, and is thus defined, *solemnis rei feudalis traditio sub præstatione fidei coram testibus vassalo facta.*

The end and design of this institution was, by this sort of ceremony or solemnity, to give notice of the translation of the feud from one hand to another; because if the possession might be changed by the private agreement of the parties, such secret contracts would make it difficult and uncertain to discover in whom the estate was lodged, and, consequently, the lord would be at a loss of whom to demand his services; and strangers equally perplexed to discover against whom to commence their actions for the prosecution and recovery of their right: to prevent therefore this uncertainty, the ceremony of livery and seisin was instituted.

This method of conveyance was made use of before men were acquainted with letters, and therefore it was required to be on the land, or near the land, that the other tenants of the manor might be witnesses of it, who in those days were called to the lord's court, to determine all controversies relating to such translation; and though after the use of letters a charter of feoffment was introduced, yet was not this necessary, but only tended to the authentication or evidence of it; and so our law determined, before the statute of frauds and perjuries, as is observed hereafter.

For the better understanding this method of conveyance, we shall consider,

(A) The several Sorts of Livery in our Law: And herein,

1. *Of Livery in Deed.*
2. *Of Livery within View, or in Law.*

(B) The Effect and Operation of Livery: And herein,

1. *The Effect thereof to pass a future Interest.*
2. *The*

2. *The Operation thereof, where the Feoffor is out of Possession.*
3. *In what Cases several Parcels will pass by one Livery, or where several Parties may take by Livery to one.*

(C) Of the Charter of Feoffment; and herein what Things are necessary to the making of a perfect Charter, and how far the Charter governs the Livery which is relative to it.

(D) Who may make a Feoffment.

(E) Of making it by Letter of Attorney.

(A) The several Sorts of Livery in our Law: And herein,

1. Of Livery in Deed.

Co. Litt. 48. a.
6 Co. 137. b.
Thorough-
good's case.
6 Co. 26.
Sharp's case.
2 Ro. Abr. 7.
and *vide* Cro.
Ja. 80. which
seems *cont.*

THE livery in deed is the actual tradition of the land, and is made either by the delivery of a branch of a tree, or a turf of the land, or some other thing, in the name of all the lands and tenements contained in the deed; or it may be made by words only, without the delivery of any thing; as, if the feoffor being upon the land, or at the door of the house, says to the feoffee, I am content that you shall enjoy it according to the deed, or enter into this house or land, and enjoy this land according to the deed; this is a good livery to pass the freehold; because in all these cases, the charter of feoffment makes the limitation of the estate, and then the words spoken by the feoffor, on the land, are a sufficient *indiciu*m to the people present, to determine in whom the freehold resides during the extent of the limitation. Besides, the words, being relative to the charter of feoffment, plainly denote an intention to enfeoff.

6 Co. 26.
2 Ro. Abr. 7.
Co. Litt. 48.
Cro. Eliz. 482.
9 Co. 138.
Moore, 458.

But, if a man without any charter, being in his house, says, I here demise you this house, as long as I live, paying 20*l.* *per ann.*; this passes no freehold, but only an estate at will, because the word *demise* denotes only the extent of the limitation of the estate intended to be conveyed; but bare words of limitation, without some act or words to discover the intention of the feoffor to deliver over the possession, are not sufficient to convey the freehold. For if a charter of feoffment be made to a man and his heirs, this, without some other act or words to give the possession, only passes an estate at will, because the act of delivery is requisite to the perfection of the charter; so that, besides the charter of feoffment, there must be some act or words to deliver over the possession before the feoffee can enjoy it pursuant to the charter.

But, if the feoffor had delivered the charter *upon the land* in the name of seisin of all the lands comprised in the deed, this had been good to execute the deed, and to give livery also; because the bare delivery of the deed is good to execute it as a deed, and the delivery of the deed or any other thing, in the name of seisin of the land, is sufficient to give livery, because the intention of those solemn acts is only to discover to all persons in whom the freehold is lodged; and this end is as effectually answered by the delivery of a deed, or any thing else in the name of a seisin, as of a turf or a twig, the one being equally visible and notorious as the other.

9 Co. 137. b.
138. a. Co.
Litt. 48. a.
57. a. 2 Ro.
Abr. 7. 6 Co.
26.

A., being seised of lands in fee, borrowed 20*l.* of *B.*, and for re-payment agreed to assure him the land; and thereupon they both went to the land, where *A.* said to *B.*, I am indebted to you 20*l.*, and if I do not pay you before *Michaelmas*, then I bargain and sell this land to you, and if I pay you then, I shall have my land again; and then put *B.* in possession of the land. This was holden a good livery, because here the possession was actually delivered pursuant to the agreement of assuring the land for the security of the money, which possession was to be revested on the payment of the money by *A.* the feoffor.

Moore, 144.
Keale's case.
Cro. Eliz. 25.

2. *Of the Livery within View, or the Livery in Law.*

The livery within view, or the livery in law, is when the feoffor is not actually on the land, or in the house, but, being in sight of it, says to the feoffee, I give you yonder house or land, go and enter into the same, and take possession of it accordingly. This sort of livery seems to have been made at first only at the court barons, which were anciently holden *sub dio* in some open part of the manor, from whence a general survey, or view, might be taken of the whole manor, and the *pares curiæ* easily could distinguish that part which was then to be transferred.

Pollex. 47.

But this sort of livery is not perfect to carry the freehold till an actual entry made by the feoffee, because the possession is not actually delivered to him, but only a licence or power given him by the feoffor to take possession of it; and therefore, if either the feoffor or feoffee die before an entry made by the feoffee, the livery within the view becomes ineffectual and void. For if the feoffor dies before entry, the feoffee cannot afterwards enter, because then the land immediately descends upon his heir, and consequently, no person can take possession of his land without an authority delegated from him who is the proprietor. Nor can the heir of the feoffee enter, because he is not the person to whom the feoffor intended to convey his land, nor had he any authority from the feoffor to take the possession. Besides, if the heir of the feoffee were admitted to take possession after his father's death, he would come in as a purchaser, whereas he was mentioned in the feoffment to take as the representative of his ancestor,

Co. Litt. 48. b.
2 Ro. Abr. 3. 7.
Vent. 186.
Moore, 85.
Pollex. 48.

ancestor, which he cannot do since the estate was never vested in his ancestor.

2 Ro. Abr. 3.
Co. Litt. 48. b.

But, if the feoffee, in such case, dare not enter into the land without peril of his life, he may claim the land, as near as he may safely venture to go; and this shall be sufficient to vest the possession in him, and render the livery within view perfect and complete. For nobody is obliged to expose his life for the security of his property; but when he has gone as far as he may with safety, the law very reasonably looks upon such intention to be as effectual as the act itself; for otherwise it might be in the power of a man, by his own act of violence, to deprive another of his right, and thereby to receive an advantage from an unlawful act.

2 Ro. Abr. 7.

If a man delivers a charter of feoffment to his feoffee, within view, and says, I will that you have the lands which you see there, the which are comprised in this charter, according to the purport of the charter, this is a good livery within view; for the charter of feoffment fully denotes the intention to enfeoff, and the words are a licence to the feoffee to enter into the land, and to take the possession thereof, according to the charter.

2 Ro. Abr. 7.
2 Co. 55. b.

But, if the feoffor had only delivered the charter of feoffment within view, and only shewed the feoffee the lands, without saying any thing, though the feoffee had actually entered into the land, and the feoffor had afterwards agreed to the entry, yet this it seems is no good feoffment; because the bare shewing of the lands to the feoffee implies no authority or licence from the feoffor to take possession; and, consequently, the entry being without any authority cannot vest the freehold in him, because there was no solemn act, nor publick declaration made by the feoffor, by which the *pares* might discover a real intention to change the possession, and the subsequent agreement of the feoffor can never support an act which was originally void. For though the feoffee, after the delivery of the charter, might take the usufructuary possession as tenant at will, yet the freehold still continued in the feoffor, for that cannot pass from one to another, without some solemn or publick declaration, that the *pares* may, upon any dispute, determine in whom the freehold resides.

Perk. § 214.
2 Ro. Abr. 3.
Bro. Feoff-
ment, 57.
Vent. 186.
Pollex. 53.

If a man makes livery within view to a woman, and before she enters, the feoffor marries her, and afterwards never claims any thing but in right of his wife, this is a good execution of the livery; for the husband claiming the land, in right of his wife, shall be sufficient to reduce the lands actually into her possession, since he is the proper person to transact for her; and therefore shall be presumed to have parted with and delivered up the possession to her, since after the coverture he claimed the land only in her right.

Parsons v.
Perns, Mod. 91.
2 Keb. 372.
380. S. C.
Vent. 186. S. C.

So, where two women were jointenants in fee, and one of them made a feoffment to a man, and livery within view, by saying, Go, enter, and take possession; and before the man entered, he married the feoffor; his entry after the marriage was a good

good execution of the livery, because, by the livery within the view, an interest passed to the feoffee, which is not revocable by the feme; and his entry after the coverture makes the utmost notoriety the thing is capable of to discover in whom the freehold is lodged; and his entry shall be intended for his benefit; and therefore shall have a retrospect to the livery in view to make it a perfect feoffment.

Pollex. 45 to
53. S. C.

The livery within view may be made of lands in another county than where the lands lie, because the translation of the feud was often made at the court baron in the presence of *pares curie*; and these courts being holden *sub dio*, the *pares* could have a distinct view of every part of the manor; and therefore were proper to attest this sort of investiture, though the lands were in a different county; for, notwithstanding that, they might have been part of the same manor for which the court was holden.

Co. Litt. 48. b.

(B) The Effect and Operation of Livery: And herein,

1. *Of the Effect thereof to pass a future Interest.*

THIS ceremony was first instituted, that the *pares* of the county might, upon any dispute relating to the freehold, determine in whom it was lodged, and thence be the better enabled to determine in whom the right was. Hence therefore it is, that if a man makes a feoffment, or lease for life, to commence *in futuro*, and makes livery immediately, the livery is void, and only an estate at will passes to the feoffee; for the design of the institution would fail, if such livery were effectual to pass the freehold; for it would be no evidence or notoriety of the change of the freehold, if, after the livery made, the freehold still remained in the feoffor; the use of the investiture would rather create than prevent the uncertainty of the freehold, and in many cases would put men to fruitless trouble and expence in pursuit of their right; for by that means, after a man had brought his *præcipe* against a person, whom he supposed to be tenant to the freehold, and had proceeded in it a considerable time, the writ might abate by the freehold's vesting in another by virtue of a livery made before the purchase of the writ. Another reason why such future interests cannot be allowed to pass by any act of livery was, because no man would be safe in his purchase, if the operation of livery might create an estate, to commence many years after the livery was made; and though they have allowed a future interest, to commence by way of lease, yet that had no such ill effect in making purchases uncertain, because anciently they were under the power of the freeholder, who, by recovery, might destroy them; and now, unless such leases were made upon good considerations, they are fraudulent

Cro. Eliz. 451.
2 Vent. 204.
Co. Litt. 217.
5 Co. 94. b.

against a purchaser; and it is not to be presumed that leases at great distances should be purchased for value.

2 Co. 55.
Buckler's case.
2 And. 29.
Moore, 423.
Cro. Eliz. 450.
585. Hob. 170.
171. 5 Co. 24.
Ro. Rep. 261.

Hence, by the way, we may account why a freehold in reversion or remainder cannot be granted *in futuro*, though there no livery is necessary to pass it; as, where *A.* was tenant for life, remainder to *B.* in fee; *A.* made a lease for years to *C.*, and afterwards granted the land to *D. habend.* from *Mich.* next ensuing for life: this grant to *D.* was adjudged void, though *C.* attorned to it after *Michaelmas*, because such future grants create an uncertainty of the freehold, and the tenant of the freehold being the person who is to answer the stranger's *præcipe*, and was answerable to the lord for the services, it were unreasonable to permit him, by any act of his own, to prevent or delay the prosecution of their right.

Greenwood
v. Tyler, Hob.
314. Cro. Ja.
563. S. C.
Smith v. Bole,
Cro. Ja. 458.
3 Bulstr. 290.
S. C.

But, where a man makes a lease to commence from *Michaelmas*, and after *Michaelmas* makes a livery and seisin, this is sufficient to pass the freehold, because in this case, at the time of the livery made, the possession and freehold were actually transferred to the lessee, and did not remain in the lessor, after the notoriety made, which gives notice of transferring the freehold.

Cro. Ja. 563.
Hob. 314.

Yet, if the feoffer had made a letter of attorney to give livery, the attorney could not give livery after *Michaelmas*, unless an express authority were therein contained for it, because the natural import of such authority is to give livery immediately, and the authority of the representative cannot extend beyond the delegation.

Hennings v.
Paucharden,
Cro. Ja. 153.
Mellow v.
May, Moore,
36. Cro. Eliz.
873. S. C.

A. by indenture demised to *B. habend. a die datûs* (which was the 10th of June) *indenturæ prædict.* for his life, with a letter of attorney to make livery; the attorney made livery the 23d of July following, and the livery was holden to be void; because the estate for life being by the indenture to commence the 10th of June, the attorney had no authority to change the commencement of the estate; and therefore not having pursued his authority, by not giving livery to let the freehold commence according to the deed, what he did afterwards was without any authority, and, consequently, void. But in this case, if the deed had not been delivered till after the day of the date, and the attorney had given livery *at the time of the delivery of the deed*, this had been a good livery, because the deed of feoffment was to govern the livery, but the deed itself had no effect till the delivery; and therefore the attorney making the livery at the time the deed of feoffment, which was to govern it, began to operate, he seems thereby to have executed his authority well enough.

Callard v.
Callard, Cro.
Eliz. 344.
Poph. 47. S. C.
2 Ro. Abr. 7.
S. C. Co.
Litt. 48.

If a man makes a feoffment to commence after his own death, or makes a feoffment in this manner, being upon the land, *I do here, reserving an estate for my own and my wife's lives, give you these my lands to you and your heirs*, these are void feoffments, because the possession is not delivered at the time of the notoriety made; and therefore, if such feoffments were allowed, the investiture would be so far from being an evidence to discover in whom

whom the freehold is lodged, that it would often mislead the juries in such inquiries. Besides, it were absurd to suffer a man to reserve a particular estate to himself, and thereby in the same contract be both feoffor and feoffee.

If a lease for years is made to *A.*, the remainder to *B.* for life, and livery is made, the freehold is well conveyed to *B.* But this livery cannot be made to *B.* himself, because the possession cannot be delivered to him, for that belongs to *A.* during the term. The livery therefore must be made to *A.*, who is to receive the possession, and such livery actually vests the freehold in *B.*, because the presumption is, that every man accepts of a gift which is for his interest; and *A.* is looked upon as the attorney of *B.* to take the livery, because he, having an immediate interest in the land, is the only person to whom the possession can be delivered; for *B.* has no immediate right to the possession, and therefore, as he cannot receive it himself, by consequence, he cannot depute another to take it.

But this livery must be made to *A.* upon the land, for a livery within the view will not pass the freehold to *B.*; for this livery within the view, being anciently made in court, could only be made by the immediate homagers of the court from the one to the other; but *A.* in this case being no homager to the court, since he was only lessee for years, was not capable of such livery within view.

And this livery to *A.* must be made to him before he actually enters and takes possession, by virtue of the lease, because if the possession be once filled by the lessee for years, there is no vacant possession to be transferred by the livery, for *quod semel meum est, amplius meum esse non potest*; no man can receive that from another which is already in his possession.

If a lease for years be made to *A.* and *B.*, the remainder to *C.* in fee, and livery be made to *A.* in the absence of *B.*, whether the conveyance be by deed or without, the livery is good to vest the remainder in *C.*; because by the bare demise, *A.* and *B.* have an interest in the land, during the term, without any further ceremony, and each being equally entitled to the whole possession, either may invest himself in the whole possession by entry, or receive the possession from the lessor by the solemnity of livery; and, therefore, when the whole possession is delivered by the lessor, and livery made to *A.* in the absence of *B.* in the name of both, this livery is sufficient to vest the remainder in *C.*, because *A.* had as much power to receive the possession of the whole, as if the lease for years had been made to him only, he and *B.* being jointenants by the demise, and thereby seised *per my & per tout*.

But, if a lease for life had been made to *C.* to commence immediately, and *C.* had appointed *A.* and *B.* his attorneys to take livery from the lessor; the livery made to one of them alone had been ineffectual and void; because one only without the other had no authority from the delegation to receive the possession, and, consequently, what is done by a representative without

Litt. § 60.
5 Co. 94. b.
Co. Litt. 49.
2 Ro. Abr. 8.

Co. Litt. 49. b.
2 Ro. Abr. 6.

Litt. § 60.
Co. Litt. 49.
5 Co. 94.
Moore, 14.
Co. Litt. 216. a.
Plow. 156. a.

Co. Litt. 49.
5 Co. 94.
2 Ro. Abr. 8.

Co. Litt. 49. b.
5 Co. 94. b.
Palm. 23.

an authority from the principal, is a nullity and void. But otherwise it is, if the letter of attorney had been jointly and severally, to receive livery.

Co.Litt.217. a. If a lease for years be made to *A.*, remainder to the right heirs of *B.*, and livery and seisin be made to *A.*, yet the freehold does not pass from the lessor; and therefore the livery is void, because there was no person in being at the time of the livery made in whom the freehold could vest, for *nemo est hæres viventis*; and the law will not endure such future operation of the investiture, because it would create an uncertainty of the freehold, which would necessarily perplex and delay all prosecutions against the freehold.

Plow. 156. a. Co. Lit. 217. If a lease for years be made to begin at *Michaelmas*, remainder to *J. S.* in fee, and livery be made before *Michaelmas*, the livery is void for the former reason; but a lease for years may be made to commence *in futuro*, because the freeholder, who is to answer the stranger's *præcipe*, is, notwithstanding such future interest, certain and known, and therefore not within the reason of the former case.

Lit. § 350. Co. Lit. 217. If *A.* makes a lease for *five years* to *B.* upon condition, that if *B.* pays him 10*l.* within two years, that then he shall have a fee-simple in the lands, and makes livery and seisin to *B.*; this passes the freehold immediately, and *B.* has a fee conditional; because if the freehold were not to vest in *B.* till the condition performed, it would be difficult to determine in whom the freehold is; for such conditions may be inserted in deeds, which are perfected privately between the parties, and therefore not so proper to govern the possession and seisin of the freehold, as the solemn investiture by livery, which is made in the publick view of the whole county; therefore, as this solemnity was first appointed to give notice of the transferring of the freehold, it follows, that from the reason of the investiture the freehold must pass at the time of the solemnity made, or not at all. But, if *A.* had made a lease *for life*, upon like condition, to have fee, the livery made thereon should not carry the inheritance till after the condition performed, because there passed a certain freehold, at all events, to the lessee, and the livery gave notice in whom it was lodged, so that no man can pretend ignorance against whom to bring his *præcipe*, which would be the mischief in the former case, if the freehold did not pass at the time of the livery made.

2. The Effect of Livery when the Feoffor is out of Possession.

Co. Litt. 48. b. 2 Ro. Abr. 3, 4. 7 H. 4. 19. b. Dyer, 33. Cro. Eliz. 322. It is regularly true, that the feoffor must be actually in the possession of the land at the time of the livery made, or otherwise the livery will be ineffectual and void; because the design of the livery is to give notice of the change made of the possession, and therefore it must be a vacant possession that is delivered; but it were absurd, that a man should be permitted to transfer to another what he has not in himself. Wherefore if a man makes a lease for years, or life, of his land, or has his land extended by virtue

virtue of a statute merchant, &c., and makes a feoffment and livery, the comusee or lessee being in possession of the land, the livery is void; because the land is filled by the lessee; and, consequently, during the continuance of his interest, the feoffee cannot deliver a vacant possession; and therefore the livery, which is a solemnity instituted to give notice of the change of the possession, must be void.

Thus, if there be lessee for years of a house and several closes, and the lessee and all his servants being in the house, the lessor enter into one of the closes, and make a feoffment of it, and give livery, this is a void feoffment; because the possession of part of the thing demised is possession of the whole, for the impossibility that a man should be in the actual possession of every part of the land at the same time; and, consequently, the lessor cannot take possession of the close, which was filled by his lessee; and therefore the livery must be void, because the feoffor had no vacant possession to transfer at the time of the livery made.

So it is, if the lessee for years himself had not been in the house, or any part of the land, yet if his wife, children, or servants had been on any part of the land, that were sufficient. But the cattle of the lessee grazing upon the land, without either wife or servant on the land, does not fill the possession so as to prevent the lessor from entering, and making a good livery to pass the freehold, because the cattle cannot be said to continue upon the land, *animo possidendi*, for the benefit of their master, as a servant may, and in duty ought to do.

But, if a man makes a lease for life of lands, and afterwards makes a feoffment of the same lands, and makes livery and seisin upon the land, by the assent of the lessee, and in his presence, this is a good livery to pass the inheritance; because the lessee's permitting the feoffor to come upon the land, and make livery, is a sufficient quitting of the possession to him, either by way of surrender, or to create a tenancy at will in the feoffor, to make the feoffment and livery more effectual and valid.

But, if the servant of the lessee were only on the land, the livery made by the feoffor, though with the servant's permission, had been void if the servant continued in possession at the time of the livery made; for while the servant continued in possession, it must be only for the use and benefit of him that placed him there; and, consequently, the possession of the servant must be looked upon as the possession of the master; and therefore the livery must be void, because it could not deliver a possession which was still filled by the master, and which the master never consented to part with; and the permission of the servant will not admit of such a construction as was made in the precedent case, because the servant having no interest, but in right of his master, could neither make a surrender, nor a tenancy at will to the feoffor.

But it has been holden, where a man made a lease for years of a house, and afterwards made a feoffment of it, with a letter of

Bettisworth's case, 2 Co. 31. b. Moore, 250. S. C. 2 Ro. Abr. 4. S. C. Co. Lit. 48. b. Dyer, 18. b.

Co. Lit. 48. 2 Ro. Abr. 4. Dyer, 18. Bro. tit. Feoffment, 66. but Moore, 11. says "by some contra," but adds "qu."

2 Ro. Abr. 5. Dyer, 18. Sheppard v. Gray, Bro. tit. Surrender, 48.

2 Ro. Abr. 5.

attorney to make livery, and the attorney came to the house to make livery in the absence of the lessee, and found nobody in the house but the servant of the lessee, who quitted the possession of the house at the desire of the attorney, and then the attorney made livery, which the master approved of at his return, saving his term; that this was a good livery; because here the servant actually quitted the house, and thereby the attorney had a vacant possession to deliver to the feoffee. So, if the attorney had found the lessee himself upon the land, and had entered and ousted him, and then made livery, that had been good to pass the freehold; for though the ouster had been a tortious act, yet the possession became thereby vacant, and, consequently, by the livery, might be delivered to the feoffee.

2 Co. 32. n.
2 Ro. Abr. 4.
Dyer, 18. b.

If there be *A.* lessee for years of six acres, and he make a lease for years of three acres to *J. S.*, and he in reversion enter upon *J. S.*, and make a feoffment with livery, this shall pass the three acres; because, by the demise of *A.* for years, the possession became separate and divided, which was united and one under the lease to *A.* himself; and therefore *A.*'s continuing in possession of his own three acres could never be a possession of the other three, which he had no right to during the demise to *J. S.* But, if *A.* had only made a lease at will to *J. S.* of those three acres, the entry and livery of the reversioner had not passed them, because *A.* is still supposed to be in possession of those three acres, since he may enter into them when he pleases, by the determination of his own will; for as no man can be actually upon every parcel of the land, the possession of one acre is very reasonably construed to be the possession of the whole.

Bridgman v.
Charlton,
2 Ro. Abr. 5.
2 Ro. Rep.
260. S. C.
Moore, 846.
S. C.

So it is in case of a tenant at sufferance; as, if tenant in tail makes a feoffment in fee to the use of himself in fee, and afterwards makes a lease for years, and dies, by which the issue is remitted before entry, and, consequently, the estate of the lessee for years is determined and changed into a tenancy at sufferance, because the fee-simple, out of which it was derived, is vanished by the remitter; and the issue enters into part of the land descended, and makes a feoffment of the whole, and gives livery of that part into which he entered, in the name of the whole, this shall pass all the lands to which the issue was remitted, though the tenant at sufferance was in possession of part; because that possession may be reasonably supposed to be in me, which I may actually place myself in at my pleasure; and therefore the livery of that part, in which the issue had actually entered in the name of the whole, shall pass all the lands.

2 Ro. Abr. 5, 6.
Terry v.
Brown.

A. seised of land in fee, holden of the queen in socage, died; and it was found by office, that he died without heir, by which the lands were seised as the escheat of the queen; and *B.* the heir of *A.* traversed the office, upon which issue was joined; and pending the issue, *B.* made a deed of feoffment, with a letter of attorney; and afterwards the issue being for *B.*, judgment was given *que les mains la R. soient amove*, and then the attorney made livery, after which the *amoveas manus* was executed; this was
holden

holden a good feoffment and livery; because, by the judgment against the queen, her possession was defeated, and *B.* was restored to his right of possession, which he might have placed himself in at his pleasure; and therefore might transfer that to another which he might actually invest himself in at pleasure.

Thus, if land descends to *J. S.*, who enters but into part of it, ^{2 Ro. Abr. 5.} and makes a feoffment of the whole, and livery in that part in which he entered in the name of the whole, all the land shall pass; for besides that, in this case, an entry into part may be construed an entry into the whole, the feoffor having a power to reduce the whole into his actual possession at his will; the very act of feoffment with the livery in all these cases may reasonably be taken to be a determination of his will to take the possession, since the livery and feoffment would be invalid, unless he were in possession.

If husband and wife be seised of land in fee, and the husband make a feoffment of the whole, the wife being upon the land, yet the livery shall pass the land, because the husband had the whole possession, either in his own right, or in right of his wife, and therefore could deliver it over by the investiture, though the wife should disagree to it. ^{2 Ro. Abr. 5. Perk. § 223.}

If the queen be lessee for years, and he in reversion enter upon the land, and make a feoffment in fee, this is void; because the law preserves the possession for the queen, who, by constantly attending the business of the publick, is presumed not to have leisure to take care of her private concerns. But, if the queen had made a lease for years to *J. S.*, and he in reversion had entered and ousted him, and made a feoffment, that had been good; because the queen had no right to the possession during the lease to *J. S.*, and the reversioner having gained the possession by his ousting *J. S.* might, consequently, deliver it by the investiture. ^{2 Ro. Abr. 5. & vide 2 Co. 53.}

If a man makes a lease for life to *A.*, and after makes a feoffment and livery to *A.* of the land in lease, this is a good livery and feoffment; for though the land was in lease to *A.*, yet his acceptance of the feoffment and livery amounts to a surrender, *ut res magis valeat*, and, consequently, the feoffor has thereby possession to transfer by the livery to the feoffee. ^{2 Ro. Abr. 495. Dyer, 358. Moore, 636.}

If a man be seised of two acres, and make a lease for years of one of them, and after make a feoffment of both acres, and livery of the acre in his own possession, in the name of both; the livery is void and ineffectual to pass the acre in lease, because that being full of the lessee, the feoffor had not the possession to transfer by the livery; yet such feoffment is a good grant of the reversion of the leasehold acre, if the termor attorns; because every man's act is construed most strongly against himself; and therefore the feoffor shall not be admitted to claim any thing in either of the acres, since the possession of the one was actually transferred by the livery, and the reversion of the other in lease by the deed of feoffment, which, with the attornment of the tenant, amounts to a grant. ^{Co. Litt. 49. a. 2 Ro. Abr. 56. Plow. 162.}

2 Ro. Abr. 4.
56. Ro. Abr.
482. Eedes
and Knots-
ford.

But, if there be a lease for years to *A.*, remainder to *B.* for life, and *C.* the reversioner in fee make a feoffment in fee, with livery to *A.*, this is void as a feoffment, because *C.* had no possession to transfer by the livery, that being already in *A.*, and the freehold in *B.*, by the former lease; and the acceptance of the livery by *A.* was neither a surrender, nor an attornment; as in the former case it would not amount to a surrender, because of the intermediate freehold which was in *B.*, nor did the feoffment amount to a grant and attornment; for though, according to the former case, every man's conveyance is construed most strongly against the grantor; yet in this case the grant is ineffectual, for want of attornment; for *A.*'s acceptance is no attornment, because he shall not bring *B.* within his fealty, by an act which was not in its original intention designed to be prejudicial and injurious to *B.*, by displacing his remainder.

2 Ro. Abr. 6.
Dyer, 18.

If a man be seised of two acres, and, being disseised of one, make a feoffment of both, and livery in the acre in possession, in the name of both, yet the acre of which he was disseised does not pass, because he could not deliver that possession to the feoffee, which the disseisor had. So it is, if the disseisor had made a lease at will, and then the disseisee had made a feoffment of the acre in his possession, in the name of both, this had not passed both the acres, because the possession of one acre was still out of him, and the feoffment could not be any determination of the will of the disseisor.

Dyer, 18.
2 Ro. Abr. 5.

But, if a man be seised of two acres, and make a lease at will of one, and after enfeoff *J. S.* of both acres, this shall pass both; because the very feoffment and livery is a determination of the estate at will, and, consequently, the feoffor has thereby resumed the possession, in order to convey it by livery: otherwise, of a lease for years, because the possession is in the termor during the lease.

2 Ro. Abr. 6.
9 H. 7. 25. b.

If *A.* be lessee for life of *Black-Acre*, and being likewise seised in fee of *White-Acre* make a feoffment of both, and give livery in *White-Acre*, in the name of both, this is a good feoffment of both acres; because *A.* had the freehold and possession of both acres, and therefore might well deliver them over by the investiture: otherwise, if *A.* had been only possessed of *Black-Acre* for years, for then it should not pass by the feoffment, because the charter of feoffment passes the interest in the term before the livery made, and a less estate by right shall be supposed to pass, rather than a greater by wrong. But in the first case, where *A.* had the freehold in both acres, nothing passes till the livery was made; and therefore the livery must operate to pass the fee in both acres, *secundum formam chartae*, else it can pass nothing.

2 Ro. Abr. 4.

But, if *A.* had been possessed of *Black-Acre* for years in *auter droit*, as guardian to an infant, and had made a feoffment of both acres, and given livery in *White-Acre*, in the name of both, that had passed both acres to the feoffee; because the term being vested in the infant, the guardian could lawfully transfer it as if he had been in possession of it in his own right, and therefore the

the livery must operate *to oust the infant* of the term, and *disseise him in reversion*, else it will have no effect at all.

3. *In what Cases several Parcels will pass by one Livery, or where several Parties may take by Livery to one.*

It seems, that anciently the feoffment and giving livery was performed before the *pares* of the manor where the lands lay. But this being found too much to streighten the transferring of the possession, it was found necessary to admit the testimony of strangers; and this came afterwards to be established for the conveniency of it. And because all men of the county assembled at the county-court, in order to determine disputes relating to the whole county, as the tenants of the manor did at their court baron; and because there lay an appeal from the court baron to the county court, so that the *pares* of the county were thereby ultimately to determine of all things relating to the particular manor; it seemed the more reasonable to admit the *pares comitatus* to attest the investiture through any particular manor, and indifferently through the whole county; and hence it came to be admitted, and so the law continues, that if a man seised of lands in several villages in one county, makes a feoffment of the whole, and gives seisin of parcel of the lands in one town, in the name of all the lands in that town and in the other towns, that all the lands of the feoffor lying in that county shall pass, as well as if there had been livery given in each town.

Co. Litt. 253.
a. 2 Ro. Abr.
11.

But, if a man having lands in two counties makes a feoffment of both, and gives livery of the land in one county, in the name of all, the land in the other county shall not pass, because there was no relation or dependence between one county and another, as there was between the several manors and county court; for one county having no power or jurisdiction over another, the *pares* of one were reasonably presumed to be ignorant of what was transacted in the other; and therefore the investiture, which passed the land in one county, was ineffectual to carry the lands in the other, because that investiture could be only a notoriety to the *pares* of the county where it was made; and, consequently, there having been no notice given to the *pares* of the other county by any solemnity of the transferring of the possession, the possession must reside where it was placed by the last investiture.

Perk. 227.
2 Ro. Abr. 11.

But, if a manor extend into two counties, and the feoffment be made of the whole manor, and livery only in the part lying in one county, in the name of the whole manor, yet the whole manor shall pass; because the investiture is a notoriety equally to all the *pares* of that manor of the transmutation of the possession; and though they live in different counties, yet they reside *in eodem territorio ab eodem feodum habentes*; and therefore are presumed to be conuzant of every thing done within the territory or manor to which they belong.

Perk. § 227.

But, if the manor of *Dale* extend into the counties of *D.* and *S.*, and

Perk. § 228.

S., and a feoffment be made of the manor of *Dale*, in *D.*, and livery and seisin in *D.*, nothing passes by this livery but that part of the manor which lies in *D.*, because the feoffment being confined to the manor of *Dale* in *D.*, nothing can pass that does not lie in the county of *D.*

Co. Litt. 49.
359. 2 Vent.
202. 205.
5 Co. 95.
2 Ro. Abr. 9.
2 Leon. 23.
Mutton's case.

If a feoffment be made to *A.* and *B.* by deed, and livery be made to *A.*, in the absence of *B.*, in the name of both, the livery is good to pass the estate to both. But, if the feoffment had been made without deed, and the livery given to one, in the name of both, it should operate to him only. For *the parties are united in a deed*, they all take as one; therefore livery to one, in the name of the rest, is an actual delivery to them all. But *without deed they are not so united*; and therefore the delivery to one, in the name of several, is no actual delivery to the rest, but the whole estate must reside in him to whom it is delivered, and a subsequent assent cannot take it out of him, such assent being not so solemn as the feoffment. Besides, in the case of the feoffment by deed, *A.* may be looked upon as the attorney of *B.* to receive livery; and therefore the estate shall immediately vest in *B.*, because every man is presumed to assent to a grant for his advantage; but the feoffment without deed will admit of no such construction, because no man can receive livery as attorney to another, without an appointment by deed.

(C) Of the Charter of Feoffment: And herein, what Things are necessary to the making of a perfect Charter, and how far the Charter governs the Livery which is relative to it.

2 Ro. Abr. 21.
Co. Litt. 7.

THE things, which are essentially necessary to the making of a perfect charter, are but sealing and delivery; for if a man gives land to another and his heirs, and seals and delivers the deed, and gives livery, it is a good charter, and the inheritance shall pass as well as if it had all the formal parts which are generally used in deeds of conveyance.

But since by the statute of frauds and perjuries, the charter of feoffment is made equally necessary with the livery and seisin, to pass the freehold or inheritance, it being thereby (a) enacted, (a) By 29 Car. 2. c. 3.
“That all leases, estates, interests of freehold in any lands, tenements, or hereditaments, made or created by livery and seisin only, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect;” for this reason it may be necessary to consider the formal parts of the charter which are generally used in this sort of conveyance at this day.

These are, 1. The premises. 2. The *habendum*. 3. The *tenendum*. 4. The (b) *reddendum*. 5. The clause of (c) warranty.

(b) But for

ranty. 6. The *(d) cujus rei testimonium*, comprehending the sealing. 7. The date. And lastly, the *his testibus*.

this *vide tit. Rents.*
(c) *Vide tit.*

Warranty. (d) And note, that if the deed be sealed, though it wants the words in *cujus rei testimonium sigillum meum apposui*, yet it is good enough; for the seal appearing, it must be presumed to be set there by the parties to the deed. 2 Co. 5. Leon. 25. Owen, 23. Bendl. 1.

1. Of the premises of the deed; and their office is to name the grantor and grantee, and the thing to be granted or conveyed: Of this two things are observable as regularly true; 1. That no person, not named in the premises of the deed, can take any thing by the deed, though he be afterwards named in the *habendum*, because it is the premises of the deed that make the gift; and therefore when the lands are given to one in the premises, the *habendum* cannot give any share of them to another, because that would be to retract the gift already made, and, consequently, to make a deed contrary and repugnant in itself. Thus, for instance, if a charter of feoffment be made between *A.* of the one part, and *B.* and *C.* of the other part, and *A.* gives lands to *B.*, *habendum* to *B.* and *C.* and their heirs; *C.* takes nothing by the *habendum*, because all the lands were given to *B.*, and, consequently, *C.* cannot hold those lands which are given before to another. But in this case, if the *habendum* had been to *B.* and *C.* and their heirs, to the use of *B.* and *C.*, this had been a good limitation of a use, and, consequently, the statute would carry the possession to the use, and *B.* and *C.* thereby become jointenants.

Co. Litt. 6. a.
9 Co. 47. b.
Hob. 275. 313.
2 Ro. Abr. 65.
Cro. Ja. 564.
Cro. Eliz. 58.

13 Co. 53.
Poph. 126.

So, if a deed of feoffment be made, without naming any feoffee in the premises, *habendum* to *B.* and his heirs, it seems doubtful whether *B.* shall take any thing by this gift, for though there be not that repugnancy in this case as in the former, the lands being given to nobody in the premises of the deed, and, consequently, the *habendum* cannot be said to be contrary to the premises, but rather explanatory in describing who shall hold the lands which were given in the premises; for which reason, it seems, that my Lord Coke (a) holds, that the gift to *B.* is good; yet by the opinion of (b) others the gift is void, because the *habendum* can only limit the duration of the estate, but no man can by virtue thereof hold lands which were not given to him.

(a) In Co. Litt. 7. a.
(b) Cro. Eliz. 903. 917.
2 Ro. Abr. 66,
67. 3 Leon.
33. ||The

cases in Ro. Abr. and 3 Leon. are certainly *contra*. That in Cr. El. seems *contra* on the first reading; though, on examination, the question appears to have been rather on the manner of pleading the deed, than on the operation of it. But in Car. Rep. 123. there is a case of 21 and 22 El. in which the two chief justices and the chief baron certified to the chancellor, that a lease was good in law, though the lessee was named in the *habendum* only; and a case in Allen, 41. is also with Lord Coke. Hargr. Co. Litt. 7. a. n. 3. ||

If lands be given to a husband, *habendum* to him and his wife, and to the heirs of their two bodies, the wife takes nothing, because she was not mentioned in the premises; and therefore shall take nothing of that which was before given entirely to her husband.

2 Ro. Abr. 67.

But there are these four exceptions from this rule; 1. That if

Co. Litt. 21.
lands Plow. 158.

Cro. Ja. 454.
Poph. 126.
2 Ro. Abr. 67.

lands be given in frankmarriage, the woman that is the cause of the gift may take by the *habendum*, though she be not named in the premises; as, if lands be given to *J. S.*, *habendum in liberum maritagium una cum* the woman who is daughter of the donor; this is a good estate in frankmarriage to them both; because the gift being totally on her account, it is necessary to the creation of the estate in the husband that the wife should take.

Brook's case.
Poph. 125,
126. Cro. Ja.
434. S. C.
2 Ro. Abr. 67.
S. C. Downs
v. Hopkins,
Cr. El. 323.
||(a) See Fisher
v. Wigg, 1 P.
Wms. 15., and
1 Ld. Raym,
622.||

2. In grants by copy of court-roll, as if a copyholder surrenders to his lord, without limiting any use, and then the lord grants it in this manner; *J. S. cepit de domino, habendum* to the said *J. S.* and his wife, and the heirs of their bodies begotten, this is a good estate-tail in the wife; for these customary grants, that are made in pursuance of a former surrender, are construed according to the intention of the parties, (a) as wills are. Besides that, the custom of the manor is the rule for the exposition of such sort of grants, and in many manors such sort of form is usual.

2 Ro. Abr. 68.
Hob. 313.
Cro. Ja. 564.

3. That a man not named in the premises may take an estate in remainder by limitation in the *habendum*.

Plow. 158.4 14.
2 Ro. Abr. 68.

4. In wills; for if a man devises lands to *J. S.*, *habendum* to him and his wife, this is a good devise to the wife; because, in construction of wills, the intention of the deviser is chiefly regarded, and wherever that discovers itself, it shall take place, though it be not expressed in those legal forms that are required in conveyances executed in a man's life-time.

2 Ro. Abr. 65.
2 Co. 55. a.
9 Co. 47.

2. Of the *habendum*; and the office of this is to limit the certainty and extent of the estate to the feoffee or grantee, for the *habendum* need not repeat the thing granted; it is sufficient if it be named in the premises, because it is the premises that make the gift, and the word *habendum* does of its own nature refer to things mentioned in the premises.

2 Ro. Abr. 65.

Of the *habendum* there are these things observable; 1. That the *habendum* cannot pass any thing that is not expressly mentioned or contained by implication in the premises of the deed; because the premises being part of the deed by which the thing is granted, and, consequently, that makes the gift; it follows, that the *habendum*, which only limits the certainty and extent of the estate in the thing given, cannot increase or multiply the gift, because it were absurd to say, that the grantee should hold a thing which was never given to him.

2 Ro. Abr. 65.

Hence it is, that if a man grants a manor, *habendum* together with another manor, or with the advowson of another manor, only the manor granted in the premises shall pass.

2 Ro. Abr. 65.

But, if a private person grants a manor *habendum una cum advocatione*, which belongs to the manor, this is a good conveyance of the advowson, because it was impliedly given by the gift of the manor itself.

2 Co. 23.
Baldwin's
case.

2. How far the *habendum* may alter or abridge the gift in the premises. And here it is regularly true, that the *habendum*, that is repugnant and contrary to the premises, is void, and shall be rejected;

rejected; because the rule in the interpretation of all deeds is, that all grants shall be taken most strongly against the grantor; and therefore he shall not be allowed, by any subsequent part of the deed, to contradict or retract that gift which he made in the premises; as, if a man gives lands to *J. S.* and his heirs, *habendum* to him for life, this is a void *habendum*, because repugnant to the premises.

But for the better explication of this rule, it will be necessary further to consider it under these exceptions; 1. That if no express estate be given in the premises, as, if a rent be granted generally in the premises to *J. S.*, this creates an estate for life in *J. S.*, by implication of law; that is, the parties having omitted to determine how long *J. S.* shall enjoy the rent, the law construes the grant most strongly against the person that makes it, and therefore gives *J. S.* an estate in the rent for his own life. But, if the grantor had by the *habendum* limited the rent to *J. S.* for years, or at will, this *habendum* had been good; for the law creates an estate for life in *J. S.* only because there was no express estate given by the grantor. But, when upon the face of the deed it evidently appears that the rent was given but for a determinate number of years, or only at the will of the grantor, there the law will never create an estate against the express provision of the parties, or permit *J. S.* to enjoy the rent beyond the period of time positively limited in the deed.

So, the *habendum* may frustrate and control the estate by implication in the premises, though the estate limited by the *habendum* be void itself. Thus, if a deed of feoffment be made, and the lands given generally in the premises, *habendum* to the feoffee and his heirs, after the death of the feoffor, the implied estate for life shall not pass by the premises, because it is evidently the intention of the deed that no estate shall pass till after the death of the feoffor; and the limitation in the *habendum* is void; because the livery cannot pass the freehold *in futuro*, for that would create an uncertainty of the freehold, and strangers would be at a loss against whom to bring their *præcipe*, as is before observed.

2. If to the perfection of an estate limited in the premises there be a ceremony necessary, which is not requisite to pass the estate in the *habendum*; there, if the ceremony be not performed to carry the estate in the premises, the *habendum* shall stand, though it be repugnant to the premises; as, if a man covenants, grants, demises, and to farm lets land to *A.* and *B.*, and the heirs of *B.*, *habendum* to *A.* and *B.* for three hundred years, this is but a term for years in *A.* and *B.*, though there be words of inheritance; for it was plainly the intention of the lessor to create a term only by his using the common words of demise. Besides, it is evident that the lessees by the premises could have but an estate at will, because the words of inheritance in the premises were not sufficient to carry the freehold without livery, which was not made in this case, and, consequently, the *habendum* does not really contradict, but enlarge the gift in the premises.

Hob. 170.
Co. Litt. 183.
2 Co. 24. a. 55.
2 Ro. Abr. 65,
66. Cro. Eliz.
254. 8 Co. 154.

Cro. Eliz. 254.
Hogg v. Cross,
Hob. 171.
2 Ro. Abr. 66.
2 Co. 55.
Buckler's case,
Moore, pl. 591.
Cro. Eliz. 451.
585. Vide
Moore, 881.
cont.

2 Co. 23, 24.
Baldwin's
case, And. 223.
Owen, 48.

premises. It is true, my Lord *Coke* says, at the end of this case, that if livery had been made, only a term for years should have passed; because that the words of demising and covenants in the deed plainly discover the intention of the parties to create a term. But *Q.* of this, because there are words of inheritance in the premises; and therefore a livery pursuant to them ought to be taken most strongly against the grantor.

8 Co. 154. b.
Co. Litt. 21. a.
Litt. Rep. 345.

But, though the *habendum* cannot retract the gift in the premises, yet it may construe and explain in what sense the words in the premises shall be taken; for it is upon a view of the whole deed that the intent of the parties must be collected. Therefore, if lands be given to a man and his heirs, *habendum* to him and the heirs of his body, this is but an estate-tail; because the *habendum* only expounds the general word *heir* in the premises, and such exposition is consistent, and does not destroy the operation of the words mentioned in the premises, but only explains in what sense they are to be taken, and what heirs are comprehended.

Pilsworth v.
Pyett, Sir T.
Jon. 4. 2 Keb.
365. S. C.

A prebendary demised land, of which he was seised in right of the church, to *J. S.* and his heirs, *habendum* to him and his heirs for three lives, and it was holden to be a good lease against his successor; because the *habendum* explains in what sense and to what purpose the word *heirs* was used in the premises, *viz.* to create a special occupancy in the lessee; for if the demise had been only to *J. S.* *habendum* for three lives, without inserting the word *heirs*, any stranger, upon the death of *J. S.*, might have entered and holden the land as a general occupant, during the lives of the *cestui que vies*; therefore the heirs of the lessee shall enjoy the land, because they are mentioned in the premises; but the *habendum* explains in what manner they shall enjoy it, and that is, as special occupants during the three lives.

Cro. Eliz. 131.
Piers v. Hoe.

But it has been holden, where a husband was seised of land in right of his wife for her life, and they both by deed of feoffment conveyed the land to *J. S.* and his heirs, *habendum* to him and his heirs, to the use of him and his heirs for the life of the wife; that the whole fee-simple passed to *J. S.*, and so was a forfeiture of the estate; for there being a fee-simple conveyed to *J. S.* by the livery, and the premises and *habendum* of the deed, the words of restriction for the life of the wife refer only to the limitation of the use, and, consequently, the fee-simple remains in the feoffee; whereas, in the former case, the conveyance was wholly at common law; and therefore the restriction in the *habendum* must relate to that or be void, which is never admitted where the words are only explanatory and not repugnant.

Moore, 876.
2 Ro. Abr. 66.
Wilkins and
Perrott.
Brownl. 169.
Buls. 135.

So of a rent; as, if the grant had been to *J. S.* and his heirs, executors, and assigns, *habendum* to him and his heirs, executors, and assigns, for or during the life of *J. N.*, this is a good *habendum*, and the lessee has only an estate for life; for the *habendum* does not defeat, but explain the operation and use of the word *heirs* in the premises; for as this case stands, upon the death of *J. S.*, his heirs shall enjoy the rent during the life of *J. N.*, as

special occupants; whereas, if the rent had been granted only to *J. S.* for the life of *J. N.*, it would have determined upon the death of *J. S.*, because there can be no general occupant of a rent; and the heirs of *J. S.* could not take, because not named in the grant.

If the grant had been to him and his heirs, *habendum* to him for his life, and the lives of three others; this is likewise a good *habendum*; because it does not render the word *heirs* in the premises useless, but expounds them only to create a special occupancy, and thereby to prevent the determination of the estate by the death of the grantee.

But, if the grant in the premises be of a rent to a man and his heirs, *habendum* for the life of the grantee, this is a void *habendum*, because it totally defeats the operation of the word *heirs* in the premises, and, consequently, is repugnant and not explanatory, and therefore void.

If a man makes a feoffment in fee in 20 acres to *A.* and *B.*, *habendum* one moiety to *A.* and the other moiety to *B.*, this is good, and the *habendum* makes them tenants in common; for though the premises be joint, and therefore of themselves would operate to give a joint estate and possession, yet the *habendum* explaining the manner of possessing is not inconsistent or repugnant, because it makes no division of that undivided possession which was given in the premises.

But, if the *habendum* had limited ten acres to *A.*, and the other ten acres to *B.*, this had been void, because the *habendum*, in this case, contradicts and is repugnant to the premises; for by the premises, the entire and undivided possession of the whole twenty acres is equally given to both; and therefore the *habendum* that excludes *A.* out of his share of ten acres, and *B.*, out of his share of ten acres, is contradictory to the premises, and therefore void.

If a lease be made to two, *habendum* to one for life, remainder to the other for life, this is a good *habendum*, because it explains the design of the gift in the premises, and shews that they shall take the whole in succession one after the other.

So, a lease to the mother and son, *habendum eis pro termino vitæ eorum & alterius eorum diutius vivent., successive uni eorum post alterum sicut nominantur in charta & non conjunctim*; here the *habendum* explains in what manner they shall enjoy the land: nor is the *habendum* void for the uncertainty who shall take first, because they are to take one after another, as they are named in the deed; and therefore the mother was adjudged to be tenant for life, the remainder to the son.

But a demise to *A.*, *habendum* to him, *B.*, and *C. pro termino vitæ eorum & alterius eorum successive diutius vivent.*; this is a void *habendum*, and neither *B.* nor *C.* can take any thing: not as lessees in possession, because not parties to the deed, or named in the premises; nor by way of remainder, because they cannot take jointly in remainder, the limitation being to them *successive*; nor

Bowles v. Poor, 1 Bulstr. 135. Cro. Ja. 282. S. C.

2 Co. 23, 24.

Co. Litt. 190. b. 183. b. and 180. b. note 1. 13th edit. Hob. 172.

Hob. 172.

Co. Litt. 183. 190. 2 Co. 55. 2 Ro. Abr. 65.

Dyer, 361. Buls. 135.

Hob. 313. Windmore v. Hobert.

nor can they take in succession one after the other, because *non constat* by the deed who shall take first in remainder.

Cro. Eliz. 89.
107. Moore,
267. Leon.
217.

A. made a lease to *B.*, *C.*, and *D.* for their lives, *proviso*, and it is covenanted and granted, that *C.* shall not enjoy the land during the life of *B.*, and that *D.* should not enjoy the land during the life of *C.*, this is but a collateral covenant, which shall not alter the nature of the estate given by the premises which create the gift.

Underwood &
Underhaye's
case, 2 R. Abr.
66. pl. 4. Hob.
271. S. C.
Moore, 881.
S. C. & Cro.
El. 269. S. C. ill
reported. ¶ If
a man grants
a reversion,
habendum after
the death of
the tenant for
life, it is good;
for it is but a
limitation

A. made a lease for three lives, and after grants the reversion to *J. S.*, *habendum* to him for life, such estate for life to begin after the death of the three first lessees; this is a good grant of the reversion to *J. S.* during his life to commence immediately; for though the *habendum*, as is already observed, may totally control any implication in the premises, and defeat the estate therein given by implication of law, yet in this case there was an express estate given for the life of the grantee, and no subsequent words shall defeat that estate which was complete and express by the former part of the deed; and therefore the subsequent words, which would limit the estate to commence *in futuro*, are void; because a freehold cannot be granted *in futuro* for the reasons already observed.

when he shall have the possession. But, if it be *habendum* after the death of a stranger, it will be otherwise. *Buckler v. Hardy*, Cro. Eliz. 585.¶

Lilly v. Whit-
ney, Dyer,
272. 2 Ro.
Abr. 66. S. C.
Hob. 171.
Cro. Eliz. 255.
So Jernan v.
Orchard,
1 Salk. 346.
12 Mod. 11.
S. C. Freem.

A termor for years, reciting by indenture his term and lease, grants all his term, estate, and interest to another, *habendum sibi & assignatis suis immediate post mortem* of the grantor; this was holden a void *habendum*, because, by the grant in the premises the whole interest was absolutely conveyed; and therefore the *habendum*, that retracts the grant, is void; for it may happen that the grantor may outlive the term, and then the *habendum* defeats and is repugnant to the grant.

500. S. C. Skin. 528. S. C. Show. P. C. 199. S. C.

Plow. 147,
148. 160.
Throgmorton
v. Tracy.

A. makes a lease for three lives of lands, and afterwards demises to *J. S.* for ten years the reversion of the lands, *habendum* the said lands from *Michaelmas* next ensuing after the death of the lessee for lives; this is a good demise to *J. S.*, because the word *reversion*, including not only the interest or estate which *A.* had depending upon the estate for lives, but likewise the land itself, returning after the determination of the particular estate, the *habendum*, which explains in what sense the word *reversion* is to be taken, shall stand; and therefore in this case *J. S.* was adjudged to have a term for years in the land, to commence upon the determination of the freehold.

See Perk.
§ 633, &c.

3. The next formal part of the deed is the *tenendum*, and this, since the statute of *quia emptores terrarum*, must be to hold of the chief lord in fee, if a fee-simple be conveyed; but, if an estate-tail be conveyed, it may be to hold of the donor.

[It is now of very little use, being only inserted by custom: it was formerly used to signify the tenure by which the estate granted

granted was to be holden, viz. *tenendum per servitium militare, in burgagio, in libero soccagio, &c.*; but all these being reduced by statute 12 Car. 2. c. 24. into free and common socage, the tenure is now never specified.

4. Next follows the *reddendum*, which is that by which the grantor doth create or reserve some *new* thing to himself out of what he had before granted. See tit. *Rent*.

5. The clause of warranty. A warranty is a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same lands, and to render in value, if they are evicted by a former title. See tit. *Warranty*.

6. Of the *cujus rei testimonium*, comprehending the sealing. This clause is not necessary, though sealing be of the essence of a deed, for if a writing be not sealed, it is not a deed. Co. Litt. 6. a. 7 a. 2 Co. 5. a. 1 Leon. 25.

The practice of sealing came into this country with the Normans. Some indeed, among whom is Sir Edward Coke, have supposed that it obtained in some degree in the time of the Saxons, a mistake which hath proceeded from not knowing that the crosses (with which both principals and witnesses then signed) were indifferently called *signa* and *sigilla*. This mode of authenticating instruments soon became of general use; though it is certain that there were several conveyances, which, down as low as the reign of Edw. the 3d, were admitted as good and legal, when otherwise well attested, although they never had any seals affixed to them. These were the grants of those who still adhered to the old Saxon mode, and retained the subscription of names and crosses. And mankind might, perhaps, safely rely upon the authority of seals, whilst signets were carefully preserved, and the arms or impressions were appropriated: but as population increased, and the same arms were indiscriminately used by numbers, the evidence of seals only must necessarily become uncertain and unsatisfactory: the statute of 29 Car. 2. c. 3. revives, therefore, the old Saxon custom, and expressly directs the signing, in all grants of lands, and many other species of deeds. It hath indeed been formerly holden, that sealing is a signing within the statute, a doctrine which would have disappointed the intent of the legislature, and which the better judgment of later times hath exploded. Spelm. Glossar. voc. Sigillum et signum. Co. Litt. 70. a. Nichols. English Histor. Libr. 242.

7. Of the date. — The date is not essential to a deed; for if it hath no date, or a false or impossible date, the deed shall be good, and shall take effect from the time of the delivery. 3 Lev. 2 Str. 764. Co. Litt. 6. a. 2. Co. 5. a. 3 Leon. 100.

So, if it hath the day of the month, but no year is mentioned, for that is a void date: and in such case it may be pleaded to have been delivered at some other day than that mentioned in it. 2 Ro. Abr. 27. Yelv. 194.

If two deeds bear date the same day, and are evidently but one agreement, that shall be presumed to be executed first, which will support the clear intent of the parties. 1 Burr. 60.

8. Lastly, the *his testibus*. The attestation or execution of a deed in the presence of witnesses is necessary, rather for preserving the evidence, than for constituting the essence of the deed. 2 Inst. 77, 78. 2 Bl. Com. 307.

deed. This clause of *his testibus* was formerly introduced as well in the king's grants as in the deeds of subjects; in the former however it hath been long discontinued, the king attesting his patent himself; and it was entirely disused in the latter in the reign of Henry 8., since which time the witnesses have subscribed their attestation either at the bottom, or on the back of the deed.]

(D) Who may make a Feoffment.

2 Ro. Abr. 2.
Co. Litt. 247.
4 Co. 125. a.
Show. Parl.
Cases, 153.
and *vide tit.*
Ideots and Lunatics.

IF a person *non compos* makes a feoffment, and gives livery himself, this is allowed on all hands to be good to bind himself, so that he can by no process or plea avoid the feoffment, and restore himself to the possession. The same law of an ideot. And the reason is, because the investiture being made before the *pures curiæ*, their solemn attestation could not be defeated by the person himself, it being presumed they were competent judges of the ability of the feoffor to make such feoffment.

4 Co. 125.
2 Ro. Abr. 2.
8 Co. 42, 43.
Whittingham's case.

But, if an infant makes a feoffment, and makes livery himself, this shall not bind him, but he himself may avoid it by writ of *dum fuit infra ætatem*: yet the feoffment of the infant is not void in itself, as well because he is allowed to contract for his benefit, as that there ought to be some act of notoriety to restore the possession to him, equal to that which transferred it from him.

8 Co. 45. Co.
Litt. 247. a.
4 Co. 125. a.
2 Ro. Abr. 2.
Show. Parl.
Cases, 153.

But, if an infant makes a feoffment, and a letter of attorney to make livery, that is void. So, if a person *non compos* makes a surrender or release, this is void in law. So, if he makes a letter of attorney to give livery. But the heir at law, after the death of the person of *non sane* memory, or idiot, may avoid his feoffment; and so may the king upon an office found of his lunacy during his life.

4 Co. 125.
2 Ro. Abr. 2.
8 Co. 42, 43.
45. Cro. Ja.
617. Gardiner
v. Norman,
Perk. 2183.

As the infant's feoffment is voidable by *dum fuit infra ætatem*, when he comes of full age, so it is voidable by him by entry during his nonage; but his letter of attorney is merely void. And the same law seems to be of a feme covert; for if she makes a feoffment upon the land, it is voidable by her husband; but, if she makes a letter of attorney to give livery, it is absolutely void in law. And the reason is, because the contracts of those that are disabled by law to contract were void contracts; but their infeudations were not in themselves void, because they were made *coram paribus curiæ*, who were presumed not to attest contracts of persons disabled by the law to contract, especially since such contracts were made for military or socage service, which were for the good of the commonwealth; and by those infeudations a stranger was directed to bring his *præcipe* against the person that was actually invested in the land; wherefore the infant's feoffment was good till it was avoided by an act of equal notoriety, to wit, by his entry *coram paribus*, which was equally solemn with the act of feoffment, or by bringing his *action at full age*, when the

the

the law had enabled him, by action in a court of record, to set aside the feoffment that he had made during minority. But the law enabled him by entry to set aside the acts *coram paribus* during minority, because the *pares* might undo what was done *in pais*; and the courts of justice were not to destroy the acts *in pais* till the infant, by his own discretion, had chosen to avoid them, because it was derogatory to the dignity of the courts of justice to set aside the solemn acts *in pais*, till the infant had come to such age of discretion as might make it fully appear that the feoffment was made during his disability. For the infant was not received to disable himself during the time of his disability; but during such disability he might, by equal solemnity *in pais*, disable himself, since such an act was only *coram paribus*, in the same manner as the feoffment itself was made, but the warrant of attorney of the infant was *ipso facto* void; and therefore such feoffee was a disseisor, as if no authority had been committed to the attorney to make the feoffment. But in the case of the *non compos* he was not admitted to stultify himself, because there was no stated time when such persons returned to sense and understanding, and therefore they could not be presumed to be conscious themselves of their own follies or defects. But the king, who had the care of all his subjects, might, by solemn office found, avoid such acts of insanity, and so might the heir at law after their death.

See 2 Bl.
Comm. 291,
292.
F. N. B. 202.
D.

(E) Of making it by Letter of Attorney.

A MAN may either give or receive livery by his attorney; for since a contract is no more than the consent of a man's mind to a thing, where that consent or concurrence appears, it were most unreasonable to oblige each person to be present at the execution of the contract, since it may as well be formed by any other person delegated for that purpose by the parties to the contract.

Co. Litt. 52.
2 Ro. Abr. 8.

But such delegation or authority to give or receive livery must be by deed, that it may appear to the court, that the attorney had a commission to represent the parties that are to give or take livery, and whether the authority was pursued.

Co. Litt. 48. b.
52. a. 2 Ro.
Abr. 8. Pal-
freman v.
Grobie.

For if the letter of attorney be to make livery upon condition, as to make a feoffment conditional, and the attorney deliver seisin absolutely, the livery is not good, because the attorney had no authority to create an absolute fee-simple; and therefore such absolute feoffment shall not bind the feoffor, because he gave no such authority; and hence in some books the attorney is called a disseisor.

11 H. 4. 3.
2 Ro. Abr. 90.
Co. Litt. 258.
Perk. § 188.

But, if the letter of attorney had been to make livery absolutely, and the attorney had made it upon condition, this seems a good execution of his power, and the feoffment good; because when the attorney had once delivered possession, he fully executed his power; and the condition annexed to it, being without

26 Ass. 39.
2 Ro. Abr. 8.
Co. Litt. 258.
Perk. § 192.

authority, is void; and therefore shall not destroy the operation of the livery.

Perk. § 189.

If a warrant of attorney be given to make livery to one, and the attorney make livery to two; or if the attorney had authority to make livery of *Black-acre*, and he made livery of *Black-acre* and *White-acre*; though the attorney has in these cases done more, yet there is no reason that should vitiate what he has done pursuant to his power, since what he did beyond it is a perfect nullity, and void.

Perk. § 188.

But, if the attorney were to deliver seisin to two, and he had made livery only to one, that had been void, because he had no authority to deliver the whole possession to one exclusive of the other, and therefore it is void for the whole.

Co. Litt. 52.

2 Ro. Abr. 9.

An attorney cannot make livery within view, because such livery is made by signs or words, instead of the act of delivery. Besides, the power of the attorney is to deliver the possession, but that power is not executed by the livery in view, because the possession is not in the feoffee till actual entry made by him, and, consequently, the attorney has not executed his authority.

Co. Litt. 49.

2 Ro. Abr. 8.

If a letter of attorney be given to two jointly to *take* livery, and the feoffor make livery to one in the absence of the other, in the name of both, this is void; because they being appointed jointly to receive livery are considered but as one.

Co. Litt. 49.

2 Ro. Abr. 8.

But, if *a feoffment be made to A. and B.* and the feoffor give a letter of attorney to deliver seisin, and *J. S.* give livery to *A.*, in the absence of *B.*, in the name of both, this is a good livery; for though the entire possession be delivered to one only, yet they being joint-tenants by the deed of feoffment, such livery to one makes no alteration or change in the possession, because, if the livery had been made to both, each had been placed in the possession. Besides that, every man being presumed to accept a gift for his advantage, *A.* is looked upon as the attorney of *B.* to receive the possession for him; and therefore the livery to *A.* enures to the benefit of *B.* till he disagrees to it.

Dyer, 62. Ro.

Abr. 326. See

Co. Litt. 52. b.

n. 2. 13th edit.

But, if a letter of attorney be made to three *conjunctim et divisim*, and two only make livery, this is not good, because not pursuant to their authority, for the delegation was to them all three, or to each of them separately; yet if the third was present at the time of the livery made by two, though he did not actually join with them in the act of livery, yet the livery is good; because when they all three are upon the land for that purpose, and two make livery in the presence of the third, there is his concurrence to the act, though he did not join in it actually, since he did not dissent from it.

Co. Litt. 52. b.

Poph. 103.

Dyer, 131.

a. 340. a.

2 Ro. Abr. 9.

If a letter of attorney be given to *A.* to make livery of lands already in lease, the attorney may enter upon the lessee in order to make livery; because, while the lessee continues in possession, the attorney cannot deliver seisin of it; and therefore to execute the power given him by the letter of attorney, it is necessary he should have a power to enter upon the lessee. But by *Rolle*, it is

the safer way to insert a clause in the letter of attorney, for the attorney to enter & omnes alios inde expellend.

If A. be disseised of *Black-acre* and *White-acre*, and give a letter of attorney to enter into both, and make livery, if the attorney enter into one acre only, and make livery *secundum formam chartæ*, this is not good, because the attorney has not pursued his authority; for the estate of the disseisor cannot be defeated without an entry into both acres; and till the estate be defeated, the attorney cannot execute his power in the manner it was delegated; and therefore what he did in this case was void.

Co. Litt. 52. a.
2 Ro. Abr. 9.

This power of the attorney must be executed during the life of the person that gives it, because the letter of attorney is to constitute the attorney my representative for such a purpose, and therefore can continue in force only during the life of me, that am to be represented. And hence it is, that if J. S. take a letter of attorney to deliver seisin after my death, it is void; because he cannot deliver seisin during my life, for that were plainly without any authority from me; nor can he do it after my death for the former reason.

2 Ro. Abr. 9.
Co. Litt. 52.
Perk. § 182.

This authority to give livery may be delegated by deed indented, though the attorney be not party to the deed, because the attorney takes nothing by the deed, but has only a naked authority delegated to him; and therefore, since a man may take an estate in remainder, though he is not party to the deed, *a fortiori* one not party to the deed may receive a naked authority or power by it.

2 Ro. Abr. 8,
9. and *vide*
Co. Litt. 52.

But, if any corporation aggregate, as a mayor and commonalty, or dean and chapter, make a feoffment and letter of attorney to deliver seisin, this authority does not determine by the death of the mayor or dean; but the attorney may well execute the power after their death, because the letter of attorney is an authority from the body aggregate, which subsists after the death of the mayor or dean, and therefore may be represented by their attorney. But, if the dean or mayor be named by their own private names, and die before livery, or be removed, livery after seems not good.

11 H. 7. 19.
14 H. 8. 3.
Co. Litt. 52. b.
2 Ro. Abr. 12.

There are few or no persons excluded from exercising this power of delivering seisin, for monks, infants, *femes-covert*, persons attainted, outlawed, excommunicated, villeins, aliens, &c. may be attorneys; for this being only a *naked authority*, the execution of it can be attended with no manner of prejudice to the persons under these incapacities or disabilities, or to any other person, who by law may claim any interest of such disabled persons after their death.

Co. Litt. 52.
Perk. § 187.

A *feme-covert* may be an attorney to deliver seisin to her husband, and so may he in remainder be an attorney to make livery to the tenant for life.

Co. Litt. 52. a.
Perk. § 198.
So a husband
may be at-

torney for his wife. Co. Litt. 52. a.

If lessee for life make a deed of feoffment and letter of attorney to his lessor to deliver seisin, if the lessor make livery accordingly,

Co. Litt. 52.
Perk. § 200.

ingly, it is a good feoffment; but the lessor, notwithstanding he gave livery himself, may enter for the forfeiture of the tenant for life; because the freehold being in the tenant for life, the lessor was only his representative to transfer it. But, if the tenant had been only lessee for years, and the lessor had made livery, that had been no forfeiture of the term; because, the freehold being only in the lessor, he could not be the representative of the termor to convey what the termor had not; and therefore the freehold, which past by the livery, must proceed from the lessor himself, and, consequently, shall bind him.

Co. Litt. 52.

If *A.* makes a lease for years to *B.*, and after makes a deed of feoffment with a letter of attorney to *B.* to deliver seisin, and *B.* makes livery accordingly, this shall not extinguish or affect his term, because the livery was made to pass the freehold, and that he did as representative to the lessor; and therefore, since the feoffee can claim nothing from the lessee, the interest of the lessee remains as it was, unaffected by the feoffment.

FINES AND AMERCEMENTS.

IT seems that originally all punishments were corporal; but that after the use of money, when the profits of the courts arose from the money paid out of civil causes, and the fines and confiscations in criminal ones, the commutation of punishments was allowed of, and the corporal punishment, which was only *in terrorem*, changed into the pecuniary, whereby the courts found their own advantage.

This begot the distinction between the greater and less offences; for in the *crimina majora* there was at least a fine to the king, which was levied by a *capiatur*; but upon the less offences there was only an amercement, which was affeered, and for which a *distringas* or action of debt only lay.

But for the better understanding hereof we shall consider,

- (A) Who have sufficient Authority to fine and amerce.
- (B) For what Offences the party is to be fined or amerced.
- (C) In what Actions or Proceedings there ought to be a Fine or Amercement: And herein,
 1. Of the Nature of the Action, in which there ought to be a Fine or Amercement.
 2. At

2. *At what Time to be awarded.*
3. *Whether to be awarded when the Party is acquitted as to Part.*
4. *Whether to be awarded where there are several Parties, and some of them only acquitted.*
5. *Of awarding Fines and Amercements jointly or severally.*
6. *Whether the Party can be twice amerced in the same Action.*

(D) Where a Fine ought to be awarded, and not an Amercement, & *vice versa*.

(E) Who, in respect of their Persons, are not to be fined or amerced.

(F) Of the Reasonableness of the Fine; and herein of mitigating or aggravating it.

(G) Of the Reasonableness of an Amercement, and the Affeerment thereof: And herein,

1. *Of the Necessity of an Affeerment.*
2. *By whom the Affeerment is to be.*

(H) Of the Manner of recovering Fines and Amercements.

(A) Who have sufficient Authority to fine and amerce.

REGULARLY, all courts of (a) record may fine and imprison an offender, if the nature of the offence be such as deserves such punishment. 8 Co. 39. Dalt. 400. (a) But no court, unless of record, can fine or imprison. 11 Co. 43. b. Godb. 381. S. P. adjudged. — That wherever a jurisdiction is erected with power to fine and imprison, that is a court of record. Salk. 200.

Therefore the sheriff in his *torn* may impose a fine on all such as are guilty of any contempt in the face of the court, and may also impose what reasonable fine he shall think fitting upon a suitor refusing to be sworn, or upon a bailiff refusing to make a panel, &c., or upon a tithingman neglecting to make his presentment, or upon one of the jury refusing to present the articles wherewith they are charged, or upon a person duly chosen constable refusing to be sworn. 2 Inst. 143. 8 Co. 38.

Also, the steward of a court-leet may, by recognizance, bind any person to the peace who shall make an affray in his presence, sitting the court, or may commit him to (b) ward, either for want of sureties, or by way of punishment, without demanding F. N. B. 82. Dalt. c. 1. Lamb. c. 10 H. 6. 10. b. Crompt. 7.

2 Hawk. P.C. 4. ing any sureties of him; in which case he may afterwards im-
 (b) But in pose a fine according to his discretion.
 11 Co. 43. it is said, that some courts may fine, but not imprison; as the leet. Ro. Rep. 74. S. P. by my Lord Coke; and in Ro. Rep. 35. it is said by Coke, that this is the only court that can fine, but not imprison.

Keilw. 66. Also, the sheriff in his *town*, and the steward of a court-leet,
 Kitchin, 43. 51. have a discretionary power, either to award a fine or amerce-
 (a) But the ment for contempt to the court; as for a suitor's refusing to be
 statute 1 E. 4. sworn, &c.; and the (a) steward of a court-leet may either
 c. 2. restrains the sheriff amerce or fine an offender, upon an indictment for an offence not
 from levying capital, within his jurisdiction, without any farther * proceed-
 any fines or ing or trial; especially if the crime were anyways enormous; as
 amercements an affray accompanied with wounding.
 on indictments found before him. — * *Qu. de hoc.*

11 Co. 44. It is said, that some courts may imprison but not fine, as
 Ro. Rep. 74. the constables at the petit sessions.

11 Co. 43. b. Also, some (b) courts cannot fine or imprison, but amerce, as
 (b) A. was the county, hundred, &c.

seised of the manor of *Gravesend*, and prescribed for a water-court within his manor, for re-
 formation of the disorders amongst watermen; and whether this court was not in nature of
 a leet, and not a court-baron, so that the steward, without any special prescription, might
 assess a fine, *dubitatur.* Leon. 216.

11 Co. 44. a. But some (c) courts can neither fine, imprison, nor amerce;
 (c) No Eng- as (d) ecclesiastical courts holden before (e) the ordinary, arch-
 lish court can deacon, &c., or their commissaries, and such as proceed accord-
 fine for not ing to the canon or civil law.

appearing to answer a bill there. Ro. Rep. 336. Nor can the chancellour for breach of a decree. 4 Inst.
 84. (d) Their proceedings are only by ecclesiastical censures. 4 Inst. 324. *Vide* 16 Car. 1.
 c. 11. § 4. 13 Car. 2. c. 12. Noy, 17. (e) But whether the high commission court (while
 standing) could fine and imprison, was *verata questio.* *Vide* Poph. 60. Cro. Car. 582.
 4 Inst. 324, &c. 332. By 16 Car. c. 11. § 2., such fines and imprisonment recited to have
 been used to the oppression of the subject. — That they used to fine and imprison, which
 was illegal; yet the parties were remanded on a *habeas corpus.* Comb. 306. *per* Holt C. J.

(B) For what Offences the Party is to be fined or amerced.

11 H. 6. 12. b. EVERY court of record may injoin the people to keep silence
 Ro. Abr. 219. under a pain, and impose reasonable fines, not only on such
 8 Co. 38. as shall be convicted before them of any crime on a formal pro-
 11 Co. 43. secution, but also on all such as shall be guilty of any contempt
 Cro. Eliz. 581. in the face of the court; as by giving opprobrious language to
 Sid 145. the judge, or obstinately refusing to do their duty as officers of
 the court.

40 Ass. 10. for If any of the jury give their verdict to the court, before they
 this *vide* head are all agreed of their verdict, they may be fined.
 of *Juries.*

8 Co. 38. b. If time out of mind a constable hath yearly been elected, and
 Griesly's case. presented by the jury at a leet, and J. S. by them is elected and
 v. 93. presented

presented constable, and being (a) in court, and by the steward (a) That the required to take his oath accordingly, refuses and departs in con- steward may tempt of the court, the steward may impose a fine on him. impose a fine upon a person who is elected by the homage, if he is present at the leet, and refuses to be sworn to execute the office. But, if the person is not present, the steward cannot fine him, but he may be amerced, which must be presented at the next court, and affirmed. But the party ought to be summoned, and a time and place ought to be appointed under a penalty, when and where he shall come, and before whom to take the oath; and it is not sufficient to allege in general that he had notice, for though he be an inhabitant, yet he may be essoined. 5 Mod. 130, adjudged.

So, if a tithing-man refuse to make a presentment in a leet, 8 Co. 38. b. the steward may impose a reasonable fine on him.

So, if one of the jury in a leet depart without giving his ver- 8 Co. 38. b. dict, he shall be fined by the steward.

If one is present when a murder is done, and does not his 3 Inst. 53. best endeavour to apprehend the murderer, he shall be fined and imprisoned.

So, if two are fighting, and others looking on, who do not Noy, 5c. endeavour to part them, if one is killed, the lookers on may be indicted and fined to the king.

If at a justice-seat, holden within a forest, a man makes a false 4 Inst. 297. claim of privilege, he shall be fined.

If a dead body in prison, or other place, whereupon an in- Keb. 278. quest ought to be taken, be interred or suffered to lie so long 2 Hawk. P. C. c. 9. § 23. that it putrify before the coroner hath viewed it, the gaoler or township shall be amerced.

If any homicide be committed, or dangerous wound given, 3 Inst. 53. whether with or without malice, or even by misadventure, or 4 Inst. 183. self-defence, in any (b) town, or in the lanes or fields thereof, in Cro. Car. 252. the (c) day-time, and the offender (d) escape, the town shall be 3 Leon. 207. amerced; and if out of a town, the hundred shall be amerced. 2 Inst. 315. Dyer, 210. (b) By the

statute 3 E. 1. c. 6., no city, borough, or town shall be amerced without reasonable cause, and according to the quantity of the offence; vide Cro. Car. 252., where an information was exhibited against the mayor and commonalty of London, for that J. S. was killed in a tumult there, and none of the offenders taken, nor any person known or indicted for the felony; upon which they appeared and confessed the offence, and were fined 1500 marks. (c) Where the stroke was given in the day-time, but the party did not die till night, *dubitatur*. Leon. 107. 3 Leon. 207. (d) Of which the coroner may inquire upon view of the body; or the justices of the peace may inquire of such escapes, and certify them into the King's Bench. 4 Inst. and vide 3 H. 7. c. 1.

Also, since the statute of Winchester, 13 E. 1. c. 5. ordains, 3 Inst. 53. that walled towns shall be kept shut from sun-setting to sun- 7 Co. 6. b. 7. a. rising, if the fact happen in any such town by night or by day, and the offender escape, the town shall be amerced.

If by the forest law, hue and cry is made for a trespass in 4 Inst. 294. venison, any township or village within the forest, which does not follow the hue and cry, shall be amerced at the justice-seat.

If the deciners ought to pay rent at the leet (e) *pro certo letæ*, 13 H. 4. 9. this is not (f) properly a rent, but a sum in gross; and if they do Ro. Abr. 211. not pay it, they may be amerced, for this is due and payable at Yelv. 186. the leet. S. P. a custom being laid. Brown. 190. 6 Co. 77. — But, if not warranted by the custom, perhaps it is otherwise. Godfrey's

frey's case. 11 Co. 44. b. Ro. Rep. 32. 73. (e) For the original thereof *vide* 6 Co. 77. 2 Inst. 71. (f) But for a rent distrainable, no amercement shall be in a leet. 11 H. 4. 89. b. Ro. Abr. 211.

12 H. 4. 8. b. A man shall not be amerced in (a) a leet for trespass to the lord himself, for he shall not be his own judge.

S. P. *per Gawdy*. Raym. 160. Saund. 135. 2 Keb. 139. 3 Keb. 744. S. P. adjudged. || 3 Burr. 1706, 1707. 1731. Nor will a custom warrant the amercement in such case. Wood v. Lovatt. 6 T. R. 511. || (a) But such private trespass may be presented there for the lord's information. Saund. 135. 2 Keb. 139.

9 H. 6. 55. If a man arrests another in *London*, coming to the Common Pleas to answer a writ at the suit of the (b) same man, because S. C. 8 Co. he ought to have his privilege, the plaintiff shall be fined for the contempt of the court.

(b) But, if another man had arrested him, who was not plaintiff in the writ in *Banco*, he should not be fined. 9 H. 6. 55.

11 H. 6. 22. So, if the plaintiff in a suit in *banco* be arrested at the suit of the defendant in *London*, (c) before the return of the writ in *banco*, this is a contempt to the court; and for this he shall be fined and imprisoned. *

of law is guilty of double vexation; as if he sues in *B.*, and, pending this, sues in *London* for the same cause, he shall be fined. 8 Co. 60. a. Gouls. 30. pl. 5. — * *Sed qu.* If this is now law? as the defendant may have just cause of action against the plaintiff notwithstanding the prior suit pending.

(C) In what Actions or Proceedings there ought to be a Fine or an Amercement: And herein,

1. Of the Nature of the Action in which there ought to be a Fine or Amercement.

2 Co. 39.
F. N. B. 75.

IT seems that regularly there was a fine or amercement in all actions; for if the plaintiff or demandant did not prevail, it was thought reasonable that he should be punished for his unjust vexation; and therefore there was judgment against him, *quod sit in misericordiâ pro falso clamore*.

Vide tit. Bail.

Hence, when the plaintiff took out a writ, the sheriff, before the return of it, was obliged to take pledges of prosecution, which, when fines and amercements were considerable, were real and responsible persons, and answerable for those amercements, but being now so very inconsiderable that they are never levied, there are only formal pledges entered, *viz. John Doe and Richard Roe*.

8 Co. 60.
Ro. Abr. 212.
219. Cro. Eliz.
344. Cro. Ja.
255. † But
see *infra* the
stat. 5 & 6 W. 3.
c. 12.

In all actions, where the judgment is against the defendant, it was to be entered with a *misericordiâ*, or a *capiatur*. And herein the difference is, that if it be an action of debt, or founded on a contract, the entry is *ideo in misericordiâ*, without assessing any sum in certain, which was afterwards assessed by the coroners in the proper county; but, if it were in an action of trespass, the court set the fine and levied it by a *capiatur*. †

8 Co. 59.
Ro. Abr. 222.

And therefore in all actions *quare vi & armis*, as rescous, trespass, &c., the defendant shall be fined.

So, in a writ of recaption in the Common Pleas, if judgment be given against the defendant, he shall be fined and imprisoned; but in a writ of recaption in the county-court, if the defendant be convicted he shall only be amerced. 8 Co. 41. a. 60. b. 11 Co. 43. F. N. B. 73.

In an attaint against him who recovered in the first action, if the plaintiff recovers, the defendant shall be (a) amerced. Ro. Abr. 212. (a) But in 8 Co. 60. it is said, that if the attaint pass against the defendant, if he was party to the first record, he shall be fined and imprisoned; otherwise, if he was not party to the first record.

If a man recovers in an assise, and dies, and his wife is endowed, in an attaint against his wife, if he recovers, the wife shall be (b) amerced. 40 Ass. 20. Ro. Abr. 212. (b) But not fined, because not party to the first record. 8 Co. 61.

In an action upon the (c) statute of *Marlebridge*, for driving a distress into another county, the defendant shall be ransomed, (which admits that he shall be fined). 30 Ass. 38. Ro. Abr. 219. (c) 52 H. 3. c. 4, which see explained, 2 Inst. 106.

In an assise of rent, if the tenant be found guilty of a disseisin with force, because of a rescue done by him, without *vi et armis*, he shall be fined, though this be not within the statute. 33 H. 6. 206. Ro. Abr. 219. || Br. *Fine sur Contempts*.

pl. 40. cites S. C. S. P. in assise [generally as it seems], but otherwise if the disseisin be found without force; for there he shall be only amerced; for the writ of assise does not mention *vi et armis*, but *injuste et sine judicio disseisivit*. 8 Co. 59 b. M. 6 Ja. in Scac. *per Cur.* in Beecher's case, cites S. C. S. P. accordingly by reason of the force; and if the defendant brings certificate of Assise, which is returned *tardè*, yet *capias pro fine* shall issue. So, if the defendant brings Attaint; but contrary upon writ of error. Br. *Fine sur Contempts*. pl. 46. cites 33 H. 6. pl. 21. Vin. Abr. *Amercement* (Z) pl. 3. note.||

In all judicial writs, if the plaintiff is barred, nonsuit, or his writ abates, the plaintiff shall not be amerced, (d) because the process is founded upon a record. 8 Co. 61. a. (d) That a man shall not be fined in an

audita querela. 12 H. 4. 15. b. Ro. Abr. 219.

But as fines and amercements in those actions, by not being levied, became matter of form, it was thought hard, that for any irregularity herein a judgment should be arrested; and therefore,

By the 16 & 17 Car. 2. c. 8. it is enacted, "That no judgment after verdict, confession by *cognovit actionem*, or *relicta verificatione*, shall be reversed for want of *misericordia*, or *capiatur*, or by reason that a *capiatur* is entered for a *misericordia*, or a *misericordia* is entered where a *capiatur* ought to have been entered." For which vide tit. Amendment and Jesfail.

And by the 5 W. & M. c. 12., reciting that divers suits and actions of trespass, ejectment, assault, and false imprisonment, brought by party against party in the respective courts of law at *Westminster*; and upon judgment entered against the defendant or defendants in such suits or actions, the respective courts aforesaid do (*ex officio*) issue out process against such defendant and defendants for a fine to the crown for a breach of the peace thereby committed, which is not ascertained, but is usually compounded for a small sum of money, by some officer in each of the said courts, but never estreated into the Exchequer; which officers, or

or some of them, do very often outlaw the defendants for the same, to their great damage; therefore it is enacted, "That no writ or writs, commonly called *capias pro fine*, in any of the said suits or actions in any of the said courts, shall be sued out or prosecuted against any of the said defendant or defendants, or any further process thereupon, but the same fines, and all former fines, yet unpaid, are and shall hereby be remitted and discharged for ever. Yet nevertheless the plaintiff or plaintiffs in every such action shall (upon signing judgment therein, over and above the usual fees for signing thereof) pay to the proper officer, who signeth the same, the sum of six shillings and eight pence, in full satisfaction of the said fine, and all fees due for or concerning the said fine, to be distributed in such manner as fines and fees of this kind have usually been, and not otherwise; which said officer and officers shall make an increase to the plaintiff or plaintiffs of so much in their costs, to be taxed against the said defendant or defendants."

Salk. 54.
Comb. 387.

But, though this statute takes away the *capiatur* fine, yet it is said to be the practice of the Court of Common Pleas, to make a special entry of the judgment in this manner, *nihil de fine quia remittitur per statutum* in the same manner as where the fine was pardoned, in which case the entry was *nil de fine quia pardonatur*.

Lindsey v.
Sir Talbot
Clerk, Carth.
390. Salk. 54.
S. C. Comb.
387. S. C.

But it was ruled on debate in the King's Bench, that this statute having taken away the fine, there was no judgment of *capiatur* to be entered against the defendant, nor any thing in lieu thereof, but that that clause was totally to be left out of the judgment, for that it was not like the case of a pardon, which does not alter the law, but only excuses that party, so *nihil de fine quia pardonatur*.

2. At what Time to be awarded.

Co. Litt. 126.
5 Co. 49.
Cro. Eliz. 65.
Cro. Car. 564.

If in a real action the tenant comes the first day and renders the land, he shall not be amerced.

38 E. 3. 20.
Ro. Abr. 212.

So, in detinue for a box of charters by the heir, upon the delivery of his father; if the defendant comes the first day, and says, that he hath been always ready to tender them, and yet is, if the plaintiff does not traverse this, the defendant shall not be amerced.

14 E. 3. 16.
Ro. Abr. 212.

In a *cui in vita*, if the tenant vouches, and the vouchee comes the first day of the summons and tenders, yet he shall be amerced; for when the tender is not at the first day of the original, an amercement is due to the king.

2 R. 2. 45.
Ro. Abr. 213.

In an account, if the defendant comes the first day and tenders the money, and the plaintiff accepts it, none of them shall be amerced.

46 E. 3. 40.
Ro. Abr. 212.

So, in an account, as receiver of rol., if the defendant pleads, never his receiver, and this is found against him, by which he is adjudged

adjudged to account; and after he comes and tenders the 10*l.*, and makes oath, that after the time that the money was delivered to him, he could not find any thing to buy for profit, this shall be a good discharge of the defendant, and neither he nor the plaintiff shall be amerced.

In dower, if the tenant, after he is (a) essoined, renders dower, and avers, that he hath always been ready, &c., the tenant shall not be amerced.

22 E. 3. 1.

Ro. Abr. 212.

(a) But, if the tenant tenders

to the demandant her dower, after she hath taken a day *prece partium*, he shall be amerced, though this delay was by the assent of the demandant. 18 E. 3. 39. Ro. Abr. 212. S. C. but a *quare* is added.

In a writ of dower, if the tenant vouches the heir of the baron, and the vouchee demands the lien; and upon this the vouchee enters into warranty, as he who hath nothing by descent, &c., and the tenant says that he hath assets by descent; upon which judgment is given, that the demandant shall recover against the tenant, &c., the vouchee shall be *in misericordia*, though he doth not counterplead the warranty.

18 E. 3. 14.

Ro. Abr. 212.

If in an action of debt the defendant comes the first day, and appears by attorney, and makes defence, *scilicet, defendit vim & injuriam quando*, &c., and after the attorney pleads *non sum informatus*, the defendant shall be amerced; for he ought to have acknowledged the action the first day, and not to have made any defence.

Ro. Abr. 213.

Hobberly v.

Lewis ad-
judged.

So, if in debt the defendant comes the first day, and imparls till the next term, and then judgment is given upon *non sum informatus*, the defendant shall be amerced. || *Rolle* adds, "adjudged *quod capiatur*; but it seems as if this was mistaken." ||

Ro. Abr. 213.

Dame Slaney
v. Vawtrej.

But, if in an action of debt, the defendant comes the first day by attorney, and says, that *non est informatus*, and thereupon judgment is given, the judgment shall be against the defendant for the debt, damages and costs; but *nihil in misericordia quia venit primo die per summonitionem*, because this is all one, as to the plaintiff, as if he had confessed the action, for he is not more delayed by this, and this is the course of the Common Pleas in such cases.

Ro. Abr. 213.

Barecroft v.
Rooks. Yelv.
108. Dismo
v. Sherley,
S. P. adjudged.

If in a writ of entry, *in le quibus* in *Wales*, the defendant pleads *non disseisivit*, and pending this plea, a general pardon is made by parliament, by which all fines, amercements, &c. are pardoned, and after judgment is given for the demandant, yet the tenant shall not be amerced for the delay after; for the not rendering the first day, according to the command of the king's writ, is the cause of the amercement, and that is pardoned.

5 Co. 49. Hall
v. Vaughan,
adjudged.Moore, 394.
S. C. adjudged.
Co. Litt. 126.Jenk. Cent.
258. S. P.

If in debt against executors the defendants do not appear the first day, but after come and plead *plene administraverunt*, and thereupon the plaintiff prays judgment *quando assets acciderint*, he shall have such judgment, and the defendants shall be amerced. And though in this case it did not appear, by the record, but that the defendants pleaded the day of the declaration, yet *per*

Vent. 96.

Noel v. Nel-
son, adjudged.
Sid. 449. S. C.
adjournatur.Lev. 286. S. C.
adjudged, and*Vaughan*

said it was after impar-
lance. Sand. *Vaughan C. J.* it shall not be so intended, unless entered *ven-*
erunt primo die.

226. S. C. adjudged, and there said by Sanders, that it was not law; for though they delayed the plaintiff, yet by their subsequent plea they excused themselves of the *tort*; as if in a *quare impedit* a bishop imparls, and after pleads *he claims nothing but as ordinary*, he shall not be amerced, because he hath excused himself of the wrong; but *quare* of this reason, because in this very case the bishop shall be amerced, as appears by Hob. 200. Cro. Ja. 93.

Co. Litt. 127. If the plaintiff be nonsuit, or if a writ abate by the (a) act of
8 Co. 61. the plaintiff or demandant, or for matter of form, the plaintiff or
Ro. Abr. 219. demandant shall be amerced.

(a) But, if a writ abate by the act of God, the plaintiff or demandant shall not be amerced. Co. Litt. 127.
8 Co. 61. S. P. So, in trespass for taking his corn, if upon the pleading the right of the tithes come in question, by which the writ abates, yet the plaintiff shall not be amerced, because there was not any default in him. 38 E. 3. 6. b. Ro. Abr. 213. S. C.

43 Ass. 18. In an action brought by two, if the writ abate (b) by the
43 E. 3. 23. death of one of them, the other shall not be amerced, because it
Co. Litt. 127. is by the act of God, without the default of the party.
Ro. Abr. 213.

(b) [Such an abatement is now prevented by 8 & 9 W. 3. c. 11. § 7.]

47 Ass. 3. So, if two join in a personal action, and one is nonsuit, which
8 Co. 61. in law is the nonsuit of the other, yet the other shall not be
amerced, because this is not his fault.

8 Co. 61. a. If one demandant or plaintiff is nonsuit in such action, wherein
summons and severance lies, and the other proceeds therein, he
that is nonsuit shall not be amerced.

3. Whether to be awarded when the Party is acquitted as to Part.

8 Co. 61. a. It seems to be a general rule, that if part is found for the de-
mandant or plaintiff, and part against him, he shall be amerced.

Ro. Abr. 216. As, if in action of covenant for several covenants broken, the
Wassel and Yelton, Ro. plaintiff be barred for one, he shall be amerced for this, though
Rep. 411. S. C. he recovers for the other.

Ro. Abr. 216. So, in an action upon the case upon a promise to do two
Ro. Rep. 411. things, *scilicet* to pay so much for certain land sold, and if the
3 Buls. 230. vendee sells it again for more than he paid, to pay so much
S. C. adjudged more; and the defendant pleads in bar a release, which is ad-
upon a writ of judged no bar for part, (*scilicet* for the last sum,) and a bar for
error, and the the first sum; he shall be *in misericordiâ* for this sum of which
judgment af- he is barred, though it be an entire promise; and he could not
firmed accord- have an action but upon both parts, for he might have acknow-
ingly. ledged himself satisfied of that which he had released.

Mustard v. If the plaintiff declares that he was possessed of an hoy, float-
Harnden, Sir ing at anchor in the river *Thames*, loaded with goods, and that
T. Raym. 390. the defendant *satis sciens*, being master of a ship sailing in the
river, so negligently governed his said ship, that she *in prædict.*
naviculam of the plaintiff *violenter ruebat*, & *illam fregit & sub-*
mersit; and upon not guilty pleaded the jury find, that *quoad*
negli-

negligentem gubernationem navis præd. defend. per quod in navigulam querentis violenter ruebat, & illam fregit & submersit the defendant is guilty, & *quoad residuum præmissorum* that he is not guilty, the plaintiff shall not be amerced, for there is no *residuum*, and the first part of the verdict comprehends all the injury complained of in the declaration.

In an action of waste *in domibus & gardino*, if upon the writ of inquiry of waste the defendant be found guilty *in domibus*, and not guilty *in gardino*, the plaintiff shall be *in misericordiâ* (a) for the garden.

14 E. 3. 27.
Cro. Car. 453.
S. C. cited and agreed, because he

counts for waste in places where no waste was done. But, where waste is assigned in cutting down twenty trees, and the waste is found in cutting down two trees only, and so the variance in quantity, it is otherwise. (a) So, if in case the plaintiff declares he is seised of two hundred acres, to which he hath common appurtenant, and that the defendant inclosed, *per quod, &c.* and the jury find that he hath only ninety acres, parcel, &c. he shall be *in misericordiâ* for the residue. Palm. 270.

In (b) trespass for the battery of his servant, and the taking of his timber, if the defendant be found guilty of the taking of the timber, and not guilty of the battery of the servant, the plaintiff shall be amerced for this.

22 Ass. 76.
Ro. Abr. 217.
S. C. Moore, 692. S. P. Dyer, 89.

pl. 111. like point. (b) So, in debt, where part is found for the plaintiff, and part for the defendant. 2 Sid. 137. Cro. Eliz. 699.

If in debt upon the statute of H. 8. for buying titles, the plaintiff demands 50*l.* for the value of the land, and the jury find the value but 20*l.*, the plaintiff shall have judgment, &c., but shall be amerced *quoad* the residue of the 50*l.*

Cro. Eliz. 257.
Savery v. Tey.

But in trespass, or other actions where the plaintiff declares *ad damnum*, if less be found than he declares for, yet the plaintiff shall not be amerced, because the action is founded upon an uncertainty.

Cro. Eliz. 257.
per Curiam.

In replevin, if the defendant avows the taking of two several distresses, for several causes, and issue is joined upon the taking of one distress, and found for the plaintiff, and a *nolle prosequi* entered as to the other, the plaintiff shall not be amerced.

2 Sid. 136.
per Curiam.

4. *Whether to be awarded where there are several Parties, and some of them only acquitted.*

If all or part is found against one tenant or defendant, and nothing or but part against the other, the demandant or plaintiff shall be amerced, unless there be no default in him.

8 Co. 61.

In an assise against two, if it be adjudged against one upon his plea, and the demandant release his damages, and have judgment presently for the land against him, relinquishing his suit against the other, he shall not be amerced for the other.

44 Ass. 33.
44 E. 3. 24.
Ro. Abr. 217.

In trespass against several, one is found guilty, and the plaintiff prays judgment against him, relinquishing his suit against the rest, he shall not be amerced for them.

44 Ass. 33.
44 E. 3. 24.
Ro. Abr. 217.

In trover and conversion of 1000 loads of coals against three persons, if one of the defendants is found guilty of 100 loads, and

Ro. Abr. 217.
Warne and

Player, Cro.
Car. 54, 55. S. C.

and not guilty of the rest, and another guilty of 100 loads, and not guilty of the rest, and the third guilty of 100 loads, and not of the rest, in this case the plaintiff shall not be amerced against any of them, because each of them is found guilty of part, though severally.

23 Ass. 18.
Dyer, 312.

In an assize against two, if the plaintiff recovers against one, and the other is found not guilty, the plaintiff shall be amerced as to him.

19 H. 6. 32.
Ro. Abr. 216.

In a writ of forcible entry against several, for entering with force, and holding out with force; if some are found guilty of the forcible entry, and not guilty of the holding out with force, the plaintiff shall be *in misericordia* for this.

19 H. 6. 32.
Ro. Abr. 216.

So, if some are found guilty of the holding with force, and that they entered peaceably, the plaintiff shall be amerced for this.

17 E. 3. 46.
Ro. Abr. 216.
S. C.

If a man brings an assise against the tenant and disseisor of a rent-service, and the tenant is acquitted, and the disseisor found guilty, the demandant shall be amerced for the tenant.

31 Ass. 31.
Ro. Abr. 216.
S. C.

So, in an assize of a rent against one tenant and two disseisors, if he recovers against the tenant and one disseisor, and the other is acquitted of the disseisin, the demandant shall be amerced for him.

5. Of awarding Fines and Amercements jointly or severally.

11 Co. 43.
Ro. Rep. 74.
Dyer, 211.
Lev. 125.

If there are several defendants, and all of them convicted, a joint award of one fine against them all is erroneous, for it ought to be severally against each defendant; for otherwise one, who hath paid his proportionable part, might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another.

11 Co. 42.
Godfrey's case.
Ro. Rep. 32.
73. S. C.

If at a court-leet twelve of the inhabitants, time out of mind, by the steward, have been sworn chief pledges, who at every leet have used to present, that they the said chief pledges should pay to the lord of the leet 10s. *pro certo leta*, and accordingly have paid it at the said leet; if at a court-leet twelve chief pledges being sworn to inquire of the articles of the leet, refuse to present, that they ought to pay 10s. *pro certo leta*, the steward cannot impose one joint fine upon them all, but must fine them severally; for the refusal of one is not the refusal of the other.

11 Co. 43. a.

If in an assise against two the disseisin is found with force, though the disseisin was joint, yet the fine shall be several.

11 Co. 43. a.

If in a plaint two are nonsuited, the amercement shall be several.

11 Co. 43. a.

And though the judgment be against two, and *ideo in misericordia*, yet when it is affected by the coroners *in pais*, the amercement shall be laid on them severally.

11 Co. 43.

So, if there are several defendants, and by law they are to be fined, though in the entry of the judgment it is *ideo capiantur*, yet it shall be taken *reddendo singula singulis*, and there shall issue several *capias pro fine*.

11 Co. 63. b.

Yet in some cases a fine or amercement shall be imposed upon several

several jointly, as upon a county, hundred, and so upon a village, &c., as for the escape of a murderer, &c., because of the uncertainty of the persons, and the infinity of their number.

In trespass against two, if one be found guilty to damage *quoad* him, and the other is found guilty to damage *quoad* him; in this case each defendant shall be amerced severally, and the plaintiff shall also be severally amerced *quoad* each of them. 5 Co. 58.

6. *Whether the Party can be twice amerced in the same Action.*

It is laid down as a rule, that a defendant shall not be amerced twice in the same action, for that would be to punish him twice for the (a) same offence. 8 Co. 61. a. Ro. Abr. 218. (a) But where one defendant

may be amerced several times for several defaults in the same action, vide 2 Leon. 4, 5, 185, 186.

In a *quare impedit*, if the plaintiff recovers the presentation against the defendant, and thereupon judgment is given upon demurrer for a writ to the bishop; and upon this the defendant is amerced, and after, a writ is awarded to inquire of the damages and the other points of the writ, and found accordingly, and judgment also given; for this the defendant shall not be amerced again. 5 Co. 58. b. Ro. Abr. 218.

In an action against the same defendant or tenant, if the defendant or tenant pleads one plea to part, and another plea to the rest, or confesses part, and pleads to issue for the other, and several issues are found against him, yet the defendant or tenant shall not be twice amerced. 5 Co. 58. Ro. Abr. 218.

If in an *ejectione firmæ* against four, three are found guilty *quoad* part, and not guilty for the residue, and the fourth is found not guilty generally, the plaintiff may be amerced jointly *quoad* all the defendants, *scilicet*, *pro falso clamore quoad* the three, for so much of which they were found not guilty, and *pro falso clamore quoad* the fourth, *quod sit in misericordiâ*. And the prothonotaries said the usual course was so, and sometimes otherwise, *scilicet*, that *quoad* the three for so much, &c., he be *in misericordiâ*, and *quoad* the fourth that he be *in misericordiâ* also. Cro. Car. 178. Deckerow & al' v. Jenkins,

In dower defendant confesses as to part, and judgment is given against him *quod sit in misericordiâ*, and as to the rest he pleads in bar, upon which there is a demurrer, and judgment is given against him, *quod sit in misericordiâ*. It was objected in error, that a man ought not to be twice amerced in the same action; but it was holden well enough in this case, because both judgments are final and independent of one another; but according to the report of this case in *Salkeld*, it would be otherwise where one judgment is only interlocutory and depends upon another, as (b) *quod computet* in account. Lord Gerrard v. Lady Gerrard, Salk. 54. 253. Ld. Raym. 72. S. C. Comb. 352. S. C. and S. P. 5 Mod. 64. S. C. and S. P. Skin. 592. S. C. and S. P. adjudged, because the second

amercement was for a new delay. (b) That in account, if the defendant be adjudged to account, judgment shall be presently before the final judgment, *quod sit in misericordiâ quia non* VOL. III. S s prius

prius compuiavit; and in this case, if he be afterwards found in arrearages, judgment shall be again, *quod sit in misericordiâ*. Ro. Abr. 218. Parrey's case adjudged, and affirmed upon a writ of error, and said by the clerks to be the course of the court.

(D) Where a Fine ought to be awarded, and not an Amercement; & *vice versâ*.

8 Co. 39.
Hob. 180.

(a) For the various significations of the word *fine*, vide actions of debt, the defendant is only to be (b) amerced.

8 Co. 59.

Co. Litt. 126. — And that there is no difference between a fine and *ransom* in a legal understanding; for a fine makes an end of the business, and so does a *ransom*, because it redeems from imprisonment; and if they were different things, it would follow, that where the books say that a man shall make a fine and ransom, they must be taken to intend, that he ought to pay two different sums, of which there is no precedent, Co. Litt. 127. a.; but in Dyer, 232. pl. 5. it hath been adjudged, that where a man is to make fine and *ransom*, the ransom must be treble the fine at least. (b) That if a sheriff, having returned a *cepi corpus* into the King's Bench on a *capias* against a man on an indictment of felony, does not bring him in at the day, it seems that he is by the course of the said court to be amerced, not fined. 40 Ass. pl. 42. — So, if a vill or hundred suffer a felon to escape without being arrested, they are to be amerced, not fined. 3 Inst. 53. Dyer, 210. 4 Inst. 294. — But whether the punishment inflicted on a gaoler for suffering a criminal negligently to escape, be properly a fine or an amercement, *Q. & vide* 8 H. 5. 2. Fitz. Coron. 84. 292. Rast. Ent. 583. 27 Ass. pl. 9.

8 Co. 60.

(c) So, in replevin it was adjudged for the avowant, a *retorno*

A man shall be fined and imprisoned for all contempts (c) done to any court of record, against the commandment of the king's writ under his great seal, as in a *quare non admisit*, *quare incumbravit*, attachment upon a prohibition, &c.

habendo awarded, and there the sheriff returned an *elongata*, and a *withernam* was awarded, though the plaintiff brought the money into court, and prayed the process might be stayed; yet the court would not grant it till they had assessed a fine upon the plaintiff. 2 Leon. 174.

8 Co. 58.

Beecher's case, Cro. Ja. 211. S. C. and S. P.

But when the demandant or plaintiff, tenant or defendant *se retraxit*, or *recessit in contemptum curiæ*; yet this is no contempt against the commandment of the king by writ, and therefore he shall not be fined in such case, but amerced only.

8 Co. 60. a.

If in replevin the defendant claims property falsely, and this in a *proprietate probandâ* is found against him, he shall be fined and imprisoned.

8 Co. 60. a.

If one denies a recovery or other record to which he himself is party, he shall not be fined; for it is not his act, but the act of the court; and he does not deny the record absolutely, but *non habetur tale recordum*.

Ro. Abr. 222. and several cases there cited out of the year-books to this purpose.

In an assise, if the tenant be attainted of a disseisin with force, he shall be imprisoned.

Ro. Abr. 223.

But in an assize for a rent-seck, if the defendant be found a disseisor by denier only, the judgment shall not be *quod capiatur* but only *in misericordiâ*.

Also, in an assise of a rent-charge against several tertenants; if it be found the plaintiff distrained for this, and one of the defendants, without consent of the rest, made the rescous, though the others are disseisors by the denier; (a) yet they shall not be imprisoned, but only he who made the rescous.

with force. 39 Ass. pl. 4.
Ro. Abr. 223.
(a) For he who made the rescous is the only disseisor
Co. Litt. 161. b.

In an assise, if the tenant by his plea does not deny the ouster, though he be after found a disseisor without force, yet he shall be imprisoned.

28 Ass. 15.
Ro. Abr. 222.
S. C.

In an assise of nuisance, if the defendant be found guilty, he shall be imprisoned.

19 Ass. 16.
Ro. Abr. 222.
S. C.

Although in all actions (b) *quare vi & armis*, as rescous, trespass, &c., the defendant shall be fined; yet (c) in actions of (d) trespass upon the (e) case, if the defendant be found guilty, the judgment shall not be *quod capiatur*, but *quod sit in misericordia*.

(b) 8 Co. 59. b.
Ro. Abr. 222.
(c) 8 Co. 59.
Hob. 180.
(d) That in trespass or other actions,

where the plaintiff declares *ad damnum*, if less be found than he declares for; yet the plaintiff shall not be amerced, because the action is founded upon an uncertainty. (e) So, in an action against an inn-keeper for goods stolen, the judgment shall not be *quod capiatur*. Cro. Ja. 224. adjudged.

Cro. Eliz. 257.

But in trespass, if the plaintiff declares that he levied a plaint in London, and upon process *J. S.* was arrested by a serjeant, and that the defendant *vi & armis* rescued him, *per quod* he lost his debt; and upon not guilty pleaded, it be found for the plaintiff; the judgment hereupon ought to be *quod defendens capiatur*; for though the nature of the action is properly an action upon the case, as touching the loss of the debt of the plaintiff; yet this being with force to the serjeant who was a minister as well to the plaintiff as the court, the plaintiff may count *vi & armis*.

Hob. 180.
Wheatly and Stone. Ro. Abr. 222.
S. C.

If a man denies his own deed, and this is found against him by verdict, he shall be imprisoned for his falsity, and trouble to the jury.*

Ro. Abr. 220.
224. 2 Bulst.
230. S. P.

* Qu. If this is now law.

But, if a man, where his own deed is pleaded against him, pleads *non est factum*, and after at the *nisi prius*, or before verdict, *relictâ verificatione cognoscit* this to be his deed, he shall not be imprisoned, but only amerced.

But for this vide 8 Co. 60.
Ro. Abr. 224.
Keilw. 42.
2 Ro. Rep. 45.
2 Keb. 678. 688.

Noy, 4. Cro. Ja. 64. Dyer, 67. Raym. 202. Mod. 73. 2 Saund. 189. 2

If a man pleads a deed of the plaintiff or his ancestor, made to the ancestor of the defendant who pleads it, and this is found against him, he shall not be imprisoned for his falsity, because he could not know whether this was his deed or not, being made to his ancestor.

20 Ass. 10.
Ro. Abr. 224.

In trespass *contra pacem*, for trampling his corn; if it be found that the cattle of the defendant escaped, but not *contra pacem*,

27 Ass. 56.
Ro. Abr. 223.

S. C. * *Qu. de hoc*, if now law? and trampled the corn, yet the defendant shall be imprisoned, for he ought to keep his cattle at his peril.*

Ro. Abr. 222, 223. In an action upon the case, upon an *assumpsit*, if the defendant be found guilty, the judgment shall not be *quod capiatur*, but *quod sit in misericordiâ*.

Ro. Abr. 223. 8 Co. 59. S. P. In a writ of deceit against the party who recovered in a real action and the sheriff, if it be found that no summons was because made, he that recovered before shall be imprisoned. founded upon the deceit done to the court in obtaining judgment.

8 Co. 60. b. In all cases where a thing is restrained by any statute, the offender shall be fined and imprisoned.

Cro. Ja. 631. Like point adjudged, 12 Co. 134.; like point resolved, 2 Inst. 131. 2 Ro. Rep. 400. — In an action of *scandalum magnatum*, whether the judgment ought to be *quod defendens capiatur*, *dubitatur*; Probee and the Marquis of Dorchester, Sid. 233. adjourned, Keb. 813. adjourned upon a writ of error. Lev. 148. *dubitatur*; but the court inclined, that if it was in *misericordiâ*, it was sufficient.

30 Ass. 38. As in an action upon the statute of *Marlebridge* for driving a distress out of the county, the defendant being found guilty shall be imprisoned. †
† *Qu. de hoc*, if now law?

Ro. Abr. 222. So, in an action of debt upon the statute of 1 & 2 Ph. & Mar. c. 12. of distresses, by which the defendant shall forfeit to the party grieved, for the driving a distress out of the hundred, 5*l.*, and treble damages; if the defendant be found guilty, the judgment shall be *quod capiatur*.

Ro. Abr. 223. In an action of debt upon the statute of usury, for treble the sum lent for taking more than 8*l.* per cent., if the defendant be found guilty, the judgment shall be *quod capiatur*, because he took it contrary to the provision of the statute.

Ro. Abr. 223. Sid. 233. S. P. *arguendo*. But in an action of debt upon the statute of 2 & 3 E. 6. c. 13., for not setting forth tithes, if judgment be given for the plaintiff, the judgment shall be *quod sit in misericordiâ*, and not *quod capiatur*; (a) because this is but a debt given in recompence of tithes, and this is the usual course.

(a) In debt for 5*l.* upon the statute of 1 & 2 Ph. & Mar. c. 12. for taking above 4*d.* for a distress, the defendant shall be in *misericordiâ* only, because this action is founded upon the non-payment, and not upon the statute. Cro. Car. 560. adjudged.

Cro. Ja. 350. Oldfield v. The Hundred of Witherly. So, in an action for a robbery founded upon the statute of *Winchester*, if the defendants are found guilty, the judgment shall be *quod sint in misericordiâ*; because this action is not founded upon any *male-feasance*, but upon a *non-feasance* only.

Cro. Car. 32. Swayn and Rogers, adjudged. In an action of trespass for an assault and battery; if the battery was done before a general pardon, by which the fine is pardoned, yet the judgment shall be entered (b) *quod capiatur*; for the court need not take conuizance thereof without demand.

(b) The entry in this case is sometimes *quod capiatur*, and sometimes *quod non capiatur quia pardonatur*; but for this vide Cro. Eliz. 153. 778. Leon. 300. Brownl. 211. Yelv. 126. 5 Co. 49. Moore, 394. Jenk. Cent. 258. Lane, 71. Salk. 54. pl. 2.

(E) Who,

(E) Who, in respect of their Persons, are not to be fined or amerced.

THE king being plaintiff or demandant shall not be amerced, Co. Litt. 127.
nor shall the (a) queen consort. 8 Co. 61.

3 Bulst. 276. (a) Where the judgment is against the queen, & in *misericordiā nihil eo quod consors regis*. Ro. Abr. 215. F. N. B. 31.

An infant being plaintiff or demandant shall not be amerced, Co. Litt. 127.
and this is the reason (b) he shall not find pledges. 8 Co. 61.

3 Bulst. 276.
Palm. 518. Ro. Abr. 214. 288. (b) That he shall not find pledges. Cro. Car. 161. adjudged.

But an infant defendant shall be amerced, if he pleads with Ro. Abr. 214.
the demandant, and the matter is found against him; (c) but he Cro. Car. 410.
shall be pardoned of course. (c) And the

entry in such
case is *ideo in misericordiā sed pardonatur quia infans*. 8 Co. 61. Palm. 518. *Nihil in miseri-*
cordiā, quia infans. Cro. Car. 410.

But, if an infant brings an action by his *prochein amy*, and Dyer, 338.
pending the action comes of full age, and makes an attorney, pl. 41.
and after is *nonsuit*, he shall be amerced.

If an infant brings an action of trespass by guardian against Ro. Abr. 214.
two, and the defendants plead not guilty, and at the *nisi prius* Methwold and
the plaintiff appears in person, and a verdict is found for the Anguish, ad-
plaintiff for part, and not guilty for the rest, and one of the judged.
defendants not guilty, and judgment is given for the plaintiff for
that for which the verdict is given for him, & *quod nil capiat*
per billam for the rest; and as to him that is found not guilty,
sed nihil de misericordiā pro falso clamore, &c., quia querens tem-
pore transgressionis prædict. factæ infra ætatem existebat; yet this
is good, and no error.

If a *præcipe* is brought against an infant, and pending the plea 5 Co. 49.
he comes of full age, he shall be amerced for the delay after he Moore, 394.
comes of full age. Ro. Rep. 294.

If baron and feme are vouched in the right of the feme, and 3 Bulst. 251.
judgment is given against them, and the feme is to be amerced, 16 E. 3. 14.
they shall be amerced, (d) though the feme be within age, the Ro. Abr. 14.
husband being of full age. (d) And this
amercement shall not be
pardoned of course. 16 E. 3. 14.

In an action upon the case against baron and feme for scan- Hob. 127.
dalous words spoken by the feme, and judgment given against
both, as well the husband as the wife shall be amerced.

In an action of trover and conversion against baron and feme, Ro. Abr. 215.
for the conversion of the feme during the coverture; if the feme Cro. Ja. 439,
be found guilty by verdict, and the baron not guilty, yet both 440. Ro. Rep.
shall be in *misericordiā*; for the amercement is not for the con- 293. 3 Bulst.
version, but for the delay of the suit and the non-rendering the 151. S. C. ad-
first day, of which the baron is as well guilty as the feme. judged.

Ro. Abr. 215, 216. In a writ of dower, if the tenant vouches the baron and feme, as in the right of the feme, as heir to the husband of the demandant, and the vouchers demand the lien, upon which the lien is shewn, and they enter into warranty, as those who have nothing by descent; and the tenant says, that they have by descent, upon which judgment is given against the tenant, &c., the feme only shall not be amerced without the baron, but both.

Bro. Appeal, 25. 8 H. 4. 17. pl. 2. If a feme covert sues a groundless appeal of the death of her husband, known by her to be alive, she shall be fined.

37 Ass. 1. In an assise against baron and feme, if the feme be received upon the default of the baron, and plead in bar, and acknowledge an ouster, and the demandant take issue upon the bar, and this be found for the demandant, the tenant shall not be imprisoned for this confession of an ouster, (a) because she is a feme covert.

Ro. Abr. 220. (a) But, if a feme covert be found guilty of a trespass before the coverture, she shall be imprisoned. 22 Ass. 87. Ro. Abr. 220.

Ro. Abr. 220. If a baron of parliament be found a disseisor with force in an assise, the judgment against him shall be *quod capiatur*.

Ld. Stafford's case. Cro. El. 170. S. C. adjudged, for that it is upon a disseisin found, in which case a fine is given by the statute of Westm. 1. c. 36.; || and no person being exempt therein, it shall bind a nobleman as well as any other. || Vide 2 Inst. 236. — And Hob. 61. that barons are not subject to imprisonment, but for great contempt.

Ro. Abr. 220, 221. Earl of Lincoln and Flower. Cro. Eliz. 503. S. C. adjudged || and affirmed in error, because upon this plea found against him a fine is due to the Queen, and none shall have privilege against her, and therefore a *capias pro fine* well lies. ||

So, in a debt upon an obligation against a baron of parliament, if the defendant pleads *non est factum*, and the issue is found against him, the judgment against him shall be *quod capiatur*.

(F) Of the Reasonableness of the Fine: And herein of mitigating or aggravating it.

2 Hawk. P. C. 48. § 11. *vide tit. Judgment*; and that by *Magna Charta* every fine must be with a *salvo contentemento*, which see explained, 2 Inst. 28. WHERE a person is convicted of a criminal offence, for which he ought to be fined, the measure thereof is left to the discretion of the judges, who proportion such fine, so as to make it adequate to the offence, from the consideration of the baseness and enormity, and dangerous tendency of it, the malice, deliberation, and wilfulness with which it was committed, the age, quality, and degree of the offender, &c.

By the Bill of Rights, st. 1. W. & M. st. 2. c. 2. it is particularly declared, that excessive fines ought not to be imposed, and that all grants and promises of fines and forfeitures of particular persons, before conviction, are illegal and void. ||

Salk. 55. pl. 5. If a prosecutor accepts costs from the defendant, he cannot, by the rules of the court, aggravate his fine, because, in such cases, having no right to demand costs, if he takes them after he must take them by way of satisfaction of the wrong; after which it is unreasonable for him to harass the defendant.

But

But as to those costs given by 5 & 6 W. & M. c. 11. on the removing of a cause by *certiorari*, the prosecutor is not restrained from aggravating the fine to be set on the defendant, because he has a right to such costs by the express words of the statute. 2 Hawk. P. C. 292. *cont.* Sulk. 55. pl. 5.

A fine is under the power of the court during the term in which it is set, and may be mitigated as shall be thought proper; but after the term it admits of no alteration. Co. Litt. 260. Cro. Car. 215. Raym. 376.

If a person is indicted and found guilty of a great nuisance, and a writ goes to the sheriff to abate it, if the party refuses to abate it at his own charge, the court will raise the fine accordingly; *secus*, if the nuisance may be easily removed, as pulling down a wall, &c. Comb. 10.

Upon a motion to submit to a small fine after a confession of the indictment, which was for an assault; *Holt*, Ch. Just. took a difference where a man confesses an indictment, and where he is found guilty; in the first case, a man may produce affidavits to prove *son assault* upon the prosecutor, in mitigation of the fines: otherwise, where the defendant is found guilty; for the entry upon a confession is only *non vult contendere cum domino rege, & ponit se in gratiam curie*. Salk. 55. pl. 6. The Queen and Templeman.

If an excessive fine be imposed at the sessions, it may be mitigated at the King's Bench. Vent. 336.

The court may assess a fine, but cannot award any corporal punishment against a defendant, unless he be actually present in the court. * Salk. 56. 400. pl. 4. Comb. 36. 77. * And therefore the

personal appearance of the defendant in such cases is not to be dispensed with, unless by rule of court in motion, and the clerk in court, or some other person approved of, undertaking to pay such fine as shall be set on the offender, &c.

(G) Of the Reasonableness of an Amercement, and the Afferment thereof: And herein,

1. Of the Necessity of an Afferment.

BEFORE the statutes of (a) *Magna Charta*, and Westm. 1. c. 6. the lords used to set such excessive and grievous ameracements on their tenants, that under pretence of such ameracements they often seised the whole profit of the tenement which they had granted. To prevent this oppression, and to take away all fines and ameracements at the will and pleasure of the lord and his steward, and likewise all excessive fines and ameracements, if they were never so certain, the statutes appoint, that every (b) amercement shall be afferred, so that though the (c) court or homage (d) do award an amercement, yet it is to be afferred by the afferors, who are so called, because they *affer* or bring in the quantity of the amercement. (e) (a) That yet these statutes were in affirmation of the common law. 8 Co. 39. 2 Inst. 27.

(b) An amercement in *Latin* is called *miseri-cordia*, because it ought to be assessed mercifully, and this ought to be moderated by afferment of his equals, or otherwise a writ de *moderata misericordia* lies. Co. Litt. 126. b. for this writ *vide* F. N. B. 75. Regist. 86. 184. 187. (c) So, that though in the courts of *Westminster*, where ameracements were ordered either against plaintiff or defendant, they were carried down to the coroner to be settled and afferred.

8 Co. 39. Saund. 227. (d) In Hob. 129. it is said the jury must amerce to a certain sum, which may be mitigated and affeered by others, and therefore these offices cannot be confounded; and so in 3 Lev. 206., that every award of an amercement in a court leet must express a certain sum; but this opinion has been over-ruled by a later resolution, where it hath been holden, that though such amercement must be affeered, yet the award thereof need not express any particular sum. Salk. 56. pl. 7. [Fitzgib. and 1 Wils. 248. acc.] And therefore, in judgment of law, the award of the *miserecordia* is the act of the court only, and the assessment of the sum to be paid the act of the affeersors, and so ought to be pleaded. Kitchen, 51. See Fitzg. 109. (e) || The best derivation of the word *affeer* would seem to be from *affeur* in the Customary of Normandy, which the Latin interpreter expresses by *taxare*, that is, to set the value of a thing; and the same with *estimare*. Cowell, Voc. Affeersors, 8 Co. 39. a. In the form of the oath of the Affeersors in Kytchin, they were sworn well and duly to *tax*, *assess*, and *affeer*, &c., words seemingly synonymous.||

2 Inst. 27, 28.

169. 8 Co. 39.

These amercements are to be with a *salvo contenemento*, and were always holden too grievous and excessive, if they deprived the offender of the means of his livelihood; as, if he were a sockman, and the amercement extended to take away the beasts of his plough; if he were a military man, and it extended to take away his arms; if he were a merchant, and it extended to take away his merchandize; if he were a villein, if it took away his cart or wainage; for the words of *Magna Charta* are, *liber homo (a) non amercietur pro parvo delicto, nisi secundum modum illius delicti, & pro magno delicto secundum magnitudinem delicti, salvo sibi contenemento suo, & mercator eodem modo salvâ merchandizâ suâ, & villanus alterius quam noster eodem modo amercietur salvo wainagio suo, si inciderit in misericordiam nostram.*

(a) || The stat.

of West. 1.

3 E. 1. c. 6.

extends this

provision to

cities, boroughs,

and towns.||

8 Co. 39. a. b.

2 Inst. 27.

11 Co. 43.

Keilw. 65.

Cro. Eliz. 581.

Dalt. Sheriff,

400.

(b) || However,

as it was the

But a fine may be set without affeerment, for the statute of *Magna Charta* does not extend to those cases where a court of justice may imprison, and where a fine is set by way of mercy, as a ransom and purgation of the offence; for the statute was designed in mercy to the offenders, and not to hinder them from mercy, and so did not extend to offences that might be punished by imprisonment. (b)

object of *Magna Charta* to protect the feud from forfeiture for less offences, as it was in treason and felony; and it would have amounted to a forfeiture of the feud, if fines were so large that they could not be paid out of the person's estate without process for the sale of it; therefore, upon the estreating of fines and amercements, a practice grew up in imitation of the affeerment, of issuing writs to the Court of Exchequer to attenuate such debts, and to issue an inquisition to inquire, *quantum inde Regi dare valeat per annum, salvâ sustentatione suâ et uxoris, et liberorum suorum*; and accordingly such debts were reduced into annual payments, according to the annual value of the debtor's freehold. When the debts were thus attenuated, if they were not paid at the time, the whole was levied, because the debts were so attenuated according to the contenement of the party; and if he did not pay it according to the attenuation, he plainly endeavoured to avoid the justice of the law, and therefore the whole was immediately to be levied. Gilb. Exch. 99, 100.||

Moore, 75.

3 Leon. 7, 8.

Bendl. 159.

S. C. adjudged.

Leon. 203.

Kitchen, 51,

52. Ro. Abr.

468. Cro. Ja.

382. 2 Ro. Abr.

If at a court baron, according to the custom there used, a byelaw is made, and the penalty of 20s. laid upon every offender, and at another court a tenant is presented for a breach thereof, by which the said penalty is forfeited, this cannot be affeered.

On the presentment of a nuisance in a torn or leet, the sheriff or steward may either amerce the party, and also order him to remove it by such a day, under a certain pain, or may order him to remove it, under such a pain, without amercing him at all.

And

And the party having notice of such order shall forfeit the pain on a presentment at another court, that he hath not removed the nuisance, without any farther proceeding. And every pain so forfeited may be recovered in like manner as a fine or amercement by distress (a) or action of debt; (b) neither shall it be affeered to a less sum than is at first set.

136. Ro. Rep.
201. Allen, 78.
3 Leon. 7, 8.
(a) There cannot be a distress without a custom. Ld. Raym. 69.

¶ This means in a court baron; for a fine and all amercements in a leet, a distress is incident of common right. 11 Co. 45. a. b. Cr. El. 748. || (b) So, where a certain penalty is given by statute for an offence, of which the leet hath consuance, the steward may impose it by way of fine without amercement. Carter, 28, 29.

2. By whom the Affeement is to be.

The award of the amercement is the act of the court, but the taxing or reducing it to a certainty must be done by (c) certain officers called affeers, chosen and sworn (d) for that purpose; and therefore if an amercement be imposed in a court (e) leet, and affeered by the (f) jury, and not by sworn affeers for that purpose, it is a void amercement, and the lord of the leet cannot maintain his action for it.

8 Co. 40. b.
3 Lev. 206.
(c) That the amercements on plaintiffs or defendants in the court of Common Pleas were by the

clerk of the warrants made estreats of, and delivered to the clerk of assise within each circuit, to deliver them to the coroners in each county to affeer, and such assessment by the coroners of the respective counties hath been holden a satisfaction of *Magna Charta, quod nulla prædictarum misericordiarum ponatur, nisi per sacramentum proborum & legalium hominum de vicineto*, the coroners being elected by the whole county. 8 Co. 39. b. (d) || See the form of the oath in Kytch. 47. || (e) So, a justification for an amercement in a court-baron, without shewing it was affeered, is naught. 3 Lev. 19. (f) But it has been holden, that if a jury in a leet tax an amercement, this is sufficient without any other affeement, for the amercement is the act of the court, and the affeement of the jury. 8 Co. 40. b. Jon. 301. Cro. Car. 275. Fitz. 109. Vide 2 Ro. Abr. 542.

Although by the express words of *Magna Charta, comites & barones non amercientur nisi per pares, &c.*, yet long usage (g) hath prevailed against it, for the amercement of the nobility is reduced to a certainty, viz. a duke 10*l.*, an earl 5*l.*, a bishop who hath a barony 5*l.*, &c.

2 Inst. 28.
6 Co. 54. 8 Co.
40. a. S. C.
(g) || The amercements were reduced to this cer-

tainty by an order of the House of Lords. In former times the earldoms and baronies were affeered by the peers in parliament, and to that end, it is supposed, that estreats of the *misericordias* were sent to the clerk of the parliament. Gilb. Exchequer, 81. ||

In an (h) assise, if the plaintiff does not appear, nor any for him, yet three of the assise may be sworn to affeer the amercement, and shall do it.

28 Ass. 26.
Ro. Abr. 212.
(h) So, upon a nonsuit after

the jury are ready to give their verdict, the court may cause the amercement to be immediately affeered by the same jurors. 8 Co. 35. b. 11 Co. 43. b.

In (i) trespass if the defendant, as bailiff, &c., justifies, for that the plaintiff was presented, &c., and sets forth, that the amercement was affeered by two affeers, he ought to shew their (k) names.

Keilw. 66.
(i) So, in debt for an amercement. 3 Keb. 362. (k) So,

if alleged, that at a court-baron *coram sectatoribus ejusdem Curie*, it was presented, &c. the names of the suitors ought to be shewn. 3 Leon. 7, 8. Moore, 75. Bendl. 159.

(H) Of the Manner of recovering Fines or Amercements.

Cro. Eliz.
581. Savil, 93.
Rast. Ent. 151.
553. 606.

2 H. 4. 24. b. 10 H. 6, 7. Raym. 68. (a) And the defendant shall not be allowed to wage his law in any such action, because it is grounded on the act of a court of record. 10 H. 6, 7. Co. Litt. 295. 2 Ro. Abr. 106.

Hob. 129.
Rast. Ent. 553.
Co. Ent. 572.
(b) But that it need not be alleged in the presentment

itself. Hob. 129. — Yet *per* 2 Hawk. P. C. c. 10. § 21, it is most adviseable to have such an allegation, and that perhaps may supply the want of the averment of jurisdiction in the pleadings.

But for this
vide 2 Hawk.
P. C. c. 10.
§ 22. and
several author-
ities there
cited.

Also, it is adviseable to allege, that the offence was committed as well as presented, and to shew the names of the presentors and the affeerors in setting forth a presentment or affeerment, and also to shew that proper notice was given of holding the court.

2 Hawk. P. C.
c. 10. § 25. and
the authorities
there.

Of common right, a distress is incident to every fine and amercement in a torn or leet, for offences of common right within the jurisdiction thereof; but, if the offence was only the neglect of a duty created by custom, and of a private nature, it is clear that there must be a custom to warrant a distress, and perhaps such custom is also necessary though the duty be of a publick nature.

Ro. Abr. 670.
2 Inst. 104.

Also, the sheriff or lord may for such fines or amercements distrain the goods of the offender, even in the highway, or in land not holden of the lord, unless such land be in the possession of the crown.

Owen, 146.
Noy, 20.

But such fines and amercements being for a personal offence, no stranger's beasts can lawfully be distrained for them, though they have been levant and couchant upon the lands of the offender.

Hetley, 62.
Finch, 476.
8 Co. 41. Ro.
Rep. 76. Noy,
17. Buls. 53.

If such court is in the king's hands, the distress may be sold of common right, after it hath been kept for a reasonable time, as the space of sixteen days. And it seems the better opinion, that where any such court is in the hands of a common person, if the goods were distrained for an offence of a publick nature, they may be sold of common right, without any special custom for that purpose.

Cro. Eliz. 698.
748. Moore,
574. pl. 789.
607. pl. 839.
2 Keb. 745.

No bailiff can lawfully distrain for any such fine or amercement without a special warrant for so doing, which must be set forth by him in an avowry or justification of such a distress. Salk. 107. pl. 2.

FINES AND RECOVERIES.

A FINE is an agreement of the parties on record, by which lands are transferred from conuzor to conuzee, with or without a render. This is esteemed a conveyance of greater security than a feoffment, or the investiture by livery, being not only equivalent to the notoriety of livery (a), but having the constant and undoubted credit of a court of record to protect and support it; and this farther convenience and security, that it does not only transfer the right of the vendor, and all claiming under him, but likewise extinguishes the right of others who omit to make their claim in due time.

Spelman describes it thus: Finis est sollemnis ritus transferendorum prædiorum in Curia Regis civilium causarum, quo nihil sanctius vel augustius ad alienationes

& hereditates stabiliendas. Spel. Glos. voc. Finis. (a) [But this was not on account of the acknowledgment thereof in a court of record, for no such acknowledgment is made in any of the ancient fines; but because lands acquired in this manner were supposed to be recovered by sentence of a court of justice, and the possession was delivered by the sheriff, in pursuance of a writ delivered to him for that purpose. Cruise on Fines, 6.]

Fines seem originally to have been invented and allowed for different ends and purposes than they are now applied to. They were at first no more than a friendly composition and determination of the matters in debate between the demandant and tenant in the lord's court. And this way of composing differences was easily admitted in those days, because the suitors of the court, who were judges of all suits, were by these amicable compositions the sooner dismissed from their attendance at the court. Nor did the lord of the manor suffer by them, because on these agreements, the parties litigating paid him a fine for his *congé d'accorder*, as they do the king at this day, which was equivalent to the amercements, which were paid him in adversary suits.

From an observation of the peculiar benefit and security from fines, and from the countenance and encouragement they received from the courts of justice, men began to engage themselves, and oblige each other by covenants to compose their differences. And they were the more easily drawn into this amicable way, because it was not attended with the usual expences of adversary suits, which, being generally prosecuted with warmth and animosity by the parties litigating, must necessarily involve one or both parties in difficulties, which such friendly compositions are free from; and the judges, considering these agreements as the publick acts of the court, allowed them some sanction with their own judgments. Hence they came to be improved into that useful and common assurance which we find them to be at this day, as they stand upon the statutes of 4 H. 7. c. 24. and the 32 H. 8. c. 36.

These fines were not only thought useful to private or particular persons, but such as established the publick peace of the kingdom; and *Spelman says, Fines hujusmodi maxime placuere, quod propter testationis magnificentiam, non solum ad sta-*

biliendas transactiones sed ad rescindendas lites maxime valebant; ideoque ab emptoribus terrarum tanquam

tangum sacra anchora culta & admirata. Spelm. Gloss. Verb. Finis. [Mr. Cruise thinks that the idea of a fine was originally taken from the *transactio* of the civilians; and therefore dates their antiquity no higher than the reign of *Stephen*, or his immediate successor, *Henry II.* Cruise on Fines, 7, &c.]

But for the better understanding of the doctrine of fines, we shall distinguish this head into the following branches, under which the particular cases may be comprehended.

- (A) Of the several Parts of a Fine, and when they begin to operate.
- (B) The several Sorts of Fines.
- (C) Who may levy Fines.
- (D) Of the *Dedimus Potestatem*.
- (E) Of the Operation of a Fine in barring the Issue in Tail.
- (F) Of the Operation of a Fine, in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.
- (G) Of the Remedies given to Strangers, by Claim and Entry, for the Preservation of their Right.
- (H) Of erroneous Fines, and the Manner of reversing them.

Of what things a fine may be levied, and by what name, and what shall be a sufficient description of the thing, without naming either vill, hamlet, or parish, see in the next head of *Recoveries*, of what things a recovery may be suffered.

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- (A) Of the several Parts of a Fine, and when they begin to operate.

Co. Read-
ing, 3. 10.
Plow. 394.
2 Ro. Abr. 14.
2 Inst. 510.
5 Co. 38.

A fine may be levied on a writ of right close, or in any real action, but not in an original in a personal action; and the common writ of covenant, on which a fine is levied, is not a personal, but a real action; for though it is to have damages for breach of covenant, as in personal actions, yet it is to have an execution and performance of the covenants. Salk. 340. resolved *per Curiam*.

THE first part of a fine is the original writ, and without this the fine is erroneous, and may be reversed for error in *B. R.*, this being absolutely necessary to bring the parties within the jurisdiction of the court. And though at this day the original is generally a writ of covenant, yet fines are taken on all writs in which lands are demanded, or are to be charged, or which any way relate to them; for the law having provided different remedies for the several grievances of the subject, it was but reasonable in the judges to allow of these compositions, whatever method the injured person took to recover his right.

The practice now is for the conuzor to make the conuzance, and acknowledge the fine, before any original sued out. And this has so far obtained, that the judges have resolved such fines should stand, though the conuzor died before the writ of covenant was taken out. But in these cases the originals were sued out, and made returnable, as of a term precedent to the conuzance, for they are still necessary to make the fine a perfect and complete conveyance, though for the greater expedition this variation from the ancient course has been allowed.

writ of covenant sued out and annexed thereto.

If in a *warrantia chartæ* against *B.* to warrant one acre, he levies a fine of that acre and another, the fine operates to convey only all his right in that acre he was called to defend, for the other was not mentioned in the original.

terris, and the defendant make conuzance of pasture, meadow, or wood, this fine is not good, nor *e contra*; for these being of a different nature from ploughed land, (which *terra* properly implies,) are contained in the writ, and, consequently, there does not appear to the court any contention about them. 2 Inst. 514. Co. Litt. 4. a. 2 Ro. Abr. 16.

Hence it is, that if the conuzance be of the manor of *Dale*, the conusee cannot make a render of the manor of *Salé*; or if the conuzance be of the third part, the render cannot be of the whole; because the court can determine the right only of that about which the parties contend, and which the conusee demands in his original. But, if the conuzor acknowledges all his right, &c. to the demandant, for which conuzance he grants and renders the land to the conuzor for life; or if he grants a common in the land, or so many loads of wood off it, this is a good fine; because the determination is wholly of the thing in dispute, one party taking the property, and the other a profit arising from it, and comprehended in the original, for which thing in dispute it was brought.

Therefore, if the grant and render had been of a rent *de novo*, that had been good; because the rent issuing out of the land must be implied in a demand of the land; and, consequently, the concord and agreement of the parties is received and allowed for that only which they litigated.

grant the reversion.

As nothing can pass by the fine but what is expressed or implied in the covenant, so no one can take an immediate estate by it, who is not mentioned in the writ of covenant; because none can have any benefit from the judgment of the court that is not judicially before it, and sues for it. Yet a grant and render may be made to a stranger in remainder; but the reason is, because the render being only a consideration for the conuzance, a remainder limited to a stranger may be as much a consideration to the conuzor, as if the whole estate had been given to himself. But there must be an immediate estate given back to the conuzor,

because

1 H. 7. 9.
Hob. 330.
Farmer's case.
2 Vent. 47.
|| By a rule of
Tr. 30 G. 3.
every fine at
the time of the
signing of the
judge's *allocatur*
thereon,
shall have the
1 H. Bl. 526. ||

Co. Reading,
10. 2 Ro.
Abr. 16. So,
if a writ of co-
venant be
brought *de*

2 Ro. Abr. 15,
16.

2 Ro. Abr. 15.
Co. Reading,
11. 2 Inst.
514. So, if
the writ of co-
venant be of
land, he may
2 Ro. Abr. 16.

Co. Reading, 8.
2 Inst. 514.
Bro. tit. Fines,
111. But, if a
writ of cove-
nant be
brought
against *B.*,
who vouches
C., the
vouchee may
make conu-
sance. 2 Ro.

Abr. 13. Bro. because the render *ex vi termini* implies that it must return to
105. 2 Inst. him.

514.
When the parties are judicially before the court by original, the counsel for the conusee appears with the *præcipe* and concord, which is in nature of a declaration, setting forth the conusance which ought to be made by the tenant in the writ, after his appearance is recorded. Then follows his conusance, which is no more than an acknowledgment, that the manor, or other lands, &c. contained in the writ, belong of right to the demandant, as land which he hath of the gift of the tenant, with a general release and warranty to the conusee and his heirs. When this conusance was taken, they went originally to the treasury, but now by the 5 H. 4. c. 14. they stop with the *custos brevium*, who records it; that statute providing, that all the parts of the fine shall remain in the safe custody of the chief clerk of the C. B., before the chirographer has them out of court; the design of the act being thereby to prevent the inconvenience which frequently happened by the embezzlement of fines, when they lay only in the hands of the treasurer and chirographer, either by their connivance or negligence.

2 Inst. 511.
5 Co. 39.
[Formerly the post-fine, or king's silver, was paid at the king's silver-office; but it is now paid at the alienation-office, by the stat.

The next and most material thing considerable in a fine is the king's silver. This is entered on the writ of covenant, and gives it the force and effect of a fine, and is granted to the king *pro licentia concordandi*, or *congè d'accorder*, in compensation of the amercements and other fines, which became due on judgments and nonsuits in adverse suits. This is always paid by him who takes the fee-simple by the fine, and on the entry of it on the covenant, the sum given is expressed, together with the plea, and between whom, with mention of the land for which it is given.

32 Geo. 2.
c. 14. §] the second section of which enacts, that "no fine, until the same be marked with the sum "to which the post-fine amounts in the king's silver-office, shall be effectual in law." And the officer of the king's silver-office or his deputy is restrained from receiving any writ of covenant unless it appear by the mark and indorsement of such receiver, that the post-fine has been paid.]

2 Inst. 511.
It is likewise called the post-fine, in respect of the premier fine in the banaper, which is due to the king on the original, and is greater or less in proportion to that; for it is as much as the premier fine, and half as much more; as, if the premier fine be 6s. 8d., this is 10s.

2 Inst. 511.
5 Co. 39.
Dyer, 220.
(a) Petty's case, 1 Freem. 78. [When a year and a day has elapsed

From the entry of this the fine is obligatory, and begins to operate; and thenceforth the fine shall stand, though either party die before the other parts are recorded. (a) [And though the conusor be an infant, the court cannot stay the passing of the fine: all they can do in such case is, to assign the infant a guardian, with instructions to bring a writ of error to reverse it.]

from the date of the caption, or acknowledgment of a fine, without entering the king's silver, an affidavit must be made, that all those who depart with any interest by the fine are still living, otherwise the king's silver will not be received. And now that the king's silver is paid at the alienation-office, if a year elapses before the fine is carried to the king's silver-office, an affidavit must be made, that the parties were alive when the king's silver was paid, *Barnes*, 215. *Cruise on Fines*, 25.]

But,

But, if the conusor dies before the king's silver be entered, the fine is voidable, and may be reversed by writ of error; because this being given *pro licentia concordandi*, the agreement of the parties is not to be admitted as the judgment of the court till it be paid and entered, and, consequently, if the conusor dies before that be done, the fine is erroneous, as a judgment given in an adversary suit after the death of one of the litigating parties. But this is to be understood with this distinction, that where it appears by the record itself, that the king's silver was paid after the death of the conusor, there the fine is erroneous; but where after the conusance made the conusor died before the king's silver was paid, and after his death the silver was paid, and entered on a writ of covenant returnable the term precedent his death; as where baron and feme made conusance before commissioners the 26th of *March*, the feme died the day following, and upon a writ of covenant made returnable the *Hilary* term precedent, the king's silver was entered as of that term, the fine was adjudged to stand; for where there does not appear an error on the face of the record, the judges, in favour to fines, which so much strengthen men's titles, and quiet their possessions, have always supported them, and would not suffer the entering of the king's silver, after the parties' death, to be examined, when it appeared by the record itself, that the fine was completed, as a fine of the term precedent the death of the conusor.

[The king's silver, it must be remembered, is not payable until the return-day of the writ of covenant: if therefore any of the parties die before that time, the fine will be void.]

Okell v. Hodgkinson, 3 Mod. 99. Clements v. Langharne, 2 Ld. Raym. 872. Farrar, Sir T. Raym. 461. Price v. Davis, Comb. 57. 71. Watts v. Birkett, Barnes, 220. 2 Wils. 115. S. C. || But, if there are several plaintiffs or several deforciant, and one of the plaintiffs or deforciant dies before the return of the writ, the fine will be erroneous only as against the person so dying.]

The other parts of the fine are the foot and note of it: the foot of the fine runs thus: *Hæc est finalis concordia facta apud Westm. in curia domini regis, &c.*, and mentions the day, year, and place, and before what justices the conusance was taken.

The note of the fine is no more than a docket taken by the chirographer, from which he transcribes the indentures, which are delivered to the party to whom the conusance was made; and when this is done, the fine is said to be engrossed.

any time after it is levied. 4 Leon. 96.

A fine was thus: *Hæc est finalis concordia facta in curia regis apud Westm. a die sancti Michaelis in tres septiman. anno decimo Willielmi tertii coram Thom. Trevor, &c., & postea in crast. sanctæ Trinitat. 1 Annæ concess. & recordat. coram ejusdem justiciar.*; so that the concord of the fine was of one term, and the *recordat.* of the term following; and the question was, Of which term this shall be said to be a complete fine? And it was holden to be

3 Mod. 140.

2 Inst. 511.

2 Vent. 47.

Hob. 330.

Farmer's case.

Barnes, 218.

Barber v.

Nunn.

Wright v.

Mayor of

Wickham,

Cro. Eliz. 484.

Cookman v.

Barnes, 220.

2 Wils. 115. S. C.

[A fine may be

engrossed at

5 Co. 39.

2 Inst. 468.

F. N. B. 147.

[A fine may be

engrossed at

5 Co. 39.

2 Inst. 468.

F. N. B. 147.

[A fine may be

engrossed at

5 Co. 39.

2 Inst. 468.

F. N. B. 147.

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5 Co. 39.

2 Inst. 468.

F. N. B. 147.

[A fine may be

engrossed at

5 Co. 39.

2 Inst. 468.

F. N. B. 147.

[A fine may be

engrossed at

5 Co. 39.

2 Inst. 468.

F. N. B. 147.

be a fine of the term in which the concord was made, and that the *concordia facta in curiâ* is the complete fine.

Bull. N. P. 229. [The chirograph of a fine is evidence to all persons, and in all courts of such fine; because the chirographer being an officer appointed by the law for the purpose of transcribing fines from the record, his copies must be allowed to be authentick.]

1 Cruise, 43.

Rot. Parl.

Vol. iii. 495.

543. 557. 558.

¶ There are two petitions of the Commons in the rolls of parliament, 4 H. 4. No. 35., & 5 H. 4. No. 28., stating, that many fines of lands remaining in the king's treasury, and the notes of such fines remaining in the Court of Common Pleas, had been taken away, and other fines and notes of fines counterfeited and put in their places, whereby many persons were disinherited; in consequence of which a statute was immediately passed, 5 H. 4. c. 14., enacting, that all the proceedings on fines, both previous to and at the acknowledgment thereof, should be enrolled of record in the Court of Common Pleas. And by 23 El. c. 3. § 1. & 6., it is enacted, that every writ of covenant and other writ, whereupon any fine shall be levied, the return thereof, the writ of *dedimus potestatem* made for the knowledge of the same fines, the return thereof, the concord, note, and foot of every such fine, the proclamations made thereupon, and the king's silver, may, upon the request or election of any person, be enrolled in rolls of parchment; and that the enrolments of the same, or of any part thereof, shall be of as good force and validity in law to all intents, respects, and purposes, for so much of any of them so enrolled, as the same being extant and remaining were or ought by law to be.

1 Cruise, 44.

The office of the chirographer of fines was burnt down in the year 1679, whereby several records of fines, which had been levied in *Trinity* and *Michaelmas* terms preceding, were either burnt or lost. In consequence of this an act was passed, 31 Car. 2. c. 3., reciting, that the fines so burnt or lost had duly passed all the offices, so that by the records of the king's silver, the notes of the cursitor who made out the writ of covenant, and the entries thereof at the office of alienation, and by the book of entries of fines kept by the chirographer's deputy, &c. the full contents of all such fines would appear; but for want of the records of the fines so burnt or lost, purchasers and others, whose titles were secured under the said fines, were in danger of having the same impeached; and therefore enacting, that the said chirographer or his deputy should, before the end of the next *Trinity* term, upon oath certify to the justices of the Court of Common Pleas, a note of all such fines entered into the said book kept by the said deputy, as he, upon diligent search, should find were burnt or lost by reason of the said fire; which certificate should be in parchment, fairly written, and a copy thereof set up in *Westminster* hall, &c., and that any time within three years the Chief Justice of the said Court of Common Pleas, together with any one or more of the justices of the said court, should have power to send for any officer's books, records, &c., and upon full examination of any such fine, the records whereof

were either burnt or lost, should direct the said chirographer or his deputy to new-engross the note and foot of such fine without fee, and to carry the same before the said Chief Justice, and such other of the said justices as shall have taken the examination concerning the burning or loss of such fine, who were required to sign their names at the bottom of the said note and foot; and every such fine whereof the record should be so new-engrossed, should be of the same force and effect as if it had still remained upon record unconsumed or not lost.

By a rule, Tr. 52 G. 3. (June 19th, 1813.), it is ordered, that
 “ thenceforth all fines shall be left at the office of the chiro-
 “ grapher within fourteen days after the same shall have passed
 “ the king’s silver office, and that all fines then remaining in the
 “ king’s silver office should be carried to the chirographer’s of-
 “ fice, within two months from that day, and that a neglect to
 “ comply with this rule shall be deemed a contempt of court.”

4 Taunt. 600.

If the attorney employed to levy a fine mislays the papers, and does not complete it within the time required by the above rule, the court will not permit the fine to be afterwards perfected, but, if all the parties are alive, will direct a new fine to be levied at the expence of the attorney.

Stone v. Stone,
Id. 601.Lindo v. —,
5 Taunt.
305. S. P.

By a rule E. 36 G. 3. no fine which appears to have been acknowledged more than twelve months, can pass the king’s silver office without a rule of court or judge’s order; in which case, if the consors be living, an affidavit must be made thereof; and if dead, there must be an affidavit of the time of their death. And the application for a rule or order, that the fine may pass the king’s silver office, must be made to the court on motion, if in term-time; if in vacation, to a judge at chambers: and the rule or order must be filed with the *præcipe* and concord at the king’s silver office.

1 B. & P. 530.

The courts being now in the habit of requiring that a copy of the *præcipe* and concord signed by the parties shall be left with the Chief Justice, the fine may pass upon such copy, in case the original should be lost.

Ellis v. John-
son, 6 Taunt.
231.

By 27 E. 1. c. 1. the notes of all fines shall be read openly and solemnly in the Court of Common Pleas, and in the mean time all pleas shall cease; and this on two certain days of the week, according to the discretion of the justices.

By 4 H. 7. c. 24. § 1. “ After the engrossing of every fine, it
 “ shall be openly and solemnly read and proclaimed in the same
 “ court, in the same term, and in three terms then next follow-
 “ ing the same engrossing in the same court, at four several
 “ days in every term (a); and in the same time that it is so read
 “ and proclaimed all pleas do cease.”

(a) By st. 31 El.
c. 2. the pro-
clamations are
reduced to
four, that is,
once in the
term in which
they are en-

grossed, and once in every of the three terms next after the same engrossing.

Since the making of this act, the proclamations are indorsed
 on the foot of the fine, and considered as matters of record.

1 Cruise, 53.

The statute having, as we have seen, ordained that the pro-

Plowd. 371.

clamations shall be made *the same term that the fine is engrossed, and the three terms then next following*, if one of those three terms had been adjourned, the proclamations had been ineffectual in the whole, and it could not be supplied after the last term by the exposition of the words, or the equity of the statute; to remedy which the statute of 1 M. c. 7. § 2. was passed, enacting, that “all fines, whereupon the proclamations should “not, by reason of adjournment of any term by writ, be duly “made, should be of good force, effect, and strength, to all “intents, constructions, and purposes, as if the term so adjourned (a) had been holden and kept from the beginning to “to the end thereof not adjourned, and proclamations therein “made according to the form and effect of the statute.”

(a) Though only part of the term be adjourned, it is within this act, which is a favourable law, and to be taken by equity. Dy. 186. a. 2 Inst. 519.

3 Co. 86. b.
Cr. El. 692.

Dy. 216. a.
1 Bulstr. 206.

Bull. N.P. 229.
6 Taunt. 486.

Since the statute of 4 H. 7. fines have been distinguished into fines at common law, and fines with proclamations; and it is in the election of the person levying the fine to have it proclaimed or not; the proclamations being distinct from and superadded to the fine.

When a fine with proclamations is given in evidence, the proclamations must be examined by the roll, because the chirographer is not appointed by the statute to copy the proclamations, as he is to copy the concord.

A fine with proclamations is a fine at common law, with the addition of the proclamations: if then there be error in the proclamations, that error will not affect the fine; it still stands as a fine at common law: but, if there be error in the fine, the whole is gone; for the fine is the principal, and the proclamations are only to give it notoriety.

By 23 El. c. 3. § 6. “the chirographer shall every term write “out a table of the fines levied in each county in that term, “and shall affix it in some open part of the court of Common “Pleas all the next term; and shall also deliver the contents of “each table to the sheriff of each county, who shall at the next “assizes affix the same in some open part of the court.”||

(B) The several Sorts of Fines.

Co. Reading, 4.
(b) [This fine is executed as to the first part, and executory as to the second; for if the first part was not executed, it would be void,

ALL fines are either executed, as fines *sur conusance de droit come ceo*, &c., unless *sur release*, and fines *sur surrender*; or executory; as fines *sur conusance de droit tantum*, and *sur grant & render*. (b) The fine *sur conusance de droit tantum* seems to be the most ancient; for the conusance being in the place of the judgment, which was always executory in adversary suits, the demandant was obliged to follow the rules of the law, and sue out execution. (c) But in time, when these fines became the common and best way of purchasing, the purchaser, to prevent the trouble

trouble of suing out execution, had seisin given him by livery in the country, and for his further assurance obliged the vendor, by covenant, to levy a fine; and thus the fine *sur conusance de droit come ceo*, &c. came in use, which supposes a precedent gift, by which the conusee was put into possession, and, consequently, there needs no execution of what he had already.

as the cognizee can have nothing to render to the cognizor till he is in possession. Cruise on Fines, 73.

(c) If the party to whom the estate was limited by a fine executory was in possession at the time when such a fine was levied, he need not sue out a writ of *habere facias seisinam*; for in that case the fine would enure by way of extinguishment. Touchst. 4. So, if a fine executory was levied of a reversion depending on an estate for life, or years, or of a seignory, or any thing which lay in grant, they would pass immediately, because it would be impossible to give actual possession of them. 1 Co. 97. a.]

This fine *come ceo*, &c. is most commonly used, being the surest for the purchaser. In which it is to be observed, that this fine and that *de droit tantum*, convey a fee-simple to the conusee, without words of inheritance; for when the conusor acknowledges the land to be the right of the conusee, it is repugnant and contradictory to his own acknowledgment to claim any right or interest in the land in reversion or remainder. Besides, in every judgment a fee-simple was recovered, and the conusance coming in lieu of the judgment must necessarily import as much, unless the express acknowledgment of the parties (a) qualify it.

Co. Litt. 9. b. Co. Reading, 4. 7. [This species of fine hath been called a feoffment of record; but this expression is by no means accurate; for there are cases in which a feoffment hath

a more extensive operation than a fine, Co. Litt. 50. 1 Salk. 339. 3 Atk. 141.; and therefore Sir W. Blackstone hath said, that it might, with more accuracy, be called an acknowledgment of a feoffment on record. 2 Bl. Com. 348. But this, perhaps, is not making a very substantial distinction. 2 Wooddes. 309.] (a) And therefore if the limitation be expressly to the conusee, and the heirs of his body, the fine passes only an estate-tail; for it would be absurd to give more against so solemn a declaration of the parties. Co. Reading, 4. 1 Salk. 340.

Upon a fine *sur conusance de droit come ceo*, &c. the conusor cannot reserve a rent, because the conusance supposing a precedent gift he cannot charge the inheritance which he has given entirely away; and so the *reddendum* comes too late when the fine has mentioned before an absolute gift, without any such clause of reservation.

Bro. tit. Fines, 30. 2 Ro. Abr. 18. But, if the conusance be only of an estate for life, the conusor may reserve a

rent, with clause of distress; for that is a remedy the law gives for the recovery of all rent services, which this must be, being incident to the reversion. Co. Reading, 5. 2 Ro. Abr. 18.

A fine *sur conusance de droit come ceo*, &c. cannot be levied to two and their heirs; for the end of fines being to settle the possession, not only for the present, but for ever, the admittance of such a fine would not answer the end. For besides the uncertainty which of the conusees may survive and enjoy the land, the fine itself cannot operate according to the limitation; for the survivor, by the privilege of jointenancy, shall enjoy the whole, and for ever exclude the heirs of the other conusee. Besides, the fine being equivalent to a judgment, ought to decide and settle the right of the fee.

Ro. Abr. 19. Co. Reading, 5. 9. The same law is against the grant of a reversion. Bro. tit. Fines, 65. But, if lands by fine be granted to two and the heirs of one of

them, this is good; for all things will continue as the fine has settled them. Bro. tit. Fines, 64.

|| As to lands of the tenure of gavelkind, the judges allow them to be limited to two and their heirs. Rob. Gavelk. 132. But there seems to be no reason for allowing this limitation in a fine of lands of that tenure, which does not equally apply to other lands. See Mr. Preston's Conveyanc., vol. i. 287, 288. Accordingly, a fine, though levied to two and their heirs, will be allowed to be of force. 2 Mod. 49.||

5 Co. 38. b.
Tey's case.
2 Ro. Abr. 18.
Bro. tit. Fines,
5. Co. Reading, 5.

For the former reason the judges will not, or at least ought not to, admit of a fine upon condition, because such a fine does not positively determine and settle the right of the fee, it being uncertain whether the conusee will enjoy the land according to the fine, since that depends upon the performance or non-performance of the condition. But my Lord Coke tells us, that if such fines be admitted by the judges they are valid and shall stand, the rule, *quod fieri non debet, factum valet*, obtaining in this case; because fines being the private agreement and concord of the parties, it were to trifle with the authority of the king's courts, which ever ought to be preserved sacred, to suffer either party to recede from his contract, after their solemn composition acknowledged on record, and received in the most solemn manner by the judgment and decision of a court of justice.

Co. Reading,
3. cites 19 E. 3.
Qu. for there
is no report of
that year.

A. makes a lease for life, and afterwards grants the reversion to *B.* for life, the remainder in tail by fine; in a *quid juris clamat* brought by the grantee for life against the lessee, he would have surrendered by fine to the conusee, reserving a rent during his life, but the court refused it; for had this surrender, with the reservation of the rent, been admitted, it might have happened that the rent would not continue according to the limitation of the fine; for if the grantee of the reversion died before the tenant for life, the remainder-man in tail should hold the land discharged, and the tenant for life could not enjoy the rent as long as the fine gave it. But, if in this case the lessee had surrendered to the grantee for his own life, with a reservation of a rent, this might have been admitted; for this is no absolute surrender, and each party may enjoy what the fine gave him, according to the several limitations thereof.

Co. Reading,
5. (a) Note,
the forms of
these fines *sur*
grant & render
are the same
with those *sur*
conusance de
droit, only the
clause of war-
ranty is omit-
ted.

If there be lessee for life, the remainder for life, and the lessee levy a fine *sur conusance de droit tantum* to him in remainder, this enures by way of (a) surrender, because by this fine he only acknowledges all the right he has in the land to belong to him in remainder. But, if the lessee had levied a fine *sur conusance de droit come ceo, &c.* to him in remainder, it had been a forfeiture of both their estates, and he in reversion might enter immediately. And the reason of the difference is this: the fine *sur conusance de droit come ceo, &c.* always grasps a fee-simple, which passes by the precedent gift as the fine supposes; but the fine *sur conusance de droit tantum* only conveys all his right, which is intended all he can lawfully pass away.

Price v. Lang-
ford, 1 Salk.
337. 2 Show.
92. S. C.
Carth. 140.
S. C. by the

Where *C.* was seised in fee as heir of the part of the mother, and he and his wife levied a fine to *A.* and *B.* with warranty, and *A.* and *B.*, by the same fine, granted and rendered to the husband and wife in tail, remainder to the heirs of the husband; though it was urged, that the seisin of the conusee was fictitious,

and that nothing was altered by the fine, yet resolved, that the conusee was more than a bare instrument, and that the estate was once in him; and that the fine and render is a conveyance at common law, and the render makes the conusor a new purchaser, as much as a feoffment and re-infeoffment at common law.

name of Rice
v. Langford.
Com. Dig. tit.
Discent (C. 7.)
S. C.

(C) *Who may levy Fines.*

AND here it must be first observed, that whatever legal defects may be in the conusor, if the judge admits his conusance, the fine shall stand in all cases, except that of an infant, though the judge omits a very necessary part of his duty in not rejecting such fines.

Co. Reading,
8. 2 Inst. 315.

The principal defects are either want of discretion and understanding, as in infants, idiots, and persons of *non sane* memory; or want of power, as *femes covert*.

Co. Reading,
8. But for
this *vide* the
several titles

of Infants, Idiots, and Baron and Feme.

As to fines levied by an infant, though strictly speaking all contracts made by infants are in their own nature void, because a contract is an act of the understanding, which, during their state of infancy, they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power to recede from and vacate it when it may prove prejudicial to them. Now the method to set aside such a contract must be by matter of equal notoriety with the manner in which it was made; and therefore if an infant levies a fine, which is no more than his own agreement recorded as the judgment of the court, he must reverse it by writ of error; and this must be brought during his minority, that the court of *B. R.* may by inspection determine the age of the infant. But the judges by *adjuncta* may in such cases inform themselves, as, by witnesses, church-books, &c. proof of infancy by witnesses, dies before the fine is reversed, his heir may reverse it, because the court, having recorded the nonage of the conusor, ought to vacate his contract when he appeared to be under a manifest disability at the time he entered into it. Co. Litt. 380. b. Moore, 884. An infant acknowledged a fine, and the conusees omitting to have the fine ingrossed till he came of age, in order to prevent the infant from bringing a writ of error, the court, upon view of the conusance produced by the infant, and upon his prayer to be inspected, and his age examined, recorded his nonage to give him the benefit of his writ of error, which he must otherwise lose, his nonage determining before the next term. Sarah Griffith's case, 12 Mod. 444.

Vide Postea,
letter (H), &c.
Co. Litt. 380.
b. Moore, 76.
2 Ro. Abr. 15.
Bro. tit. Error,
60. Bro. tit.
Fines, 74. 79.
2 Inst. 482.
2 Bulst. 320.
12 Co. 1. 22.
Willes, 161.
If an infant
brings a writ
of error to re-
verse a fine for
his nonage,
and, after in-
spection and

As to idiots and lunaticks, it is necessary to distinguish between their acts done *in pais* and those solemnly acknowledged on record; though the law is clear, that in neither case are they admitted to disable themselves, for the insecurity that may arise in contracts from counterfeit madness and folly. But their heirs and executors may avoid such acts *in pais* by pleading the disability; because if they can prove it, it must be presumed real,

4 Co. 124.
Beverley's
case. Co. Litt.
247. Bro. tit.
Fait, 62. Cro.
Eliz. 398. 622.
F. N. B. 202.
But in what
case they

themselves
may have re-
lief in equity,
vide tit. Idiots and Lunatics.

since nobody can be thought to counterfeit it, when he can expect no benefit from it himself.

4 Co. 124.
2 Inst. 483.
Bro. tit. Fines,
75. Co. Litt.
247. Idiocy to
be judged of
by the justices,
on fine levied.
15 Ed. 2.

But neither the lunatick himself, nor his heir, can vacate any act of his done in a court of record; and therefore if a person *non compos* acknowledges a fine, it shall stand against him and his heirs. For though the judges ought not to admit of a fine from a man under that disability, yet when it is once received, it shall never be reversed, because the record and judgment of the court, being the highest evidence in the law, the consorsor is presumed to be, at that time, capable of contracting; and therefore the credit of it is not to be contested, nor the record avoided by any averment against the truth of it.

2 And. 193.
Hugh Lewis's
case. 4 Co. 124.
a. 126. b. Bro.
tit. Fines, 75.
Co. Litt. 247.
|| But in cases
of this sort,

So it is in the case of a fine levied by an idiot, it shall stand against him and his heirs; for no averment of idiocy can vacate the fine, nor will an office finding him an idiot *a nativitate* be sufficient to reverse the fine; for that were to lessen the credit of judgments in courts of record, by trying them by other rules than themselves.

equity has relieved by decreeing a reconveyance. *Addison v. Dawson*, 2 Vern. 678. It has also relieved against a fine levied upon a possession obtained under a forged deed. *Cartwright v. Pulmey*, 2 Atk. 381. Though a fine has been levied, yet if it is under circumstances of fraud, the court, said Lord *Hardwicke*, ought to prevent the stealing away an estate in this manner. *Baker v. Pritchard*, alias *Hosier*. *Id.* 388.||

West. Fines,
§ 4.

And as fines ought not to be taken from lunaticks and idiots, so neither from old dotting men who have lost the use of their reason. But, if they be weak or infirm through age and sickness, that will be no sufficient cause to refuse them.

10 Co. 42. b.
43. a. 2 Inst.
510. Sid. 11.
Ro. Abr. 347.;
but those
books which
say, that a fine
shall not bind
a woman
under cover-
ture, unless
she be exa-
mined, must

As to feme-coverts, from the intermarriage, the law looks upon the husband and wife but as one person, and allows of but one will between them, which is placed in the husband as the fittest and ablest to provide for and govern the family, and therefore gives him an absolute power over her chattels personal, to dispose of as he pleases, without her consent. But as to her real estate, it has thought fit that no act of his shall prejudice her or her heirs in it, unless she join with him by some matter of record, and on examination testify her assent to such disposition.

not be understood as if it were in her power to reverse the fine for want of her examination; but they are to be understood in this sense, that the judge ought not to receive a fine from a feme covert without examining her, lest it should not proceed from her own freedom and choice. But, if such a fine be once admitted, and recorded without any examination, though the judge has omitted a very necessary part of his duty, yet the fine shall stand, and neither the feme, nor her heirs, shall be admitted to aver that she was not examined; for that were to lessen the credit of the judgment of the courts of justice, which is the highest evidence of the law. But of fines levied by the husband solely, or by the husband and wife jointly, of the wife's inheritance, or of fines levied by the wife solely, of lands which are of the provision of the husband, *vide tit. Baron and Feme*, (1), and the statutes 11 H. 7. c. 20. & 32 H. 8. c. 28. & c. 36.

Touchst. 6.
2 Inst. 483.

|| Duress of imprisonment, or the like, cannot be alleged at law as an answer to the operation of a fine.||

[No person can levy a fine of lands that will affect strangers, unless he has at least an estate of freehold in them, either by right or by wrong; for otherwise it might be in the power of any two strangers to deprive a third person of his estate, by levying a fine of it, so that in every case where a fine is levied, and none of the parties to such fine have any estate of freehold in the lands whereof the fine is levied, it will only bind the parties themselves, and their heirs, but may at any time be set aside by the real owner, by pleading that neither of the parties had an estate of freehold in the lands at the time when the fine was levied.]

Touchst. 14.
West. Symb.
P. 2. § 13.

Hence, therefore, if a person who is only possessed of lands for a term of years, or who holds them by a statute merchant, statute staple, or writ of *elegit*, or is tenant at will, levies a fine, it will have no effect whatever as to strangers.

3 Co. 77. b.

Upon the same principle, says Mr. Cruise, a fine levied before entry or receipt of rent will be void. (a) So, if a fine be levied by a copyholder of his copyhold (b), because the freehold is in the lord.

1 Cruise 106.
Ld. Townsend
v. Ash, 3 Atk.
336. (a) || This
observation,

says Mr. Preston, in the first volume of his *Conveyancing*, p. 263., must be understood with the qualification, that the freehold is in some other person. A fine by a person who has a seisin in point of fact, as by actual possession; or in law, as an heir on the death of his ancestor, and before any abatement by a stranger, Cro. El. 639.; or by construction of law, as a person who is entitled to the reversion or remainder expectant on an estate in the possession of his tenant, or of a person connected with him in privy of estate, may levy a fine with effect. In all these instances, the freehold is in the person levying the fine, and the plea of *partes finis nihil*, &c. will be irrelevant. In Lord Townsend v. Ash, the persons who insisted on the efficacy of the fine, were persons who had a *defeasible* title under an estate gained by adverse possession. They had levied a fine, but having levied the fine before they had any seisin in fact or in law, the fine did not avail them. || (b) Co. Cop. § 55. || That a termor, or a copyholder, may, by means of a fine, acquire the fee by non-claim, a feoffment should be made to gain the freehold, and the fine be levied at a subsequent period, (Co. Cop. § 55. Margaret Podger's case, 9 Co. 104. Focus v. Salisbury, Hardr. 401.) and as of a term *subsequent* to, and not preceding the feoffment, and so that it may appear from the record that the fine was preceded in date (measured by the return of the writ) by the date of the feoffment. When a fine is preceded by a feoffment, it will be free from the objection, that *partes finis nihil habuerunt*; for the estate of freehold is acquired by the forcible operation of the livery of seisin. 1 Prest. Conveyanc. 269. ||

But a person having a defeasible right only to lands, may, notwithstanding, levy a fine of them, which cannot be set aside by the plea that neither of the parties had an estate of freehold in the lands.

Carter v. Barnardiston,
1 P. Wms. 505.

So a *cestuy que trust* may levy a fine of his trust estate, although he is only tenant at will to his trustees; for it is now settled in equity, that any legal conveyance or assurance by the *cestuy que trust*, shall have the same effect on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestuy que trust*. If it were not so, trustees, by refusing, or by not being capable of executing their trust, might prevent a *cestuy que trust* tenant in tail from exercising the power given him by the law over his estate, which would tend to the introduction of perpetuities.

1 Ch. Ca. 213.
Ca. Temp.
Talb. 43^e.

So, a fine levied by a vouchee to the demandant, or a fine from the demandant to the vouchee, will be good; because in

3 Co. 29. b.

law the vouchee is supposed to be tenant of the land, though in fact he never is so at present.

13 Vin. Abr.
228. || The
court will not
permit a fine
to be levied in
1 Taunt. 144. ||

An alien, not being capable of holding lands, ought not to be permitted to levy a fine: but, if he does levy a fine, it will not conclude the king after office found.

which it appears that the conusor is an alien enemy. Cruttenden v. Bourbell.

Co. Read. 7.

Corporations aggregate cannot levy fines; because, as they are invisible, they can only appear by attorney; whereas the statute *de modo levandi fines* requires that the parties to a fine shall appear personally before the judges. But Sir Edward Coke saith, that a sole corporation may acknowledge a fine.

By the statutes 11 H. 7. c. 20. and 32 H. 8. c. 28. women seised of jointures or estates tail of the gift of their husbands, and husbands seised *jure uxoris* are prohibited from levying fines of such estates. And the disabling statutes, which prevent ecclesiasticks from alienating their church-lands for any longer time than three lives, or twenty-one years, by necessary implication prohibit them from levying fines.

West Symb.
p. 2. § 13.

Persons outlawed, or waved in personal actions, may alien by fine, for their estates still remain in them, although they have forfeited the rents and profits.

Stevens v.
Winning,
2 Wils. 219.

A person who hath committed murder may, it seems, before conviction, levy a fine, if the deed to lead the uses be prior to the time of committing the offence.]

1 Prest. Conv.
264.

|| Tenants in common, co-parceners, and joint-tenants having an ownership only in their aliquot parts, the operation of a fine by them will be confined to their respective shares. Though joint-tenants are seised *per my et per tout*, a fine levied by a joint-tenant of the entirety will be good only for a moiety: but it will sever the joint-tenancy.

1 Cruise, 104.
6 Mod. 45.

Fairclain v.
Shackleton,
5 Burr. 2604.
Doe v. Prosser,
Cowp. 217.

But when one joint-tenant, tenant in common, or co-parcener disseises his companion, and by that means acquires a sole seisin, the fine will operate to the extent of the share acquired by disseisin, as well as the original share. ||

(D) Of the *Dedimus Potestatem*.

By this statute nobody can be a commissioner but the judges, and two or one of them, by the

consent of the rest, may receive the conusance; and if there go but one of them, he shall take with him an abbot, a prior, or a knight, a man of good fame and credit; and writs of error have been allowed to reverse fines where the conusance hath not been taken before such persons. Bro. tit. Fines, 120. F. N. B. 146. But the present practice falls short of the order this statute prescribes, and it is sufficient if one of the commissioners be a knight, Reg. Pash. 43. El. Wils. 78.; or though neither be a knight, if one of the judges of the C. B. gives his

THE statute (a) of 15 E. 2., called the statute of *Carlisle*, introduced the *dedimus*, which is a special commission, granted out of Chancery, to certain persons therein named, to take the conusance of such persons as through age or sickness are not able to appear in court in person.

allocatur

allocatur to the caption, by which great abuses have happened in the taking of fines. (a) [This statute, as it is called, is not properly a legislative act, but is merely a writ directed to the justices of the bench, for their government in taking the acknowledgment of fines. 2 Reeves, 304.]

By the custom, the chief justice of C. B. may take conusances any where out of court, and certify the same without any *dedimus*: and if a serjeant hath a patent to be C. J., he may take conusances without a *dedimus* before he is sworn.

[So by custom, the judges of assize may, in their circuits, take the acknowledgment of fines without any writ of *dedimus potestatem*, on account of the great confidence which the law placeth in their judgment and integrity. In such cases, however, a writ of *dedimus potestatem* ought to be sued out, bearing date before the acknowledgment of the fine; although, if the writ of *dedimus potestatem* is tested after the date of the acknowledgment, still the fine will be supported.]

a justice of one or the other bench should come twice in every year into their counties to take the acknowledgment of fines.}]

If a fine be levied to one of the justices of C. B., and the said justice take the conusance of the fine, it is void, *quia judex in propria causâ*.

If the *dedimus* be directed to two jointly, and the conusance be taken by one only, the fine is erroneous; for where two are invested with a joint power, it cannot by any construction from the commission be executed by one only.

The *dedimus* contains the substance of the writ of covenant, and therefore must bear *teste* after it, otherwise it is error; and must be signed by the lord keeper or chief justice, or by some of the justices of the circuit where the lands lie.

If the commissioners refuse to certify the conusance to the court in convenient time (a), which is a year and a day, a *certiorari* is to be awarded against them, reciting the substance of the *dedimus*, and that they have taken the conusance, and commanding them to certify it; and in case of refusal to do it, an *alias*, a *pluries* and attachment will issue against them.

within twelve months after it is taken, and also to certify the year and day acknowledged.]

If the commissioners die before the conusance be certified, their executors must certify it upon *certiorari* to them directed, and upon their refusal like process lies, as in the former case.

If a *dedimus* be awarded to take the conusance of three several persons, the commissioners may take the conusance from each of them, and at several times, for it may so happen that they cannot meet at one place at the same time; and if the commissioners return the conusance but of two of them, the court may erase the name of the third out of the *dedimus*, and make the writ of covenant agreeable to it; for since the third does not join, it can be no prejudice to him; and therefore it were unreasonable that his obstinacy or refusal should impeach the conusance of the others

1 H. 7. 9. a.
Co. Reading,
10. Cro. Eliz.
469. 2 Inst.
512.
Jenk. 227.

Dyer, 224. b.
Cro. El. 275.
[See Rot. Parl.
No. 16. Vol. ii.
p. 261. a petition
from the
commons be-
yond Trent,
praying, that

counties to take

Co. Reading,
10.

Cro. Eliz. 240.
Downes v.
Savage.

F. N. B. 146.
Cro. Eliz. 677.
740. Co.
Reading, 10.
Bro. tit. Fines,

116. Ro. Abr. 794. Dyer, 220.

F. N. B. 142.
(a) [They are
required by
stat. 23 El.
c. 23. § 5. to
certify the ac-
knowledgegment
of the fine

whereon it was

Co. Reading,
10. F. N. B.
147.

Cro. Eliz. 576,
577.

3 B. & P. 366.

others duly taken, and so prevent their amicable composition of their differences.

Cro. Eliz. 576,
577.

A *dedimus* was awarded to take the consuance of a fine from baron and feme, and the feme refusing to join, the consuance of the husband was only returned; in this case the court ordered a new *dedimus* to be awarded, but to be of the same date with the former, and that the return of the commissioners should be annexed thereunto; for the refusal of any one of the consors can be no reason to delay or hinder another to transfer his right.

Balch v.
Phelps, 3 B. &
P. 366.

|| But, where under a *dedimus* to take the acknowledgment of nine persons, the commissioners took the acknowledgment of six on one piece of parchment, and of three on another, the court would not permit the fine to pass.||

Touchst. 5.
Co. Read. 9.
1 Ro. Rep.
223. Cro. El.
740. 1 Ro.
Abr. 794. (a)

[As the writ of *dedimus potestatem* recites, that a writ of covenant is depending between the parties, it should bear date after the writ of covenant; else it will be error. But, (a) if it be tested on the same day with it, the fine will be valid.

Cro. Eliz. 677. Cro. Ja. 11. 5 Co. 47. b.

Wilson, 82.
Vide Dean v.
Tidmarsh,
Barnes, 143.

By a rule of the court of Common Pleas made in H. 13 Geo. 1. it was directed, that no fine acknowledged before commissioners should be allowed to pass, unless some person, who was present when the fine was acknowledged, should appear personally before the lord chief justice of the court, and be examined upon oath touching the execution thereof.

This rule having been found by experience to be attended with inconveniences, and not having answered the good purposes for which it was intended, the court made the following rules:

Wilson, 85.

H. 17 Geo. 2. " It is ordered, That instead of an oath made *viva voce* of the due acknowledgment of fines, an affidavit in writing on parchment shall be made and annexed to every fine, in which the person making the same shall swear that he knew the parties acknowledging such fine; that the same was duly signed and acknowledged; that the party or parties acknowledging, and also the commissioners taking the same, were of full age and competent understanding; that the feme-coverts (if any) were solely and separately examined apart from their husbands, and freely and voluntarily consented to acknowledge the same; and that the cognizor or cognizors, and every of them, knew the same to be a fine to pass his or their estate or estates; which fine, together with such affidavit annexed, shall be transmitted to the lord chief justice, or some other justice of this court, for his *allocatur* thereon, and such affidavit shall remain annexed to such fine, and be left with the same in the proper office. And it is ordered, That every such affidavit, except where the persons, at the time of their acknowledging the fine, are in *Ireland*, or some other parts beyond the seas, shall be made by some attorney of the courts of *Westminster hall*."

Wilson, 89.

H. 26, 27 Geo. 2. " It is ordered, That in the affidavits made in pursuance of the preceding rule, the person or persons

“ sons so making the same shall swear, that the fine was duly
 “ signed and acknowledged upon the day and year mentioned
 “ in the caption; and if there be any rasure or interlineation in
 “ the body or caption of such fine, that such rasure or inter-
 “ lineation was made before the party or parties signed the said
 “ fine, and before the caption was signed by the commissioners.”

These rules have in some instances been dispensed with, and
 (a) particularly where fines have been acknowledged out of the
 kingdom.] ¶ But with respect to such fines, it is ordered by a
 rule of court, (H. 14. G. 3.) relative to recoveries suffered by
 persons abroad, which has always been holden to extend to the
 case of fines, that “ if the party or parties shall be in *Ireland*,
 “ or in any other parts beyond the seas, then the affidavit or
 “ affidavits shall be made by one of the commissioners who hath
 “ taken the acknowledgment of such warrant or warrants of at-
 “ torney, and shall be sworn, either before some person duly
 “ authorized to take affidavits in this court, or before some ma-
 “ gistrate of the place where such acknowledgment shall be
 “ taken, having authority to administer an oath, and in the
 “ presence of a publick notary; which notary shall also certify
 “ in writing under his hand and seal, as well the due administer-
 “ ing of the said oath, as also the name, signature, and office of
 “ the magistrate administering the same.”

A strict observance of this rule will not be dispensed with,
 but upon an affidavit of the special circumstances, which may
 take the case out of it.¶

Say v. Smith,
 Barnes, 217.
 (a) Fleetwood
 v. Calenda, *id.*
 219. Heath-
 cock v. Han-
 bury, *id.* 217.
 Seton v. Sin-
 clair, 2 Bl.
 Rep. 880.

Manning, 2 Taunt. 313. Price v. Williams, 4 Taunt. 573.

Cruttenden
 v. Bourbell,
 1 Taunt. 144.
 Ruding v.

[By the statute 34 & 35 Hen. 8. c. 26. § 40. it is enacted, That
 fines shall and may be taken before the justices of *Wales*, of
 lands, tenements, and hereditaments, situated within their ju-
 risdiction, by force of their general commission, without any
 writ of *dedimus potestatem* to be sued for the same, in like manner
 and form as is used to be taken before the king's chief justice of
 his Common Pleas in *England*.]

(E) Of the Operation of a Fine in barring the Issue in Tail.

BY the 4 H. 7. c. 24. a fine with proclamations shall conclude 4 H. 7. c. 24.
 all persons, both privies and strangers, except women-covert,
 persons under age, in prison, out of the realm, or of *non sane*
 memory, being not parties to the fine; by which general clause
 all others are bound. But by the first saving,

The right and interest that any person or persons (other than
 parties) hath or have at the time of the fine engrossed, is saved;
 so that they or their heirs pursue such their right or interest by
 action, or lawful entry, within *five* years after the proclamations
 so made. This clause seems to comprehend only those who have
 present right. But by the second saving,

The

The right and interest of all persons is saved which accrues after the engrossing of the fine, so that the parties having the same pursue it within *five* years after it so accrues; and if at the time of the fine engrossed, or of such accruer, the persons be covert, (and no parties to the fine,) under age, in prison, out of the realm, or of *non sane* memory, they or their heirs have time to pursue their action within five years after such imperfection removed.

Bro. tit.
Fines, 1.
Hob. 332.
Dyer, 3.
The reasons
of this doubt,
and the
opinions *pro*
and *con.* may
be seen.

Co. Litt. 372.

2 Inst. 516,

517. Moore,

250. And.

170. Plow.

373. Jo. 39.

19 H. 8. 6.

pl. 5. And.

46. pl. 118.

Raym. 271.

287. 321. 345

to 349. Sir

T. Jon. 238. in the case of Murray and the Earl of Derby.

Though this statute evidently concludes all persons under the words *privies and strangers to the fine*, and the statute hath savings for strangers, but none for privies; yet it was at first doubted, whether a fine levied by tenant in tail could bar the issue by that statute; for the entails had continued so long, and most people were so fond of them, that the judges were very cautious in making so large an exposition on that statute as it would well bear. And though at length the judges resolved, that a fine with proclamations was a bar, not only to the tenant in tail, because he could claim no right against his own acknowledgment on record that it was the right of another; but also against the issue in tail, because the words and intention of the statute place the privies, that is, the persons claiming the right devolved at any time on the conusor, in the same condition as the conusor himself; yet this introduced the statute of 32 H. 8. c. 36., which by a retrospection confirms the construction made by the judges on the 4 H. 7. c. 24., and declares that

32 H. 8. c. 36.

All fines levied, by any person or persons of full age, of lands entailed before the same fine to themselves, or to any of their ancestors in possession, reversion, remainder, or in use, shall immediately after the fine levied, engrossed, and proclamations made, be a sufficient bar against them and their heirs claiming only by such entail, and against all others claiming only to their use, or to the use of any heir of their bodies.

(a) If there be two jointenants, and one of them levy a fine; or if there be donor and donee, and one of them levy a fine; though there be a privy between each of these within the letter of the act, yet neither the jointen-

For the better explication of these statutes, it is to be observed, that the persons, whose right is barred by the fine, are either *parties, privies, or strangers*. That the *parties* themselves are barred is plain, and admits of no doubt. As to *privies*, which is the material and operative word in the 4 H. 7. c. 24., it is to be noted, that it has a threefold signification, for it either comprehends a privy in (a) estate as between donor and donee, which arises purely from their own contract; or a relation between parties arising from (b) blood only, neither of which is meant by the word *privies* in the act; for it were unreasonable and absurd to allow any man to strip me of my acquisitions or inheritances, without any laches or neglect of mine, because I happen to be his heir, or because by a fair contract I am concerned in interest with him, or am his tenant.

tenant in the one case, nor the donor in the other, shall be barred by the fine unless they omit to make their claim within five years after their titles accrue. 2 Inst. 516. (b) So, if the heir apparent be seised of lands, and the father levy a fine and die, it shall not bar the heir,

heir, because he does not claim or derive any title to the land from his father; and therefore, in that respect, shall have five years to preserve himself from the fine. 2 Inst. 523. 3 Co. 89. a.

But the *privies* understood and intended by this act are those who are privy not only in blood to the conusor, but likewise in estate and title to the land of which the fine was levied; that is, those who must necessarily mention the conusor, and convey themselves through him before they can make out their title to the estate.

and the baron levy a fine without the wife, this shall bar the issue though the son survive, because he must necessarily, in making out his title, shew himself heir to the father as well as to the mother, and, consequently, shew himself privy to the conusor within the statute. Keilw. 205. Dyer, 251. 2 Inst. 681. 8 Co. 72. Hob. 257. 9 Co. 139. a. 2 Bendl. 50. Moore, 28. So, if there be grandfather and grandmother tenants in special tail, and the grandfather die, and the father enter upon the grandmother and levy a fine, the son is barred. Hob. 258. 333. 3 Co. 90. Moore, 146.

But, if tenant in tail has issue a daughter, who levies a fine, and after a son is born, the fine shall not bar the son, because he may make himself heir to the entail without any mention of her, and can make out his title without conveying himself through her; and therefore as to the estate he is a stranger to her, and may plead *quod partes finis nihil habuerunt*.

out issue in the life of his father, the second son shall inherit the entail notwithstanding the fine, because he need not mention the conusor in making out his title to the entail. Cro. Car. 434. Cro. Ja. 689. Moore, 252.

A. devised land to his wife for life, remainder to his son in tail, when he should attain to his age of twenty-five years; and before that time he levied a fine: this barred his issue, though he had nothing in remainder, as it was allowed he could not have till that age. For though he was not actually tenant in tail when he levied the fine, but the vesting of the estate depended on the contingency of his coming to that age, yet the issue being obliged to make out his title through his, must be barred as a privy within the words of the 4 H. 7. c. 24., and the conusor was a person to whom the land was entailed, and so plainly within the words of the 32 H. 8. c. 36.

If tenant in tail levies a fine, and dies before the proclamations are past, though a right really descends to the issue, because the fine is no bar till the proclamations are past, yet after the proclamations the entail is barred. For the proclamations distinguish the fines which bar the entail from those at common law, which only discontinue it; and by the express words of 32 H. 8. c. 36. all fines levied with proclamations of any lands entailed to the person so levying the same, or to any of his ancestors, shall immediately after the proclamation made be adjudged a sufficient bar against the said person and his heirs, claiming only by force of the said entail.

Hence it was adjudged, that where *A.* was tenant for life, remainder to *B.* in tail, and *B.* levied a fine, and died before all the proclamations were past, his issue being out of the realm; that

Hob. 333. And hence the issue in tail is barred. So it is, if there be baron and feme in special tail,

the son survive, because he must necessarily, in making out his title, shew himself heir to the father as well as to the mother, and, consequently, shew himself privy to the conusor within the statute. Keilw. 205. Dyer, 251. 2 Inst. 681. 8 Co. 72. Hob. 257. 9 Co. 139. a. 2 Bendl. 50. Moore, 28. So, if there be grandfather and grandmother tenants in special tail, and the grandfather die, and the father enter upon the grandmother and levy a fine, the son is barred. Hob. 258.

3 Co. 61. Hob. 333. So, if tenant in tail has issue two sons, and the eldest levies a fine and dies with-

Grant's case, Cro. Eliz. 611. Cro. Car. 435. 10 Co. 50. a. 2 Leon. 36. Jenk. Cent. 274.

3 Co. 86. Plow. 430. 437. Smith v. Stapleton, 2 And. 177. Moore, 628.

3 Co. 87. Case of Fines.

that after the proclamations were past, though the issue, immediately upon his return into the kingdom, made his claim to the remainder, yet it availed him nothing, but the fine was a final bar to him.

Cro. Eliz. 589.
610. Hunt v.
King.

So it was where there was grandfather, father, and son; and the grandfather being tenant in tail enfeoffed the father, and afterwards disseised him, and then levied a fine with proclamations to *J. S.*, but before the proclamations were all past the father entered, and after they were all past, the conusee entered, and then the grandfather and father died, and the son brought his *formedon*; the conusee pleaded the fine with proclamations, and the demandant thereupon pleaded the entry of his father, but could recover nothing; because after the proclamations past, the fine was a good bar to the entail which was made to the grandfather who levied the fine.

3 Co. 90.
Purslow's case.
Plow. 435.

And the law is the same in case of actions brought, as of an entry made to preserve the entail; for if tenant in tail levies a fine, and dies before all the proclamations are past, and the issue in tail brings a *formedon*, the conusee may plead the fine with proclamations, though they were made pending the writ.

Cro. Eliz. 610.
Poph. 65, 66.

And this has been carried so far, that though a particular tenant, who is a stranger to the tenant in tail, should enter before the proclamations were past, to preserve his own right, yet the entail is barred; as, if there is *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in fee, and *B.* disseises *A.*, and levies a fine; but before the proclamations are past, the tenant for life enters and avoids the fine as to himself, and *C.*, though in this case, neither the estate of *A.* nor that of *C.* is affected by the fine, yet after the proclamations made, the entail is barred from the proclamations made, nor can any act of the issue preserve it.

Plow. 430.
Bro. tit. Fines,
106.

As tenant in tail may convey his whole estate by the fine, so may he carve any less estate out of it, which shall likewise bind the issue after his death; as, if there be *A.* tenant for life, remainder to *B.* in tail, and *B.* agrees to make a lease for years to *J. S.* upon writ of covenant brought by *B.* against *J. S.*, he may levy a fine *come ceo*, &c. to *B.*, and *B.* may render the land to *J. S.* for the term agreed on, with reservation of a rent; and this lease shall continue in force against the issue; because when *J. S.* conveys by the fine, though he really has no right, the tenant in tail and his issue are estopped to say otherwise than that he took a fee-simple; and, consequently, it appearing by the fine that he was tenant in fee-simple, he has thence a power to make a lease to bind his issue.

And. 6. 3 Co.
89. Dyer, 213.
Plow. 435.

But, if there be tenant for life, the remainder in tail, and the tenant for life levy a fine *come ceo*, &c. to the tenant in tail, who grants and renders a rent-charge out of the land to the conuser, this fine shall not bind the issue, because the rent was newly created by tenant in tail, and not entailed to him or any of his ancestors; and the entail of the land continuing, no incumbrance of the donee can affect the land any longer than his life.

If

If there be *A.* tenant in tail, the remainder to *B.* in tail, the reversion to the right heirs of the tenant in tail, and the tenant in tail bargain and sell the lands to *J. S.* and his heirs, and then levy a fine to him, this is a bar to the issue in tail, but no displacing or discontinuance of the remainder in tail, because the bargain and sale conveyed no more than what the tenant in tail could lawfully grant, which was a descendible estate during his own life; and no estate of freehold passed by the fine, that being before conveyed by the bargain and sale. (a) But yet the fine had this effect, though subsequent to the bargain and sale, to convey the whole estate-tail to the bargainee, who before had but a descendible estate during the life of tenant in tail; because wherever a fine is levied to a person to whom the lands were entailed, and whom the issue must mention in his *formedon*, such fine cuts off the entail, and bars the issue.

having before parted with his estate by the bargain and sale. It cannot be done by a tenant of an estate-tail, after a subsisting estate for life, even though the tenant for life join in the fine. *Bredon's case*, 1 Co. 76. *Driver v. Hussey*, 1 H. Bl. 269. But, where a lease and release were made by a tenant in tail, and a fine was afterwards levied, in pursuance of a covenant contained in the indenture of release, and as part of the same assurance, it was holden that the estate-tail was discontinued by the fine. *Doe v. Whitehead*, 2 Burr. 704.]

If tenant in tail of a rent-charge, issuing out of a manor, levies a fine of the manor, this, by the opinion of *Hobart* and *Harvey*, is a bar of the rent, because the fine being levied of the land, inclusively gives the rent.

to be no fine levied of the rent, which being the thing entailed, and not the land, should, it seems, descend to the issue, till the entail thereof be barred by a fine. [The opinion of Lord *Hardwicke* in this case, grounding himself upon the case of *Taylor v. Shaw*, *Carter*, 21. 1 Ves. 391. seems to have been according to the doctrine in the text. But this opinion is controverted by Lord *Mansfield*, who says, that the doctrines thus broadly laid down, that a rent-charge is gone by a fine of the land, is totally mistaken, and by no means warranted by the case in *Carter*; and that the rule is universal, that a rent-charge, in a third person, is not barred by a fine and non-claim. *Goodright v. Board*, M. 25 G. 3. 1 Cruise, 295.]

That the estate-tail is preserved to the issue in tail, notwithstanding any fine levied by the tenant in tail, when the reversion is in the crown, and the estate of the provision of the king, by 34 & 35 H. 8. c. 20. *vide post*, title *Recoveries*.

(F) Of the Operation of a Fine in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.

IF tenant in tail be disseised, and the disseisor levy a fine, the disseisee has five years to make his claim by the first saving, because he is the first who has a right at the time of the fine levied; and if he omit to make his claim in that time, the issue is bound for ever.

c. 36. have made the operation of fines stronger against parties and privies than they were at common law, for by them the issue in tail is bound, though not those in remainder or reversion; yet have they enlarged the privilege that strangers had at common law to avoid them. For upon these statutes they have five years from the fine to make their claim where they have a present right at the time of the fine levied; and where it accrues after the fine, they have five years from the time of such accruer; whereas by the common law in both these cases a stranger had only a year from the entry of the silver, at which time the land passed.

10 Co. 96. *Seymour's case*. Bulstr. 162. S. C. (a) [No one except the person himself actually seized of an estate-tail in possession, can create a discontinuance; and here the tenant in tail was not at the date of the fine seized of the estate-tail,

Heliot v. Sanders, Cro. Ja. 699. But Q. because there appears

3 Co. 87. *Cro. Eliz. 896.* Co. Litt. 372. Though the statutes of 4 H. 7. c. 24. and 32 H. 8.

Dyer, 3.
3 Co. 87. b.
Cro. Eliz. 896.

If tenant in tail bargain and sell his lands, or discontinue the tail, and the bargainee or discontinuee levy a fine, though five years pass in the life of the tenant in tail, yet the issue shall have five years after his death to avoid the fine; for his father having given all his right by the sale, could not claim any right against his own gift. The issue therefore is helped by the second saving, because he is the first to whom the right accrued after the fine levied.

Plow. 373.

If a mortgagee be disseised, and five years pass after the proclamations, the mortgagee is hereby barred. But, if the mortgagor pay or render his money, he has five years to prosecute his right by the second saving in the act, because his title did not accrue till the payment of the money.

If an infant disseisor be disseised, or make a feoffment, and the feoffee or disseisor levy a fine, and five years pass, the first disseisee is barred of his right by the first saving in the act, because he has a present right, which he ought to pursue immediately by action or entry; but the infant shall have five years from his full age to avoid the fine, because no laches are to be imputed to him but from the time he arrives at his full age.

Plow. 356 to
372. Stowel
v. Zouch.

A., seised of *Black-acre* in fee, is disseised by *B.*, who levies a fine with proclamations of the said acre during the life of *A.*; three years after the fine levied *A.* dies, and his right descends to *C.* his grandson, as his heir, who at the time of the descent of such right was an infant; and the question was, Whether *C.*, having suffered five years after the fine levied to pass during his ancestor's life and his own minority, without making any claim, should be barred, or should have other five years upon his arrival at full age, to make his claim in? and it was adjudged, that he should not, but that he was barred, and that by virtue of the first saving in the 4 H. 7. c. 24., which saves to all persons and their heirs, other than parties to the fine, such right, claim, and interest as they have in lands and tenements whereof a fine is levied, so that they pursue such right by way of action or lawful entry within five years. Now *A.* having a right to *Black-acre* at the time the fine was levied, consequently, he and his heirs must be comprehended in this saving; but then they cannot take the benefit of such comprehension unless they pursue the method and the time prescribed and limited in the said saving, which they apparently neglected to do, since neither *A.* nor his grandson made any claim or entry, or brought any action for recovery of their right within the five years; and therefore such right must be barred and extinguished. And *C.* in this case shall have no privilege of infancy, because the statute intends that only in cases where the right first attached in the infant, and therefore he shall have five years after his infancy to make his claim; but here the right was first in *A.* at the time of the fine, and the statute allows but five years to pursue the right from the time it accrues, which was not done in this case.

Dyer, 133.

But, if *A.* be tenant in tail, the remainder to *B.* in fee, and *A.* levy a fine with proclamations, and then *B.* die, his heir within age, and then *A.* die without issue, and five years pass without
any

any action brought by the heir, yet he shall either, during his minority, recover the land notwithstanding the five years lapsed, because the right first accrued to him, *B.* having no right to the land by the remainder, till the estate-tail was spent, which did not happen in his life; or the heir of *B.* may defer making his claim till he comes of age, and then by the express words of the act he shall have five years to recover his right.

[If an infant be in his mother's womb when a fine is levied, *Plowd.* 366. he will be allowed five years from the time he attains his full age to make his claim; for although he is not comprehended within the letter of the act, which only mentions infants under the age of twenty-one years, and therefore does not extend to those who are unborn, yet they are within the intention of the act, and will be aided by the exception.

If a person labours under several disabilities at the same time, as, if a woman is covert, under age, of insane mind, and in prison, at a time when the fine is levied, or when a right accrues to her, and one or more of those disabilities are removed; still the five years given by the statute will not commence until all her disabilities are entirely removed.

It is now settled, notwithstanding some old opinions to the contrary, that when once the five years allowed to persons labouring under disabilities to avoid a fine begin, the time continues to run notwithstanding any subsequent disability.

But, if a person to whom a right accrues to lands whereof a fine hath been levied, labours under any of the disabilities specified and excepted in the statute 4 Hen. 7., and dies before his disabilities are removed, it was considered as a doubtful point, whether the heir of such person was obliged to make his claim within five years after the death of his ancestor, or should be allowed an indefinite time for the purpose. But it has been determined by the court of Common Pleas, that he must make his claim within the five years. For the exception in the first branch of the statute of 4 H. 7. and the proviso at the end of it, are to be taken together; and being so taken, they do not amount so much to an exception as a saving, the true meaning of which is, that the rights of those persons who are under disabilities, and of their heirs, are saved as long as those disabilities continue, and five years after: the heir therefore not being himself disabled is barred, unless he prosecutes his right within five years after it accrues by the death of his ancestor dying under a disability.]

It is a rule, that no interest is barred by a fine that is not divested and turned to a right; for if the person who has the right continues in possession at the time of the fine levied, he is under no necessity to make his claim, or entry, or to bring his action; [because, being still in possession, and not disturbed by the fine, he has already all the advantages which those remedies could procure him, and it would be unnecessary to pursue them.] As, if a man levies a fine of land, out of which I have a rent, common, or the like, the fine and five years' non-claim shall not affect

Doe v. Jones,
4 T. R. 301.
4 Taunt. 230.
S. C. cited. by
Mansfield C. J.
See Cruise on
Fines, 258, &c.

Dillon v.
Leman, 2 H.
Bl. 584.

2 Inst. 517.
9 Co. 106. a.
Cro. Ja. 60.
5 Co. 124.
Vent. 81.
|| Some modern
elementary writers,
says Lord
Carleton, dis-
pute this po-

sition, that no fine will bar any interest which is not me, because I am still in possession of my rent or common; [I cannot recover what I still enjoy; I cannot enter upon or claim against myself.]

devested and put to a right, if the words "*devested and put to a right*" are understood in their strict technical sense, that is, in the sense of depriving the party, affected by the fine, of the right of recovering his estate by entry, and of confining him to an action; but they all agree, that the estate or interest of the person, whose title is meant to be barred, must be so far affected, that he must be deprived of the possession, either before the fine is levied, or by the operation of the fine itself, and that, by the same means, a possession, inconsistent with his right, must be acquired. Ir. T. R. 574. See also 1 Cruise, 289. 1 Prest. Convey. 225. b. If therefore there be tenant for life, remainder for years, remainder in fee, and the remainder-man for years levies a fine, the estate for life is not barred; for it was precedent to that of the consor, and the possession of the tenant for life was not divested. *Focus v. Salisbury*, Hardr. 402. Com. Dig. tit. Fine, (I. 3). So, where *A.* was tenant for life, remainder to *B.* for life, remainder to *C.* in tail; and *C.*, during the life of *A.*, and while *A.* was in possession, levied a fine with proclamation, and on *A.*'s death entered and continued in possession for seven years before any entry made by *B.*, *B.* was not barred by such fine. *Carhampton v. Carhampton*, Ir. T. R. 567. So, where there was an estate to *A.* for years, remainder to *B.* for life, remainder to *C.* in fee, and *B.* levied a fine while *A.* was in possession, the remainder to *C.* was not barred; for the continuance of *A.* in possession was a continual claim by *C.*; or rather, as Mr. Preston observes, the possession of *A.* was the continuance of the seisin to *C.* See the case put in *Knight v. Grenville*, Skin. 262. and cited in N. R. 26. See also 1 Prest. Convey. 226-7. Unless therefore the freehold be in one of the parties at the time of levying the fine, the fine, as to the purpose of barring by non-claim, seems to be actually void, or voidable by the plea that "*paries finis nihil habuerunt tempore finis levati.*" *Doe v. Holmes*, 3 Wils. 249. *Smith v. Packhurst*, 3 Atk. 141. *Rowe v. Power*, 2 N. R. 1. Touchst. 14. *supra* 647. Hence it is incumbent on the party producing the fine, to shew that the consor was in possession at the time it was levied, or had received rent. *Doe v. Williams*, Cowp. 621. *Carhampton v. Carhampton*, Ir. T. R. 567. *Doe v. Spencer*, 11 East, 495. The point therefore stated in *Armstrong v. Wholesley*, 2 Wils. 19., that a fine *come ceo*, &c. of a reversion, although it passes nothing, yet after five years, and non-claim, will operate as a bar, is not law. See Sugden's Gilb. Uses, 122. note.—It has been lately decided, that where a tenant for life levies a fine with proclamations, and dies seised, and devises the estate to one who enters; this does not operate as a disseisin of the remainder-man; an actual ouster of the tenant, a wrongful putting of him out, being considered by the court as essential to make a disseisin. *William v. Thomas*, 12 East, 147. But *qu.* & vide Sugden's Gilb. Uses, 122. and Mr. Preston's argument in *Jerritt v. Weare*, 3 Price, 596. As to the evidence of a seisin in fact of the consor at the time of the fine levied, the following case has occurred:—Where a fine was levied of Michaelmas term, but on the 8th of November in fact, though by relation of law on the 6th, a writ of possession, after a recovery in ejectment, executed on the consor's behalf on the evening of the 6th, by the officer's entry on the land and claiming it for the consor, but without any actual change of the tenant in possession, who afterwards paid rent to the consor, was holden to be sufficient evidence of a seisin in fact in the consor at the time of the fine levied. And Lord Ellenborough intimated his opinion, that a receipt of rent after a fine levied, for a period of time antecedent to the fine, would be *prima facie* evidence of the consor's possession of the premises by his tenant during the period for which the rent was received, unless fraud or contrivance appeared. *Doe v. Spencer*, 11 East, 495. ||

5 Co. 124.
Saffin's case,
Cro. Ja. 60.
9 Co. 105.

A. leases to *B.* for years, to commence after a former lease *in esse*; the first lease is determined, and before any entry by *B.*, the lessor enters and makes a feoffment, and levies a fine, and five years pass without any claim: *B.* is barred of his interest; for by the general clause the fine concludes all privies and strangers; and the first saving includes the lessee in respect of the word *interest*, which a term for years may properly be called.

Leon. 99.
2 Leon. 157.
Cro. Ja. 61.
5 Co. 124. a.

But, if *B.* who had the future interest, had died before the determination of the first lease, and upon the expiration thereof the lessee had entered and levied a fine; and after the five years' admi-

admi-

administration had been granted; the administrator should have been allowed five years to make his claim; for none had a right or title of entry before, and it accrued to him by the administration after the fine, and, consequently, he must be allowed five years from the accruer of his right. But in the former case, the lessee had a right of entry at the time of the fine levied, and therefore could have but five years from that time. But, if the lessor enters upon the first lessee, and levies a fine, the second lessee shall have five years after the first lease is determined, because his right then first accrued.

As, if a man settles land by fine to the use of himself for life, with a clause in the deed of uses to this effect; that if he should make a jointure to his wife, and a lease for thirty-one years to commence after his death; then the conusees should stand seised to such uses; he makes a lease accordingly, and then he and his wife levy a fine; the lease is not barred, though five years should pass without entry or claim; because he having but a future interest, such interest is not displaced or divested by the fine; consequently, an entry were fruitless to preserve that which was not touched by the fine. Besides, this being an *interesse termini*, the lessee had no right till after the death of the lessor; consequently, he must have five years from the accruer of his right to preserve it.

A copyholder may be barred by a fine and non-claim, because it is an interest within the statute. So, executors, that have land till debts and legacies are paid, may be barred by a fine and five years' non-claim, because they likewise have an interest within the words of the statute.

If there be tenant by *elegit*, statute merchant or staple, and a fine be levied of those lands, and five years pass without any claim, they are bound by the fine, because they have each of them an interest within the words and intention of the statutes, and thereby shall be bound if they do not pursue their rights within five years. (a)

the lands, and five years pass without any claim, the interest of the tenant is barred; because, after the inquisition found, the party before entry has the possession, and may have an ejectment or trespass, and therefore his interest may be displaced, and, consequently, his right barred. Mod. 217. Ognel v. Lord Arlington. (a) [And in the case of Deighton v. Grenville, 2 Ventr. 333. 1 Show. 36. Skin. 260., all the judges agreed, that although the cognizees of statutes-merchant did not enter, yet that they had possession in law, in consequence of their extents and *liberates*, which gave them a right of entry, and therefore they might be barred by a fine. However, they cannot be barred until they have extended the lands, or pursued their rights in some other manner, for until then they have no right to enter on the lands, and, therefore, cannot be put out of possession. 1 Mod. 217.]

But, if a man have a judgment for a debt at common law, and the debtor before the land is extended alien by fine, and five years pass, the plaintiff may still have a *scire facias* and an *elegit*. So it is of a conusee of a statute before execution sued. For though the judgment and execution be incumbrances that are chargeable upon the estate, yet before execution sued, the conusee, &c. has no right to the land; for his release of all his right to the

Hardr. 410.
413. 415.
Edwards v.
Slater.

9 Co. 105. a.
Margaret Pod-
ger's case.
5 Co. 124.

2 Inst. 517.
5 Co. 134. a.
Plow. 374. So
it is, if an in-
quisition upon an
elegit be found,
and then a fine
be levied of

Mod. 217.
So, if a man
has a decree in
Chancery to
charge lands,
and the tenant
of the land,
after the de-
cree, aliens by

fine, and five years pass, yet the plaintiff may have execution; because, till the decree be executed, he has no right to the land, and therefore is not obliged to make any entry or claim to preserve it till his title accrues. *Chan. Cases, 268.*

[The estate of a devisee may be barred by a fine and non-claim if the devisee has not entered; as, where *John Metcalf* devised lands to *John Gallant*, an infant of the age of three years, in fee; the son and heir of *John Metcalf* entered on the lands, and levied a fine of them; and *John Gallant* the infant died before he attained his full age, leaving a sister, who was then married; the court were of opinion, that the sister must make her claim within five years after the death of her husband, otherwise the fine would bar her.

A title of entry for a condition broken may be barred by a fine levied by the grantee or devisee of the conditional estate; as, where lands were devised to trustees and their heirs, upon condition that they should pay a certain sum of money every year for the support of a schoolmaster, &c.; and, on non-performance of the trusts, the lands were devised over to other persons; the trustees neglected to perform the trusts, and levied a fine of the lands; it was determined that the fine was a good bar to the persons who had a title to enter on breach of the condition.

A title of entry for a condition broken may also be barred by a fine levied by the grantor of the conditional estate: as, if a person makes a feoffment on condition, and before the condition is broken, the feoffor levies a fine of the same lands, either to the feoffee, or to any other person, the condition will be thereby discharged for ever. But, if the fine was levied for the purpose of corroborating the conveyance by which the condition was created, it will not destroy the condition; for in that case the fine and conveyance will be construed together, and will operate as one assurance.

It seems, that a right or title of entry on any other account may also be barred by a fine. Thus, where *Humphrey Mackworth* was seised to him and his heirs, provided that if a hundred pounds were not paid within three months after the birth of a child, the trustees should enter; the money was not paid; so that the estate of *Humphrey* being with a *quousque* ceased, but the trustees did not enter: *Humphrey* conveyed away the lands by lease and release, and levied a fine; after which five years passed: Lord Chief Justice *Bridgeman* delivered the opinion of the court, that the entry of the trustees was barred by the fine.

A power appendant, or in gross, may be barred by a fine levied of the lands to which the power relates, by the person to whom such power is reserved; because, by the fine, the person acknowledges all his right and interest in the lands to be vested in another; and therefore it would be repugnant to that acknowledgment that he should ever afterwards claim any power over

those

those lands. Besides, a power appendant, or in gross, being part of the old dominion, is considered as an interest, which may be released. Thus, where *Christopher Digges*, being seised in fee, covenanted to stand seised to the use of himself for life, remainder over, reserving to himself a power of revocation, by deed indented and enrolled; and *Christopher Digges* revoked the uses; but, before the deed of revocation was enrolled, he levied a fine; it was resolved that the fine being levied before the enrolment of the deed of revocation, until which time the revocation was imperfect, had destroyed the power.

Digges's case,
1 Rep. 173.

See *Penne v. Peacock*, Ca.
temp. Talb. 41.

A power of revocation may also be destroyed in part, by levying a fine of part of the land, and yet the power will continue good as to the residue.

1 Inst. 215. a.
Touchst. 501.

If a person who has a power appendant, or in gross, levies a fine of the lands to which the power relates, and afterwards by deed declares that such fine shall enure as an execution of his power, the fine and declaration of uses will in that case be considered as one assurance, and will not destroy the power.

Herring v. Brown,
2 Show. 185.
1 Vent. 368.
Carth. 22.
Comb. 11.
Skin. 184.

1 Freem. S. C. *Doe v. Whitehead*, Dougl. 45. S. P.

A power collateral to the land, which is not joined with an interest, cannot be destroyed by a fine levied by the person to whom such a power is reserved; because it is considered as a bare and naked authority, which cannot be released or divested. Thus it is said by Lord Chief Justice *Popham* in *Digges's case*, that if a feoffment was made to *A.* in fee to divers uses, with a proviso that it should be lawful for *B.* to revoke those uses, *B.* could not in that case release his power, nor extinguish nor destroy it by a fine, because it was a collateral power; for the land did not move from him, nor would the party have been in by him, if he had executed the power.

1 Inst. 237. a.
265. b.
1 Rep. 174. a.

It follows from the same principles that a collateral power cannot be barred by the fine of a stranger: as, where a person by a proviso in his marriage-settlement gave his wife a power to dispose of one hundred pounds to such persons as she should appoint, to be paid within one year after his decease; and in default of payment one *John Moreton* was empowered to make a lease of certain lands to raise that sum; the wife, in a year after the death of her husband, made an appointment of this sum, but it was not paid; the heir of the husband levied a fine of the land, and five years passed, and afterwards the appointees of the one hundred pounds brought their bill to be paid that sum; Lord *Hardwicke* observed, that although by the several statutes relating to fines, all right, claim, and interest which strangers had, were barred by a fine, yet that such a stranger as *John Moreton*, who had no interest, but only a bare naked power, and who could not have made an entry, was not affected by it.

Willis v. Shorral,
1 Atk. 474.

A fine and non-claim is a good bar to a writ of error, in consequence of the word "actions" in the second saving of the

Bartholomew v. Bellfield,
Cro. Ja. 332.

statute, 4 Hen. 7.; and a fine is also a good bar to a writ of error to reverse a common recovery.]

9 Co. 105.

But, if lessee for life be disseised, the reversioner shall

have five years after the death of the particular tenant, because he can have no action to recover the freehold. 9 Co. 105. b. Co. Litt. 250. Plow. 374.

Anon. Moore,

71. Laund v.

Tucker, Ct. El.

254. Case of

Fines, 78. b.

Whaley v.

Tankard,

1 Ventr. 241.

Sir T. Raym.

219. S. C.

2 Ventr. 52.

S. C. 3 Keb.

37. 110. S. C.

Brandlyn v.

Ord, 1 Atk.

571. Willes,

341. S. C.

Goodright v. Forrester, 8 East, 552. 1 Taunt. 578. But, if tenant in tail makes a lease for life, and so discontinues the tail, and then levies a fine with proclamations, and dies without issue, and five years pass without any entry or claim, the remainder-man is barred; because upon the death of tenant in tail without issue his title commenced, and he shall be allowed but five years from thence to preserve it. Salvin v. Clerk, Cro. Car. 156.

Deighton v.

Grenville,

2 Ventr. 333.

1 Show. 36.

Skin. 260. S. C.

Lords' Jour-

nals, vol. 16.

P. 454.

26th April,

1699. Cruise

on Fines, 242,

&c.

2 Inst. 519.

[If lands are extended on two statutes, and the person who is seized of the land levies a fine; though the cognizee of the first statute must make his claim within five years after the fine has been levied, otherwise he will be for ever barred; yet the cognizee of the other statute need not make his claim until satisfaction has been entered upon record on the first statute, because that is the only proper determination of an extent, so that he will have five years allowed him from that time to avoid the fine by the second saving in the statute 4 H. 7.; because until then his right did not accrue.]

If there be tenant for life, the remainder to *B.* in tail, and the lessee levy a fine, *B.* being out of the realm; if *B.* die beyond sea, the issue in tail is at large to avoid the fine when he pleases; for that clause of the 4 H. 7. c. 24. which gives persons out of the realm, infants, &c., and their heirs, five years after their impediments removed, to pursue their right, cannot be extended to this case, because *B.* being dead, cannot return into the realm to make his claim, and the clause limits five years to him and his heirs after his return, which now is become impossible.

A copyholder of a dean and chapter levied a fine with proclamations, and five years passed without any claim by him that was dean at the time of the fine; yet the succeeding dean was not bound by the fine; because, if that were allowed, the statutes of 1 El. c. 19. & 13 El. c. 10. would be of little use to restrain

Vent. 311.

Howlett v.

Carpenter.

strain alienations; for then, by combination between the dean and tenant, all lands belonging to the chapter might be aliened.

[Although the statute 4 H. 7. does not extend to the possessions of the church, yet in case a bishop, dean, vicar, or prebendary should neglect to make his claim within five years after a fine levied of an estate to which he was entitled in right of his bishoprick, &c., he will be barred during his life, but his successor will be allowed five years to avoid the fine from the time of his becoming entitled to the lands.]

If lessee for years assigns his term in trust for himself, and afterwards purchases the inheritance and occupies the land, and then levies a fine, and five years pass without claim by the assignee, the term is lost; for neither the *cestui que trust*, nor the termor, has any remedy: not the *cestui que trust*, because he by the fine hath acknowledged the land to be the right and inheritance of the conusee; and it were unreasonable to allow him any pretensions after so solemn a confession to the contrary: not the termor, because he having a right at the time of the fine levied, and omitting to make his claim within five years, is barred by the express words of the statute. So it is, if tenant in fee simple makes a lease for 100 years to attend the inheritance in trust for himself, and still continues in possession, and makes a lease for fifty years, and levies a fine *sur conusance de droit* to confirm it, and five years pass without any claim by the first lessee, his interest is barred by the fine; for the second lease and the fine divested the first term out of the lessee, and, consequently, if there be no claim by him in five years, his interest must be barred.

But, if a man purchases the fee-simple of *Black-acre*, of which there is a long lease in being, and the conveyance is made by fine, and the purchaser, to protect the inheritance, has an assignment of the term in trust for himself; though the termor makes no claim in five years, yet the term continues; because the statute of fines being made for the security of purchasers, it would weaken their interest, if fines destroyed such leases against the intention of all parties.

Thus, if a man mortgages his land, and, as is usual, still continues in possession, and levies a fine, and five years pass, yet the mortgagee is not barred; for though the mortgagee be in reality out of possession, yet when that is by the consent of both parties, and the nature of the contract requires it should be so while the interest is paid, it is against the original design of the contract that any act of the mortgagor, except the payment of the money, should deprive the mortgagee of his security, and is no less than a fraud, which the law will not countenance.

may enter, 1 Vern. 132., and there said to be a new way of foreclosing the redemption. But *vide* 2 Vern. 189.

Thus it has been adjudged, where a man was lessee for years of one part of a manor, and tenant at will of another, rendering rent, and the lessee made a lease for life, and then levied a fine

Plowd. 332.

Cro. Car. 110.
Morris v.
Isham.

Lev. 270.
Freeman and
Barns, Sid.
478. Vent. 80.
Chan. Rep.
51. 65.

Sid. 460. Vent.
82. Lev. 272.

Sid. 460.
Vent. 82. Lev.
272. 2 Ves. 482.
So, if the mortgagee is in possession, and levies a fine, and the five years pass, yet upon payment of the money the mortgagor

3 Co. 77.
Fermor's case.

to the tenant for life, but still continued in possession and paid the rent, that this fine should not bar the lessor; because this is visibly a fraud and trick in the first lessee, which he shall reap no benefit by, and the lessor had no reason to make his claim while the rent was duly paid him.

Chan. Cases,
268. 2 Chan.
Cases, 247.

It is agreed on all hands, that a fine and non-claim will bar a trust, because the *cestui que trust* has an equitable interest, and therefore ought to pursue it by proper remedies to secure it; yet this must be understood with these following restrictions.

1 Vern. 149.
Shields v. At-
kins, 3 Atk.
563. Lord
Pomfret v.
Lord Windsor,
2 Ves. 481.
Kennedy v.
Daly, 1 Sch.
& Lefr. 355.
[So, where a
person to
whom lands

1. Where the purchaser has notice of the trust, though the trustee conveys to him by fine, and five years pass without any claim by the *cestui que trust*, yet the trust is not barred, because where the purchaser has notice, he sees the title of the vendor, and what power he has to convey; and therefore, when he takes the land from him, shall be presumed to hold it in the same plight, and that the vendor could not make him a better title than he had in himself; and when the purchaser takes it upon these terms, the trust is undisturbed, and *cestui que trust's* interest no way affected by the fine.

were devised chargeable with legacies, levied a fine, on which there was a five years' non-claim, and afterwards granted a rent-charge, and mortgaged the lands; it was decreed, that the fine and non-claim were no bar to the legatees, because the devisee having no title but under the will, must have had notice of them. *Drapers' Company v. Yardley*, 2 Vern. 662.]

2 Chan. Cases,
124, 125, 126.
Bovey and
Smith. Vern.
60. S. C.

2. Though the trustee should convey by fine to a purchaser, who had no notice, and thereby and five years' non-claim the *cestui que trust* should be barred; yet if the purchaser should reconvey to the trustee, the bar from the reconveyance ceases, and the trust as to him revives again; for he that was originally invested with a trust shall never be allowed to plead his own tortious act in his own justification, for that were to allow a man to plead his crime in his own defence, and excuse of his treachery.

[And a fine levied by a trustee will not be allowed to affect the interest of the *cestui que trust*.

1 Vern. 149.

Thus in the above case of *Bovey v. Smith*, the Lord Keeper put this case to Serjeant *Maynard*,—"A. seised in fee in trust for B. for full consideration conveys to C., the purchaser having notice of the trust; and afterwards C., to strengthen his own estate, levies a fine. Whether B. the *cestui que trust* be not in that case bound to enter within five years? and the counsel were all of opinion, that he was not; for C., having purchased with notice, notwithstanding any consideration paid by him, was but a trustee for B., and so the estate not being displaced, the fine cannot bar."

3 Atk. 563.

So in the case of *Shields v. Atkins*, Lord *Hardwicke* says, it would be dangerous, where a person enters on the foot of a trust, and never makes any declaration of his having performed the trust, to construe this such an entry, as that a fine and non-claim afterwards would be a bar. And in the case of *Lord Pomfret v. Lord Windsor*, his lordship observed, that a court

2 Vesey, 481.
2 Atk. 631.
S. P. See also

of

of equity would not suffer a fine levied by a trustee to bar an equitable right: and that if a practice of this kind was allowed to prevail, a court of equity might as well be abolished by act of parliament.]

Bowles v. Stewart,
1 Sch. & Lefr. 209.

If lands are devised to trustees till debts paid, and then to an infant and his heirs, and *J. S.* a stranger enters on the lands and levies a fine, and five years and non-claim pass, and the infant, when of age, brings an ejectment, but is barred, because the trustees ought to have entered; yet equity will relieve, and not suffer an infant to be barred by the laches of his trustees, nor to be barred of a trust estate during his infancy; and the infant in this case shall recover the mesne profits.

2 Vern. 368.
Allen v. Sayer.

[But, if the title is merely a legal one, and a man has purchased an estate which he sees himself has a defect on the face of the deeds, yet the fine will be a bar, and will not affect the purchaser with notice, so as to make him a trustee for the person who had the right; because, as Lord *Hardwicke* observes, this would be carrying it much too far, for the defect upon the face of the deeds is often the occasion of the fine being levied.

2 Atk. 631.

Before the statute of uses, if a *cestui que use* had levied a fine, it might have been avoided at any time by the plea *quod partes finis nihil habuerunt*; as the *cestui que use* had no estate in the land, but was barely tenant at will to his feoffees. But modern chancellours have very much altered the law in this respect, having laid it down as a general rule, that any legal conveyance or assurance by the *cestui que trust*, shall have the same effect and operation on the trust estate, as it would have had on the legal estate, if the trustees had conveyed it to the *cestui que trust*. So that now a *cestui que trust* in tail may by a fine duly levied, bar his issue as fully, as if he had the legal estate; for otherwise trustees by refusing, or by not being capable of executing their trust, might prevent the tenant in tail from exercising the power given him by the law over his estate, which would be extremely inconvenient, and would tend to the introduction of perpetuities.

Year Book,
27 Hen. 8. 20.
Bro. Ab. tit.
Fine, pl. 4.

1 Chan. Ca.
213. Ca. Temp.
Talb. 43.

A *cestui que trust* in tail may not only bar his own issue by a fine, but also the persons in remainder or reversion, unless they make their claim within the time specified by the statute.

Basket v. Pierce,
1 Vern. 226.

Where a fine is levied pursuant to a decree of the Court of Chancery for a particular purpose, that court will not permit it to operate farther than the decree directs.

Goodrick v. Brown,
1 Chan. Ca. 49.
2 Vern. 56.

The intention of marriage articles is so far considered in equity, that if a fine be levied of the lands comprehended in such articles to different uses, a court of equity will compel a conveyance of the lands to the uses of the marriage articles, notwithstanding the fine.

Trevor v. Trevor, 1 P. Wms. 622.
2 Br. P. C. 122.

The plea of a fine and long possession under it, is not a good bar to a bill brought for a discovery of the deeds, declaring the uses of such fine.

Holt v. Lowe,
4 Br. P. C. 253.

A springing or shifting use cannot be barred by a fine, levied of the estate out of which such springing or shifting use is to arise.]

Loyd v. Carew, Show, P. C. 137.

(G) Of

(G) Of the Remedies given to Strangers by Claim and Entry for the Preservation of their Rights.

(a) [As where a fine operates as a discontinuance of the estate, in which case a real action must be brought. 1 Vern. 212.]

IF a man have only a right of action, and his entry be taken away (a), there a claim or actual entry on the land will not preserve his right, or avoid the fine; because though he has a right to the land, yet since he has not pursued it in the manner the law has prescribed, it is as ineffectual as if he had been quiet.

Moore, 450.

A man that has a right of entry may empower another to enter for him, and such entry is sufficient to avoid a fine; for what another does by my command or direction, is looked upon to be my own act.

Poph. 108.
Pollard v.
Lutterall, Co.
Litt. 245.

But, where a man enters in my name, and without my direction, this does not avoid the fine, or preserve my right; because the statute preserves my right only in case I pursue it by entry, &c., in five years; but what a stranger does in my name, without my direction, is not my act, and, consequently, cannot avoid the fine. Yet in this case, if a stranger enters without my direction, and I agree to and approve of the entry within five years, this is sufficient to avoid the fine; because my subsequent assent and approbation is equivalent to a precedent command, and therefore the act of another by my direction is my own.

Clerk v. Pywell, Saund. 319. Vent. 42. S. C. 1 Mod. 10. Berrington v. Parkhurst, 2 Str. 1086. Andr. 125. S. C. 13 East, 489. S. C. 4 Br. P. C. 353. S. C. Hughes v. Thorne, 8 East, 474. Bates v. Brydson, 3 Burr.

Lessee for life levied a fine *come ceo*, &c., with proclamations, and he in reversion, five years after his death, brought his ejectment, and a stranger by his direction delivered a declaration in ejectment to the tenant in possession; yet this was adjudged no entry to avoid the fine. || For when a fine with proclamations is levied, and there is a right of entry, an ejectment cannot be maintained without an actual entry made for the express and declared purpose of avoiding the fine, and on some day subsequent to that entry the demise in the ejectment must be laid. But a fine at common law may be avoided without actual entry, and the confession of lease, entry, and ouster will be sufficient. So of a fine with proclamations, if all the proclamations are not made at the time when the ejectment is brought; for then it is in truth merely a fine at common law.

1897. Bull. N. P. 103. S. C. Goodright v. Cater, Dougl. 478. Jenkins v. Prichard, 2 Wils. 45. Doe v. Hicks, 7 T. R. 727. Doe v. Watts, 9 East, 17., in which the case of Tapner v. Merlott, Willes, 177., was over-ruled. See also 1 Prest. Convey. 246, 247., and the note at the end of the case of Doe v. Watts, *ubi supra*.

Fenn v. Smart, 12 East, 444.

And the law is the same with respect to a fine with proclamations levied by lessee for years. But no one, except the person who is the owner of the reversion when the fine is levied, can take advantage of the forfeiture incurred by levying the fine. The right of entry for the forfeiture cannot be transferred to an

an assignee. When (a) the person who had the remainder or reversion has merely a right of entry, he cannot, after his estate is turned into a right of entry, make any alienation. ||

214. a. 266. a. Touchst. 325. *Blunden v. Baugh*, Cro. Car. 304. *Brunker v. Cook*, 11 Mod. 128. *Taylor v. Horde*, 1 Burr. 113. *Attorney-General v. Vigor*, 8 Ves. 282. *Goodright v. Forrester*, 8 East, 552. 1 Taunt. 678.

(a) Perk. § 63.
65. 86. 157.
Litt. § 347.
Co. Litt. 486.

If an action be brought to recover lands of which a fine was levied, and the demandant discontinues, this is no claim to avoid the fine, because the discontinuance shews no intent of the demandant to preserve his right.

Dallison, 116.
Vent. 45.

[The suing out of a writ, and delivering it to the sheriff, does not amount to a pursuing of a claim or title by way of action, unless the writ be returned by the sheriff.]

1 Leon. 221.

If the claim be made by action, it must be a real action; so that an ejectment will not suffice. Nor is a bill in chancery such a claim under the statute 4 Hen. 7. as will avoid a fine.

2 Bl. Rep. 994.
Dal. 116. See
5 Ves. 238.

There is however an exception to this rule, in the case where a fine has been levied of a trust estate, because no entry by the *cestui que trust*, or claim, or other legal act, will be sufficient to avoid the fine, or suspend the bar arising from the non-claim; it can only be done by bill in chancery, as the claim to avoid a fine ought to be of a nature which corresponds with the estate.

1 Ch. Ca. 268-
278. 2 Bl.
Rep. 994.

And even where the subject-matter of the suit is of legal jurisdiction, the filing of a bill in a court of equity will, in some instances, prevent the bar arising from a fine and non-claim. And in cases of this kind, the court will direct a trial at law, with an order that the defendants shall not set up the fine in bar of the plaintiff's claim, upon the same principle that it sometimes directs that the defendants in a suit at law shall not plead the statute of limitations.

2 Atk. 389.
Pincke v. Thornycrofte,
1 Br. Ch. Rep.
289. Printed
Cases Dom.
Proc. 1784.
4 Br. P. C. 92.
2d edit.

The entry of one joint-tenant, coparcener, or tenant in common, will be sufficient to avoid the effect of a fine, as to the other joint-tenant, coparcener, or tenant in common.]

1 Cruise, 344.

|| But the entry of one parcener, who has been under a disability for above twenty years, will not give a right of entry to another parcener, who is already barred by the statute of limitations.]

*Roe v. Row-
lston*, 2 Taunt.
441.

By st. 4 Ann. c. 16. § 16., it is enacted "that no claim or entry to be made of or upon any lands, tenements, or hereditaments shall be of any force or effect to avoid any fine levied or to be levied with proclamations, according to the form of the statute, in that case made and provided, in the Queen's court of Common Pleas at *Westminster*, or in the courts of Sessions in any of the counties palatine, or in the courts of Grand Sessions in *Wales*, of any lands, tenements, or hereditaments, or shall be a sufficient entry or claim within the statute, made in the twenty-first year of king *James* the first, intituled *An Act for limitation of actions, and for avoiding of suits at law*, unless upon such entry or claim an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect."

(H) Of

(H) Of erroneous Fines, and the Manner of reversing them.

Ro. Abr. 747.

Dyer, 90.

3 Lev. 36.

As, if a man settles land to the use of himself and the heirs of his body, the remainder to his own right heirs, and dies, leaving issue only a daughter, who

AND here in the first place it is to be observed, that no person can bring a writ of error to reverse a fine, or any judgment, that is not entitled to the land, &c., of which the fine was levied; for the courts of law will not turn out the present tenant, unless the demandant can make out a clear title, possession always carrying with it the presumption of a good title till the right owner appears. Besides, where the plaintiff in the writ of error cannot make out a title, he can receive no damage by the fine, which the writ of error always supposes to be done, though it should be erroneous; and therefore it is no less than trifling with the courts of justice to seek relief, when he cannot make it appear he has received any injury.

levies a fine, and dies without issue; and *J. S.* brings a writ of error as cousin and collateral heir of the daughter, yet he shall not reverse the fine; for there could no right descend to him from the daughter, because she had but an estate-tail, which determined by her death without issue; and it does not appear that the remainder was in the daughter as right heir. Dyer, 89. Cro. Eliz. 469. S. C. 3 Lev. 36. S. C. cited. So, if tenant in tail female levies a fine, which happens to be erroneous, and dies, leaving a daughter and a son, the daughter shall have the writ of error, and not the son, because she is to enjoy the land. Ro. Abr. 744. Dy. 90. a. [So, if one who is seised *ex parte maternâ* levies a fine in which there is error, the heir *ex parte maternâ* will be entitled to the writ of error. 1 Leon. 261. So, the younger son, when entitled to lands by the custom of borough-english, shall have the writ of error, and not the heir at common law, for this remedy descends with the lands. *Id. ibid.* Yet a brother of the half-blood is not entitled to bring a writ of error on a fine levied by his elder brother; though if there had not been such fine, the land would have descended to him. Co. Litt. 14. a. n. 6.] If a man releases all his right, or makes a feoffment of all the lands, of which an erroneous fine was levied, he shall have no writ of error; but, if the release or feoffment were only of part, he may bring a writ of error to reverse the fine, as to the rest. Cro. Eliz. 469. Owen, 25. Ro. Abr. 788. Moore, 365. 413. Jon. 352.

Ro. Abr. 746.

Dyer, 89.

This, *Roll*

says, is only

for conformity; but there seems to be something of justice in the practice, that they who joined in the fine, and thereby contributed to an illegal disposition (for such is an erroneous fine) of what another man had a right to, should be instrumental and assistant to the recovery of it.

But, if there be several parties to an erroneous fine, they shall all join with the party that is to enjoy the land, though they themselves can have nothing.

Ro. Abr. 757.

Another rule to be observed is, that nothing can be assigned for error that contradicts the record; for the records of the courts of justice being things of the greatest credit, cannot be questioned but by matters of equal notoriety with themselves; wherefore though the matter assigned for error should be proved by witnesses of the best credit, yet the judges would not admit of it.

Dyer, 89. b.

Ro. Abr. 757.

Cro. Eliz. 469.

And hence it is, that, in a writ of error to reverse a fine, the plaintiff cannot assign that the conusor died before the *teste* of the *dedimus potestatem*, because that contradicts the record of the conusance taken by the commissioners, which evidently shews that the conusor was then alive, because they took his conusance

after

after they were armed with the commission and the *dedimus* issued.

But the plaintiff in error may say, that after the conusance taken, and before the certificate thereof returned, the conusor died; because this is consistent with the record.

Ro. Abr. 557.

If a conusance upon a fine be made in court, the plaintiff in error cannot assign for error, that the conusor died before the return of the writ of covenant, for that would directly contradict the record; because the conusance in court is never made till the writ of covenant be returned, the parties till then not being judicially before the court.

Cro. Eliz. 468.

If the conusance be taken before commissioners *in pais*, the plaintiff cannot assign for error, that the conusor died before the return of the writ of covenant, for the *dedimus* may issue the day after the writ of covenant, and may recite it as pending before the return thereof.

Ro. Abr. 757.
Cro. Ja. 11.
Cro. Eliz. 468.
Vide Raym.
462. 2 Jon.
181. cont.

A conusance of a fine was taken before *R. M.*, one of the justices of C. B., and after, in the prosecution of the fine, the *dedimus* was directed to Sir *R. M.*, he being after the conusance made a knight, who returned the *dedimus* with his name and title; and this was assigned for error, that the person who took the conusance was not the same that was empowered to take it: but it was not allowed, because it contradicts the record, which is, that the *dedimus* was directed to Sir *R. M.*, and that Sir *R. M.*, by virtue thereof, took the conusance.

Yel. 33.
Arundell v.
Arundell, Ro.
Abr. 757. Cro.
Ja. 11, 12.

If a *dedimus* be awarded to two, and one only take the conusance of the fine, this may be assigned for error; because where one of the commissioners only certifies the conusance, the assignment does not contradict the record. But in this case, if the fine had afterwards been drawn up as a fine acknowledged in court, there the erroneous conusance taken upon the *dedimus* shall not be assigned for error, because it shall be taken as a fine acknowledged in court only, and no averment of the party shall be admitted to disprove the record.

Cro. Eliz. 240.
Yel. 34.

If one of my name levies a fine of my land, I may avoid this fine by shewing the special matter; as to say, that there are two of my name, one of *Sale* and the other of *Dale*, and that he of *Sale* levied the fine, and not I, who am of *Dale*; for this is consistent with the record, because I still admit that one of my name levied the fine.

Co. Reading, 9.
Cro. Eliz. 531.
Hubert's case.
Moore, pl. 866.
12 Co. 123.
S. C. where
the court may
order a vacat

to be entered on the roll, or a re-conveyance of the estate.

No man can have a writ of error to reverse a fine that took any estate by it.

5 Co. 39.
Tey's case.

One *Parrott* married *A.* who had an estate of inheritance of a considerable value, and whilst she was under age he prevailed on her to levy a fine with him of those lands, the uses whereof were declared to him and her and the heirs of their two bodies, remainder to the heirs of the survivor; this fine was taken in the country by virtue of a *dedimus potestatem* to Sir *Herbert Parrott*, his father, and an ignorant carpenter; after which the wife died

Herbert Parrott's case,
2 Ventr. 30.
Mod. 246. S.C.
in C. B. *Vide*
12 Co. 121.
Anne Hungegate's case.

without

Ro. Rep. 113,
114. S. C.
12 Co. 123.
Mansfield's
case. 12 Co.
124. Warcomb
and Carroll's
case.

without issue, and now her heir at law prayed the relief of the court: upon examination it did appear, that Sir *Herbert* did examine the woman, whether she were willing to levy the fine, and asked her husband and her whether she were of age or not, and both answered that she was; and now her heir moved that this fine might be set aside, and a fine imposed upon the commissioners for this undue practice in taking a fine of one under age. But all the court agreed they could not meddle with the fine; but, if the wife had been alive, and still under age, they might bring her in by *habeas corpus*, and inspect her, and set aside the fine upon motion; for perhaps the husband would not suffer the bringing or proceeding in a writ of error. And the court were of opinion, that it was the duty of commissioners to inform themselves of the party's age, and that a voluntary ignorance would not excuse them; and that if a commissioner to take a fine execute it corruptly, he may be fined by the court; for in relation to the fine, (which is the proper business of this court,) he is subject to the censures of it, as attornies, &c. But here it did not appear, that Sir *Herbert Parrott* knew that she was under age, and therefore the court would not fine him.

Hutchison's
case, 3 Lev. 36.

Husband and wife, the wife being but sixteen years of age, levied a fine, which was taken by virtue of a *dedimus*, and they being brought into the court of C. B. by complaint of the remainder-man, a vacat was entered of the fine *quoad* the woman, and the court directed the remainder-man to prosecute an information against him who took the caption of the fine.

Eq. Cas. Abr.
258. St. John
and Turner.

A. having inveigled his wife to levy a fine of her land to him when she lay on her death-bed, pretending, as was suggested, he was to have it only for his life; a *dedimus* was sent into the country to take the fine, and the caption was taken the very day she died; and because the fine would not have stood, the party being dead before the king's silver was paid, the writ of covenant was rased in the teste, and made to bear date ten days backward, and all the other parts of the fine were rased likewise, and made to correspond with it, and the king's silver was paid, and so all appeared on the record to have been done before the death of the woman: on a bill brought in the court of Chancery to have the fine set aside, or to have a re-conveyance, it was holden by the court, that though Chancery has a power to relieve as much against a fine obtained by fraud or practice, as any other kind of conveyance, yet that such relief was not by decreeing a vacat of the fine, but by ordering a re-conveyance; but for any error in the fine, or irregularity or ill practice in the commissioners, it was a matter properly cognisable in that court where the fine was levied, and for which that court may vacate the fine; but there being no proof of fraud or practice in this case, the bill was dismissed.

See *acc.*
1 Vern. 205.
2 Vern. 307.
678. 2 Atk.
381. 390.

Ro. Abr. 752.
F. N. B. 20. b.
2 Bend. 51.
Dyer, 89.
Ro. Abr. 753.

The manner of reversing fines differs from the method observed in reversing other judgments; for in all other cases, where the suit is adversary, the record itself is removed; but in case of a fine the transcript only is removed; for where the suit is adversary, the
record

record itself is transmitted, that it may be a precedent in like cases; but fines are only a more solemn acknowledgment or contract of the parties; and therefore are no memorials of the law, and need only be affirmed or vacated; if the former, the contract stands as it was; if the latter, the justices of B. R. may send for the fine itself and reverse it, or they may send a writ to the treasurer and chamberlain to take it off the file. Besides, should the record itself be removed and affirmed, it could not be engrossed for want of a chirographer in B. R. and for this reason, my Lord *Coke* says, a fine levied in B. R. is voidable by writ of error.

If there be tenant for life, remainder to an infant in fee, and they two join in a fine, the infant may bring a writ of error and reverse the fine as to himself, but it shall stand good as to the tenant for life; for the disability of the infant shall not render the contract of the tenant for life, who was of full age, ineffectual. (a)

judged in a later case, that although a fine may be reversed as to part of the land, and remain good as to the residue, yet that it cannot be reversed *in toto* as to one person, and remain good *in toto* as to another. *Zouch v. Thompson*, 1 *Ld. Raym.* 179.]

If an infant brings a writ of error to reverse a fine for his nonage, and his nonage, after inspection, is recorded by the court; but before the fine reversed he levies another fine to another; this second fine shall hinder him from reversing the first, because the second having entirely barred him of any right to the land, must also deprive him of all remedies which could restore him to the land.

But, if tenant in tail levies an erroneous fine with proclamations, and then levies a second fine, which is also erroneous, and dies; if the issue in tail brings a writ of error to reverse the first fine, the defendant may plead in bar the second; for though there be error in the second, yet, till that appears judicially to the court, it must be looked upon as a fine duly levied, and, consequently, a bar to the plaintiff, because while the second stands in force he cannot have the land. But, if in this case the plaintiff brings a writ of error to reverse the second fine, and the defendant pleads in bar the first fine, the plaintiff may reply upon the first writ of error, that the second fine was erroneous; and upon the second writ, that the first fine was erroneous, and so be relieved against both; for here the examination of both fines comes judicially before the court, and if there appears any error, the court will set them aside, and not suffer them to stand in the way of the plaintiff's right.

But in a writ of error to reverse a fine, the defendant cannot plead the same fine now endeavoured to be reversed and five years in bar of the writ of error, no more than in a writ of error to reverse an outlawry can that outlawry be pleaded in bar of the writ of error, *quia non valet exceptio istius rei, cujus petitur dissolutio*.

Co. Reading, 12. Salk. 337. by which last book a writ of error *coram vobis* lies upon an affirmation of a fine in B. R.

Leon. 115.
317. 2 Sid. 55.
2 Jon. 182.

(a) [But it hath been ad-

Ro. Abr. 788.

Ro. Abr. 788.

Raym. 461.
Vent. 353.
2 Sid. 92, 93.
2 Jon. 181.
Cro. Jac. 333.
Ro. Rep. 36.
2 Buls. 244.
2 Inst. 518. Ld. Raym. 179.

IF

Cro. Car. 415. Ro. Abr. 797. If one that is sheriff of a county levies a fine, and the writ of covenant is directed to the coroner, this is no error, but the proper method, in order to prevent partiality.

Cro. Ja. 77. Ro. Abr. 794. A writ of covenant to levy a fine ran thus, *Præc' A. quod teneat conventionem de octo messuag', duobus toftis, decem gardinis*, and the *dedimus potestatem* was pursuant to the writ of covenant, but the *præc'*, which was drawn up with the concord, was *de duobus messuag' pro duobus toftis*; but this was no error, because where the concord was pursuant to the *dedimus* and the writ of covenant, the *præcipe*, which seems to be but a copy of the writ of covenant on paper, is more than is needful, and therefore no material error.

Cro. Ja. 77. 78. Ro. Abr. 794. If the commissioners upon a *dedimus* return thus, *executio istius commissionis patet in quodam pannello huic commission' annex'*, where the usual form is *in quodam schedulâ*; yet this is no error to avoid the fine, for whatever return certifies the conusance to be duly taken by the commissioners is sufficient; and therefore, if the commissioners certify the conusance under their seals, without any words, it is well enough. So, if the return had been made thus, *executio patet in hac annexâ*.

Dyer, 216. 182. Hughes's Abr. 938. If a fine be levied, but the proclamations thereon be not duly or regularly made, the writ of error shall reverse only the proclamations; for where the proclamations are not all of them, or not duly, made, it is altogether the same as if they had never been made, and then the fine remains good at common law to work a discontinuance.

Salk. 339. The court will not reverse a fine without a *scire facias* returned against the tertenants; for the conusees are but nominal persons; and though it was otherwise in the precedent in *Co. Ent. and Hern's Plead.* 375., and the law perhaps does not strictly require it, yet the course of the court does.

Cro. Eliz. 471. [Doubts were entertained, soon after the Restoration, respecting the power of parliament to set aside a fine obtained by force and fraud. Lords' Journals, vol. 11. p. 191. 209. 12 Car. 2. Comm. Journ. vol. 8. p. 344. 13 & 14 Car. 2. c. 27. Cruise on Fines, 347.] Fines may be avoided where they are obtained by fraud, covin or disceit, though there be no error in the process; and that may be done either by writ of disceit or averment setting forth the fraud or covin.

F. N. B. 98. a. Moore, 6. 2 Wils. 17. The reason why fines of ancient demesne lands must be levied in the lord's court is, because those lands were not originally within the jurisdiction of the courts of *Westminster*; and this privilege the tenants enjoy, not to be called from the business of the plough by any foreign litigation. But for this *vide* 4 Edw. 3. 4. Keilw. 43. Ro. Abr. 775. F. N. B. 98. a. Leon. 290. Cro. Eliz. 471. Bro. tit. Fines, 101. 9 H. 7. 12. Salk. 339.

F. N. B. 98. a. Moore, 6. 2 Wils. 17. The reason Thus, if a fine be levied of land in ancient demesne, the lord shall have a writ of disceit against the conusor and the tenant, and by that avoid the fine.

why fines of ancient demesne lands must be levied in the lord's court is, because those lands were not originally within the jurisdiction of the courts of *Westminster*; and this privilege the tenants enjoy, not to be called from the business of the plough by any foreign litigation. But for this *vide* 4 Edw. 3. 4. Keilw. 43. Ro. Abr. 775. F. N. B. 98. a. Leon. 290. Cro. Eliz. 471. Bro. tit. Fines, 101. 9 H. 7. 12. Salk. 339.

3 Co. 80. a. Plow. 49. b. If a fine be levied to secret uses to deceive a purchaser, and the conusee plead the fine in bar, the purchaser may aver the fraud in avoidance of the fine by 27 Eliz. c. 4. and such averment is

is not contrary to the record, because it admits the fine, but sets it aside for the covin and fraud in obtaining it.

So, if a fine be levied upon a usurious contract, it may be avoided by averment by 13 Eliz. c. 8. because being levied for ends the law has prohibited, will not encourage any evasion out of the act, nor suffer such usurious contracts to be supported by the solemn acts of the courts of justice against the intention of the statute. 3 Co. 80.

[By statute 23 Eliz. c. 3. § 2. "No fine shall be reversed for false or incongruous Latin, rasure, interlining, mis-entering of any warrant of attorney, or of any proclamation, mis-returning or not returning of the sheriff, or other want of form in words and not in matter of substance."

By statute 10 & 11 W. 3. c. 14. a writ of error to reverse a fine must be brought and prosecuted with effect within 20 years after the fine levied.

A writ of error can only be brought to reverse a judgment in a court of record; for to amend errors in a base court, which is not of record, a writ of false judgment lies, returnable in the court of Common Pleas. Co. Litt. 288. b.

A writ of error, properly speaking, is a proceeding in the nature of an appeal; it is therefore usually brought to reverse a fine in the court of King's Bench, that court having an appellent jurisdiction over the court of Common Pleas. But, where the error assigned in the judgment doth not arise from any fault in the court, but from some defect in the execution of the process, or from some matter of fact, the writ of error must be brought in the same court where the judgment was given; in cases of this kind, therefore, in the court of Common Pleas. F. N. B. 21.
9 Vin. Abr.
486.

During the term in which a judicial act is done, the record may be amended or invalidated without a writ of error; because, during the term, the record is in the breast of the court, and the rolls are alterable at the discretion of the judges. And now the courts of justice will allow amendments to be made at any time while the suit is depending, notwithstanding the record be made up, and the term be past; for they consider the proceedings as in *feri* until the judgment is given. Co. Litt. 260. a.
3 Bl. Com.
407.

As to the amendment of fines, the court of Common Pleas has frequently permitted it, where any palpable mistake or misprision has been made by the officers of the court, in the entry of the king's silver (a), the proclamations (b), or the description of the lands (c); and this even after error brought upon the very point.] (a) Bohun's
case, 5 Co. 43.
(b) Dowling's
case, *id.* 44.
(c) 1 Ld. Raym.
209. Pig.
Recov. 218.
Cas. of Pr. 52.
Barnes, 216. 24. 3 Wils. 58.

¶ The deed of uses is the measure by which juries usually go in ascertaining the description of the estates whereof a fine is levied; and the courts are in the habit of directing the fine to be amended as to the parcels by such deed, though it be of a later date than the fine, as is generally the case, where it is to declare the uses. 1 Ld. Raym.
209. 4 Taunt.
257. 6 Taunt.
73. 1 Marsh.
452. S. C.
6 Taunt. 276.

Gladwyn v.
Brown,
2 Taunt. 1.

Where from the length of time which had elapsed it had become impossible to swear that certain out-lying parcels, situated in a different parish from the rest of the estate were intended to pass by the fine, the court permitted the name of that parish to be inserted in the fine, upon seeing that the whole was comprized in the deed of uses.

Gill v. Yeates,
4 Taunt. 708.

Though the deed of uses do not itself immediately ascertain the parcels intended to pass by the fine, yet, if it refer to another instrument through which they can be ascertained, the court will permit the insertion of any parts that may appear to be omitted.

Lambe v. Rea-
ston, a.
5 Taunt. 207.
1 Marsh. 23.
S. C.

Though the deed of uses describe the land as being in a parish in which it is not, yet if it be clear from the other parts of the description of the land that it was intended to pass, the fine will be amended by inserting the name of the proper parish.

Shelly v. John-
son, 1 Marsh.
519. Payne v.
Garrick, *id.*
468. S. C.

And where two fines of different shares in the same lands stated them to be situated in "the parish of A." instead of "A." there being no such parish; the court permitted them to be amended; the deed to lead the uses of the first fine being correct; though that of the last had the same mistake with the fines.

Frost v. Hales,
2 Marsh. 391.

Though the deed of uses had been lost, yet a fine of premises described as being in "the town of Kingston upon Hall," was amended by prefixing the words "the lordship of Myton in the county of," upon an affidavit that they had been so described in the deed.

Jenk. Cent.
254.

It is said, that a fine will not pass a greater number of acres than are contained in the writ and concord, although the deed of uses mentions more; for the fine is the foundation of the estate, and the estate ought to rise out of it.

1 Prest. Con-
vey. 272.

There are cases however to the contrary. In 6 Co. 67. it is stated to have been adjudged in *Sir John Bruyn's case*, in the beginning of the reign of Elizabeth, that in a common recovery (which is had by agreement and consent of the parties) of acres of land, they shall be accounted according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*, 33 E. 1. In 12 Vin. Abr. tit. Evidence (T. b. 82.) there is this passage: "On trial in the North, whether lands were comprized in a common recovery or not; being, as described, but 28 acres, yet the fact was they were 120 acres; yet *bene*, because the intent of the party is what is to govern in these cases, and these 28 acres shall not go according to statute, but the estimation of the parties. *Per King Chan. Tr. Vac. 1727.* And in *Eyton v. Eyton*, 1 Br. P. C. 151. it was argued on the part of the defendant (and the argument seems to have prevailed) that the deed of uses, and not the fine and recovery, was the measure by which the jury are governed.

Id. 273.

(a) It is essen-
tial that the
lands should
be included in
it, either by special designation, or by general words.

From the above cases, we may collect, that the rule now is to amend the recovery by the deed of uses, when the lands are described in it by name, or it was evidently the intention of the parties to comprehend them. (a)

Pearson v. Broughman, 1 H. Bl. 73.

An affidavit is required of the intention to include the parcels, which are omitted out of the fine, &c. unless there be a manifest intention disclosed by the deed to include the parcels in question. Under such circumstances of intention it would seem the affidavit will be dispensed with, when by reason of the death of the parties it cannot be made. (a) At least an affidavit of the belief of an intention to comprize the parcels will be sufficient.

Wheeler v. Heseltine, 2 Bos. & Pull. 560. Dowse v. Reeve, id. 578. (a) Milbanke v. Jolliffe, id. 586. in notis. Loggin v. Pullen, Barnes, 21.

In one case the court hesitated to allow the number of acres in a fine to be increased, upon the mere circumstance that the quantity in the deed of uses was greater than in the fine, it not being sought to insert additional parcels omitted to be specified, and passing only by the general words, but all the closes being enumerated in the deed, and the quantity only under-stated in the fine.

Stone v. Ashby, 5 Taunt. 616.

It has been holden, that in a fine levied by husband and wife, the number of acres cannot be increased where the deed of uses is general. The reason assigned by *De Grey C. J.* was, that the wife is not examined to the deed as she is to the fine (a), all the parcels in which should be distinctly named to her. But *Blackstone J.* thought the deed of uses had always been allowed as sufficient evidence of the intention of the parties, even in the case of feme-coverts; and he referred to *Loggins v. Rawlins, Barnes, 21.* and *Craghill v. Pattinson, Id. 24.* He concurred with the rest of the court in refusing the amendment, because he considered the attempt to increase the number of acres by subsequent *viva voce* evidence as an inlet to fraud. In a late case of a recovery suffered by husband and wife, where the several closes were all mentioned in the deed and recovery, but were stated to be of less quantities, than from a subsequent admeasurement they were found actually to be, the additional number was allowed to be inserted, though there were no general words to aid the amendment. And upon this occasion the case of *Powel v. Peach*, was cited as an authority for the amendment.

Powell v. Peach, 2 Bl. Rep. 1202.

(a) *Qu.* This reason.

Where a fine was passed of thirty acres of land, twelve acres of meadow, and twenty-five acres of pasture; but the deed of uses conveyed a close, without describing its quality, but which was pasture containing twenty-five acres and a fraction, and another close described as meadow containing nine acres and a fraction, so that the entire quantity of the estate was in fact greater by five acres and a fraction, than the quantity comprized in the fine under the name of land, and the quantity which in fact was pasture was greater by a fraction than the quantity comprized in the fine under that name; the court refused to amend the fine by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed.

Alexander v. Hanford, 4 Taunt. 734.

Bartram v. Towne, 6 Taunt. 58. 1 Marsh. 446. S. C.

Where the deed of uses purported to convey lands situated in the parishes of *S. & S.*, in the island of *F.*, and the fine comprized lands in *S. & S.* in the island of *F.*; though there was an affidavit that these lands were in the parish of *F.* in the same island,

Cotterel v. Franklin, 6 Taunt. 284.

island, the court refused to amend the fine by inserting the parish of *F*.

Blake v. Pooley, 5 Taunt. 624. But a fine of lands in the parish of *F*. which is no parish, but the popular name of a district containing two parishes, *viz. F. St. M. & F. St. N.*, was amended by substituting these two parishes by name. The description was the same in the deed of uses as in the fine.

Phillips v. Jones, 3 Bos. & Pull. 362. If one of the deeds of uses, *viz.* the lease, contain the word "tithes," but it be omitted in the other deed, *viz.* the release, the court will not amend the writ of entry by inserting that word, though the release has the words, "and also all houses, ways, &c., hereditaments and appurtenances whatsoever to the said messuages, lands, &c., belonging or in anywise appertaining;" for the lease does not convey all the hereditaments described in the lease, but only the hereditament belonging to the messuages and lands before described in the release itself; and tithes are not hereditaments belonging to land, but are a separate subject of tenure, and must be holden by a different title.

Vide Corden v. Coclough, 2 N. R. 431.
Dowse v. Reeve, *id.* 578.
Garle v. Mason, 2 Marsh. 194. *Ross v. Worge*, *id.* 195.

Fawcett v. Lowe, 6 Taunt. 432. The deed of uses is not a sufficient authority upon which to make an amendment without an affidavit connecting it with the fine, stating that it is the deed in pursuance of which the fine was levied.||

Heath v. Sir I. E. Wilmot, 2 Bl. Rep. 788.
Gill v. Yeates, 4 Taunt. 708. Where a fine is recorded of one term, the court will not alter it, and make it a fine of another. || Nor will it transfer a writ of covenant from one county to another, nor transpose parishes from one county to another.

Dixon v. Lawson, 2 Bl. Rep. 816. (a) *Grey v. Wainwright*, 1 Marsh. 678. The court has refused to allow a change of the christian names of the parties, where no deed of uses had been executed; and where there was a deed to warrant the amendment (a), it reluctantly assented to it.

Ex parte Motley, 2 Bos. & Pull. 455. An alteration in the surnames of the deforciant it has peremptorily refused, though it was sworn that a wrong name was inserted by mistake.||

(a) *Gage's case*, 5 Co. 45. [The judges have, in some instances (a), directed the original writ upon which a fine has been levied to be amended; but the propriety of such amendments seems, from some modern determinations (b), to be extremely doubtful.]
(b) *Lord Pembroke v. Lord Jeffries*, 1 Salk. 52. 2 Ld. Raym. 1066. But they are still in the habit of allowing them.

Lindsay v. Gray, 2 Bl. Rep. 1013. In one case, the Court of Common Pleas refused to amend the return of a writ of covenant on which a fine had been levied, because the deed of uses was suspicious, the fine having been taken from a dying woman. But Sir *Wm. Blackstone* observes, that the court gave no opinion as to the propriety of such an amendment in a fair case.]

Seymour v. Barker, 2 Taunt. 198.
Moor v. Sharpe, 5 Taunt. 631. || It not being allowed to combine two operations in one fine, where certain lands in possession, and others in reversion were included in the same fine, the court permitted it to be amended *in fieri* by striking out the last.||

[By the statute 23 Eliz. c. 3. § 10. it is enacted, That no fine levied before that act, which shall be exemplified under the great seal, shall, after such exemplification, be in anywise amended. And by the statute 27 Eliz. c. 9. § 10. no fine levied before that act, which shall be exemplified under any judicial seal of any of the shires of *Wales*, or the town or county of *Haverfordwest*, or under the seal of any of the counties palatine, shall, after such exemplification, be in anywise amended.]

FINES AND RECOVERIES.

A RECOVERY, in a large sense, is a restitution to a former right by solemn judgment; and judgments, whether obtained after a real defence made by the tenant to the writ, or whether pronounced upon his default or feint plea, had the same efficacy and force to bind the right of the land in question. This was the notion of the common law; and hence men took an opportunity of making use of the decisions of the court to their own advantage, and to the prejudice of others, who, though in some cases strangers to the action, yet were interested in the land for which it was brought.

For whilst these recoveries were governed by the strict rules of the common law, particular tenants, as tenant in dower, curtesy, in tail after possibility of issue extinct, and for life only; also, those who had made leases for years, and those whose wives were entitled to dower, often took advantage of them, and by selling the lands, and suffering their purchasers to recover them, thereby defeated the right of those in remainder or reversion, &c., which were inconveniencies so great, that it was thought necessary to provide against them by (a) positive laws.

suffered either by the tenant in dower, by the curtesy, or in tail, after possibility of issue extinct, or for life; and by c. 4. of this statute, the wife is secured as to her dower; and the statutes of *Gloucester*, c. 11., and the 7 H. 8. c. 4. and 21 H. 8. c. 15. have established the right of termors, and enabled them to falsify such recoveries. *Vide* Doctor and Student, 45.

But there is no express provision made by any statute to preserve the interest of the issue in tail, or of him in reversion, against a recovery suffered by the donee; yet it seems to have been for two hundred years after the making of the statute *de donis*, that they were protected by that statute; and therefore we find no express resolution, where such recovery was allowed to bar the issue in tail, or those in remainder or reversion, till the reigns

2 Inst. 75. 429.
1 Bur. Rep.
115. 5 T. R.
107. but particularly
Cruise on Recoveries.
See also
Willes, 452.

Vide Co. Litt.
104. Kel. 109.
2 Inst. 321.
Bro. 69. F.N.B.
468. Plow. 57.
(a) As Westm.
2. c. 3. which
makes provision for him
in reversion,
against the recoveries suf-

(a) Thus in the case of *Octavian Lombard*, in the 44 Ed. 3. it was adjudged, that the donee in tail of the gift of the disseisor may grant a rent-charge to the disseisee, in consideration of a release of all his right, and the issue in tail bound by the grant. Ro. Abr. 342. Co. Litt. 343. 10 Co. 37. Plow. 436. (b) A lineal warranty with assets has been always allowed as a sufficient bar. 2 Inst. 335. Co. Litt. 374. 4 Leon. 132, 133. But the first case we find in which it was attempted to bar the issue in tail by a recovery, is *Taltarum's case*, which vide 12 Ed. 4. f. 19. Vide head of *Estates-tail*.

Co. Litt. 356.

a. Co. 15.

Vaugh. 51.

When these recoveries were established as a common conveyance, as the best and securest way of barring the issue in tail, and those in reversion or remainder, the tenant for life began to apply them once more to the prejudice of those who had the inheritance; and though the former statutes gave those who had the inheritance a remedy, yet the provision made by them being tedious and expensive, it was thought proper to make the 32 H. 8. c. 31., which declares such covinous recoveries against the particular tenants to be void in respect to him in reversion or remainder; and though the judges very reasonably determined recoveries against that act to be not only void, but a forfeiture of the particular estate, because it was a manner of conveyance as much known at that time as a fine or feoffment, and therefore by parity of reason ought to have the same effect and operation; yet that statute did not fully answer the end for which it was made.

10 Co. 45. a.

Co. Litt. 362.

For if *A.* had been tenant for life, and made a lease for years to *B.*, and *B.* had made a feoffment in fee, if the feoffee had suffered a recovery, and vouched the tenant for life, this was no void recovery within the statute; because *A.* the tenant for life was not seised at the time of the recovery; for the feoffment of the termor was a disseisin to *A.*, and him in reversion; and the statute makes recoveries of tenants for life in possession only void against them to whom the reversion then belongs.

Co. 15. Pelham's case.

Leon. 123.

S. C. (c) And

it has been since holden, that if tenant for life bargains and sells, and suffers a recovery by coming in as vouchee, though afterwards he

Yet, where tenant for life bargained and sold his land in fee by indenture enrolled, and the bargainee suffered a recovery, and vouched the bargainor; this was a void recovery, and a (c) forfeiture within the 32 H. 8. c. 31.; for though the bargain and sale was of the inheritance, yet it past only an estate for life of the bargainor, which was the greatest estate he could lawfully pass, and, consequently, the reversioner was not divested; and therefore the bargainee being a legal tenant for life in possession, the recovery against him, though with a voucher of the bargainor, was void within that act against him in reversion, whose reversion was not turned to a right, as in the former case of a disseisin.

should reverse that recovery for want of an original, yet it is a forfeiture of his estate. Sid. 90.

But the former defect was cured by 14 Eliz. c. 8., which declares all recoveries (had by agreement of the parties or by covin) against tenant for life, of any lands whereof he is so seised, or against any other with voucher over of him, to be void, as against the reversioners and their heirs.

These

These statutes made no provision for reversions or remainders expectant on estates-tail; and therefore if there be tenant for life, remainder in tail, remainder in fee, and the tenant for life suffer a recovery, and vouch the remainder-man in tail, who vouches the common vouchee; this is so far from being a void recovery within those statutes, that the reversion in fee is actually barred by it; for the intended recompence, which the remainder-man in tail is to have against the common vouchee, is to go in succession, as the estate-tail would have done; and it cannot be a covinous recovery within the act, because the remainder-man in tail joined in it, who may at any time suffer such a recovery to destroy the remainder in fee.

10 Co. 39.
b. 45. Jen-
ning's case.
Co. Litt. 362. a.
3 Co. 60. b.
Cro. Eliz. 562.
Wiseman and
Crow. Moore,
690. Cro.
Eliz. 570.
[A. tenant for
years, re-
mainder to B.
for life, re-
mainder to
the first and

other sons of B. in tail, remainder to B. in tail; A. and B. join in a lease and release, to make a tenant to the *præcipe*, and suffer a recovery. It was holden, that the estate-tail to the sons of B. was not divested by the recovery, nor did A. and B. incur any forfeiture of their respective estates: whether A. had forfeited or not, it was immaterial to consider, as there was no one to take advantage of it but B.; and B. had a remainder in tail subsequent to that limited to his sons; upon which the recovery might lawfully operate; and the recompence in value could not go to the sons, because their estate-tail preceded that of which the recovery was suffered: such estate, therefore, could not be displaced, or in any manner affected by the recovery. *Smith v. Clifford*, 1 T. R. 738.]

These common recoveries were no sooner allowed by the judges to bar estates-tail, but men began to improve them into a common way of conveyance, and to declare uses upon them, as upon fines and feoffments. Hence it is, that the statutes, which provide against any alienations or discontinuances of particular tenants, provide at the same time against their recoveries. Thus 11 H. 7. c. 20., declares all recoveries, as well as other discontinuances by fine or feoffment of women tenants in tail, of the gift of their husbands, or their ancestors, to be void. So, a recovery against husband and wife of the inheritance of the wife, without any voucher, is declared to be void within 32 H. 8. c. 28., though the statute says, suffered or done by the husband; for this, like a feoffment by baron and feme, in substance is the act of the baron only, and so within the statute. But a common recovery suffered by a feme covert, where her husband joins with her, is good to bar her and her heirs.

Doct. & Stud.
54. Co. Litt.
326. a. 8 Co.
72. 2 Inst.
342. 2 Ro.
Abr. 295.
10 Co. 43.

Under this head, we will consider,

- (A) Who may suffer a Recovery.
- (B) Of what Things a Recovery may be suffered, and by what Names.
- (C) What Estates and Interests may be barred by a common Recovery: And herein of the single and double Voucher.
- (D) Of erroneous and void Recoveries; who may avoid them, and by what Method.

(A) Who may suffer a Recovery.

Buls. 235.
2 Ro. Abr.
395. Co. Litt.
381. b.
10 Co. 43.
Ro. Abr. 731.
742. Sid. 321.
322. Lev. 142.
2 Sand. 94.
Cro. Eliz. 471.
Hob. 196.
Cro. Car. 307.
5 Mod. 209.
Mes. 10 Co.
43. & 2 Ro.
Abr. 395. cont.
vide 2 Salk.
567., where
J. S. being of
the age of
nineteen
years, his
sister who was
next in re-
mainder, and
also his heir,
married one
of his foot-
men, and he
petitioned the
king for leave
to suffer a re-
covery, who

WHEN recoveries were improved into a common way of conveyance, it was thought reasonable that those, whom the law had judged incapable to act for their own interest, should not be bound by the judgment given in recoveries, though it was the solemn act of the court; for where the defendant gives way to the judgment, it is as much his voluntary act and conveyance, as if he had transferred the land by livery, or any other act *in pais*; and therefore if an infant suffers a recovery, he may reverse it, as he may a fine by writ of error during his minority. And this was formerly taken for law, as well where the infant appeared by guardian, as by attorney, or in person. But now the distinction turns on this point, that if an infant suffers a recovery in person, it is erroneous, and he may reverse it by writ of error. But even in this case the writ of error must be brought during his minority, that his infancy may be tried by the inspection of the court, for at his full age it becomes obligatory and unavoidable. But, in some instances, the court has admitted the infant to appear by guardian, and to suffer a recovery, or come in as vouchee; but this is seldom allowed, and only upon emergencies, when it tends to the improvement of the infant's affairs, or when lands of equal value have been settled on him. And recoveries suffered in this manner have been the rather allowed, because if they be to the prejudice of the infant, he has remedy for it against his guardian, and may reimburse himself out of his pocket, to whom the law hath committed the care of him.

referred it to the judges of the Common Pleas, before whom several precedents suffered by infants on privy seals were produced; but the judges, observing that most of them were on the petitions of their fathers on their sons marriage, and an equal recompence given, and that there was no such consideration in this case, refused; but for this *vide* the above authorities, and Vern. 461. [Common recoveries suffered by privy seal are now disused, and private acts of parliament are universally substituted in their stead. Cruise on Recov. 184. For notwithstanding the precautions of the judges, recoveries suffered in that manner might be reversed by writ of error. Cro. Car. 307. 1 Mod. 48.]

Sid. 321.

Lev. 142. Q.

If an infant suffers a recovery, and appears by attorney, it seems he may reverse it after his full age; for here it may be discovered, whether he was within age when the recovery was suffered, because it may be tried *per pais*, whether the warrant of attorney was made by him when he was an infant.

Perk. 12.

3 Burr. 1804.

[When, therefore, an infant is to suffer a recovery, he must make a tenant to the *præcipe* by feoffment, and give livery of seisin in person, by which means the feoffment is only voidable; whereas if the infant appointed an attorney to give livery of seisin for him, the feoffment would be absolutely void.

Ex parte
Johnson,
3 Atk. 559.

An infant trustee may join in a common recovery, in consequence of the statute 7 Ann. c. 19., if he is directed to do so by the Court of Chancery.

The king cannot suffer a common recovery, for if he does, he must either be tenant or vouchee; and in both cases the demandant must count against him, which the law does not allow.

Idiots, lunatics, and generally all persons of non-sane memory, are disabled from suffering common recoveries, as well as from levying fines; though if an idiot or lunatick does suffer a common recovery, and appears in person, no averment can afterwards be made that he was an idiot or lunatick. But, if he appears by attorney, it seems that such an averment would be admitted, upon the same principle that an averment of infancy may be made against a warrant of attorney, acknowledged by an infant for the purpose of suffering a common recovery, as the fact of idiocy may be tried by a jury with as much propriety as the fact of infancy.

In a celebrated case which was lately determined by the House of Lords of *Ireland*, the majority of the judges were of opinion, that the caption of a warrant of attorney, taken by the chief justice of the Court of Common Pleas for the purpose of suffering a common recovery, was not conclusive evidence of the capacity of the person acknowledging such a warrant of attorney.

Although no averment of idiocy or lunacy can be made against a recovery, where the parties appear in person, yet evidence of weakness of understanding has been admitted to invalidate a deed to make a tenant to the *præcipe* for suffering a recovery; and the recovery has in that manner been set aside.]

Fig. 74.
Plowd. 244.
Cro. Car. 96.

Cruise on
Recov. 185.

Hume v. Burton, Cruise on
Recov. Append.

2 Ves. 403.
3 Atk. 313.
Jones v. Cave,
Hereford,
Lent Assizes,
1765, *coram*
Sir. I. E. Wil-
mot. Cruise on Recov. § 303.

A recovery, as well as a fine by a feme covert, is good to bar her; because the *præcipe* in the recovery answers the writ of covenant in the fine to bring her into court, where the examination (a) of the judges destroys the presumption of law, that this is done by the coercion of her husband, for then it is presumed they would have refused her.

The Court of Common Pleas cannot by the consent of a married woman, upon examination, give effect to her conveyance by lease and release. Fines were always binding upon married women, though it was thought proper to make them liable to examination by st. 18 E. 1. c. 4. *De modo levandi fines*. Fines and recoveries had their origin from real suits for the recovery of land. Though they are now merely modes of conveyance, the forms are still preserved; and the principles are kept entire. A title is asserted paramount to that of the married woman. Upon a fine, the existence of that title is recognized by an agreement after suit; and, upon a recovery, by judgment of the court upon default of the party. It is upon technical principles, and under the cover of these forms, that she is permitted to part with her estate, without a direct violation of the rule of law denying her any disposing power. 10 Ves. 587, 588.]]

10 Co. 43. a.
2 Ro. Abr.
395.
(a) || But it is
not merely by
the examina-
tion that the

(B) Of what Things a Recovery may be suffered, and by what Means.

[A COMMON recovery may be suffered of all things whereof a writ of covenant may be brought for the purpose of levying a fine, as of an honor, barony, castle, messuage, curtilage, land, meadow, pasture, underwood, warren, surze, heath, moor, &c.

Cruise on
Recov. 163.

&c. And in general a common recovery may be suffered of any thing whereof a writ of entry *sur disseisin*, or any other writ of entry will lie.

In consequence of the statute 32 Hen. 8. c. 7. § 7., a common recovery may now be suffered of every kind of ecclesiastical or spiritual profits, as of tithes, oblations, portions, pensions, &c.

5 Co. 40.

Poph. 22. S.C.

It was determined in *Dormer's* case, that a common recovery might be suffered of an advowson in gross, upon a writ of entry. Mr. *Pigott* says, that this must be understood of an advowson appendant to a manor, but could not be of an advowson in gross, since the parson has the freehold; and that therefore it ought not to be by writ of entry *en le post*, but by writ of right of advowson.

Bayley v.
University of
Oxford,
2 Wils. 116.

A common recovery may, however, be suffered of an advowson in gross, and a small quantity of land on a writ of entry *sur disseisin*.

Fig. 97. *Vide*
Turner v.
Turner, 1 Br.
Ch. Rep. 316.

A recovery may be suffered of a rent-charge issuing out of lands; but not of an annuity which is charged only on personal estate.

Fig. 96.
18 Vin. Abr.
218.

It is said in *Pigot* and *Viner*, that a common recovery cannot be suffered of a fishery, common of pasture, estovers, services to be done, nor of a quarry, a mine, or market, for they are not in demesne, but profit only.]

2 Inst. 353.
Poph. 22, 23.
2 Vent. 32.
Cowp. 346.
Hence it is,
that though

Recoveries being now settled as common assurances to establish men in their purchases, are very much favoured by the judges, and not compared to judgments in other real actions or adversary suits.

the statute of *Westminster* 2. c. 5., says, *non sint nisi tria brevia originalia* for the recovery of advowsons; yet a writ of entry in the *post*. has been admitted for an advowson in gross, because this being the original writ in these common recoveries, which are suffered by the consent of parties, the judges have allowed advowsons as well as rents, and other incorporeal inheritances, to pass by recoveries, *quia consensus partium tollit errorem*; so it is of commons in gross; and if this should not be allowed, there would be no method of barring the remainder or reversions depending upon estates-tail, which the tenant in tail in every other case has a power over. 5 Co. 40. *Dormer's* case.

2 Ro. Abr.
396. 6 Co. 64.
2 Ro. Rep. 67.
2 Vent. 32.
S. P. *vide* Cro.
Eliz. 524. 707.
and Keb. 591.
691. *cont.*

If a man be seised of a reputed manor, which really is no manor, and he suffer a common recovery of this by the name of a manor, this is a good recovery of the lands which constituted the reputed manor; though strictly speaking there is no manor recovered; because the law supports this, as all other conveyances, according to the intention of the parties; for it would be severe to vacate this conveyance, when the purchaser recovered the lands by the assent of the vendor under such a denomination.

Sid. 190. Lev.
27. Keb. 591.
691. 2 Mod.
235. S. C. be-
tween Thynn
and Thynn;
and note, that
in all the books

So, if a recovery be suffered of a manor with its appurtenances, lands which have been reputed parcel of the manor shall pass; for it is but equitable, *quod voluntas domini volentis rem suam in alium transferre rata habeatur*. And though the recovery does not mention the lands reputed parcel of the manor, but only the manor itself, yet this may be supplied by the indenture, if that be

be of the manor and all lands reputed parcel thereof, though occupied together but two years. which report this case, it is said, that

as to Sir Moyle Finch's case, (which *vide* 6 Co. 63.) all the judges of England gave their opinions under their hands, that the lands in reputation, belonging to that manor, should not pass; but that *Coke*, after he was made chief justice, got it adjudged otherwise, and so it hath been holden ever since; and well it was that it was so adjudged, because many settlements depend thereon.

If a man having a third part of a manor, suffers a recovery of a moiety of the manor, this is good to pass his interest in the third part; for where the words of a conveyance (which a recovery is agreed to be) contain more than the grantor can convey, it would be an unreasonable interpretation to make this void and entirely useless, when they are sufficient to convey so much as he might lawfully pass. So, if the recovery had been in this case of the third part of the manor, by the name of the moiety, part and purparty of the manor, this had been good for the whole third part, and not only for a moiety of the third part. Cro. Car. 109, 110. *Isham v. Morris.*

In ejectment a special verdict was found, that there was a parish of *Ribton*, and the vill of *Ribton*, but the latter not of equal extent with the former; and that *J. S.* was seised of land in tail in the parish, but not in the vill; and bargained and sold the land in the parish of *Ribton*, with covenant to levy a fine, and suffer a recovery to the uses in the deed; but the fine and recovery were only of the lands in *Ribton*. The question was, whether this recovery would serve for the said land in the parish of *Ribton*. And though it was objected, that where a place was named in a record, and no more said, it is always intended a vill; and, consequently, that in this case, the fine and recovery being of lands in *Ribton* shall pass only the lands in the vill of *Ribton*; and though it was further urged, that it was dangerous to extend the recovery farther than the words of the record, because the deed declares the intention of the parties to pass the lands in the parish, inasmuch as by such construction no man could tell what was conveyed by fines and recoveries, but must for greater certainty have recourse to a pocket-deed; yet the court, in favour of common recoveries, extended this recovery to the lands in the parish of *Ribton*; and the rather in this case, because the verdict found, that he that suffered the recovery had no lands in the vill, and, consequently, that the recovery must be void, if not extended to the parish; and though parishes are not so ancient as vills, and therefore till lately were never inserted in writs, yet now they are, and the law takes notice of them. 2 Vent. 31, 32. Sir John Otway's case. 3 Keb. 277. Mod. 250. and 2 Mod. 233. S. C. 3 Keb. 771. But for this *vide* Hutt. 105. Godb. 440. Cro. Car. 269. 276. 2 Ro. Abr. 20. Cro. Ja. 574. 120. Mod. 206. 2 Mod. 47. 8 Mod. 276. Vent. 143. 170. Mod. 78. 2 Keb. 802. 821. 848. Owen, 60. and 2 Mod. 236. Stock v. Fox, which seems against this case, but is reconcileable with this diversity, that in those cases there were

lands upon which the fine might operate, *viz.* the lands in the vill of *Street*, without taking in the parish of *Street* to carry the lands in *Walton*, a vill of that parish; but here, if those in the parish should not pass, there were no others to pass.

[As to what shall be a sufficient description in a common recovery, see further the case of *Massey v. Rice.*] Cowp. 346.

(C) What Estates and Interests may be barred by a common Recovery : And herein of the Single and Double Voucher.

Hob. 262.

IN respect to estates tail and the barring of them by recovery what is principally to be regarded is, that there must be a legal tenant to the *præcipe* at the time of the writ purchased, or at the return; for since estates-tail are only barred on account of the intended recompence which is to follow the descent of the tail, where there happens to be no tenant to the *præcipe*, the demandant can really recover nothing; and, consequently, the supposed tenant can have no recompence in value against his vouchee, for that is only given against the vouchee in consideration of what the tenant lost.

2 Ro. Abr.
395. Dyer,
252. Cro.
Eliz. 670.
Moore, 255.
But here we
must observe
a difference
between the
tenant in tail
and in fee-
simple; for if

As, if there be tenant for life, the remainder in tail, the remainder in fee; and the tenant for life, with the remainder in tail, suffer a recovery, with voucher over; this shall not bar the remainder in tail, nor the remainder in fee; because the remainder-man in tail was not tenant to the *præcipe*, and, consequently, could not have the intended recompence, because that was given in lieu of the estate recovered, which was no greater than the estate for life, the tenant for life only being legal tenant to the *præcipe*.

tenant in fee-simple be disseised, and after a disseisin suffer a common recovery, this is good by the way of estoppel against the disseisee, his heirs and assigns; for they shall not be admitted, against their own act on record, to vacate the recovery; nor can the recoveror have any thing; because the tenant to the *præcipe* was out of possession, and, consequently, had nothing to lose. But, if in this case *J. S.* disseise the disseisor, the recoveror may enter upon *J. S.*, because the recovery gave him a right against all persons, but the first disseisor, his heirs or assigns; and therefore, since *J. S.* did not claim from the first disseisor, he could not withstand the entry of the recoveror. But, where tenant in tail suffers a recovery, being out of possession, this is no bar nor estoppel to the issue, because the statute *de donis* preserves the entail for the issue against all acts of the ancestor, and a common recovery is allowed to dock the entail on account of the intended recompence, which is wanting in this case; because where the tenant in tail is not seised at the time of the recovery he can lose nothing and, consequently, can have no recompence over. Bull v. Wyatt, Cro. Car. 388. Ro. Abr. tit. Estoppel. (E) 3. || Webb v. Nect, Cr. El. 21. Lord Say and Sele's case, 10 Mod. 45. But the recovery suffered in this case by the tenant in tail is not void, but only voidable. It is binding on the tenant in tail himself; and though not binding on the issue by estoppel, yet, till regularly avoided by them, it is good, so as to govern the legal title to the freehold. See Mr. Preston's observations on this point in his *Practice of Conveyancing*, vol. i. p. 86—102. ||

Lacy v. Williams, 2 Salk.
568. 1 Ld.
Raym. 222.
475. Carth.
372.

[On a writ of error to reverse a common recovery, the error assigned was, that the tenant to the *præcipe* had not acquired the freehold until after the *teste* of the writ of *summoneas ad warrantizandum*, so that he was not seised of the freehold at the return of the writ of entry: but the court held it to be sufficient, if he acquires the freehold at any time before judgment is given. And if he has it when judgment is given (a), although the estate be afterwards defeated, yet the recovery will be good.

(a) Anon.
4 Leon. 84.
Goldsb. 82.

Lincoln Col-

Although a person has acquired the freehold by disseisin, yet he

he will be a good tenant to the *præcipe*; and in all cases where the validity of a common recovery is contested, the court will suppose that there was a good tenant to the *præcipe*, if nothing appears to the contrary.

If a writ of entry is brought against the tenant of the freehold and a stranger, the recovery will be valid; for the recompence in value will go to the person who has really lost the estate.

If there are two joint-tenants of a manor, and a writ of entry of the whole manor is brought against one of them, on which a common recovery is suffered, it will be only good for the moiety of the person against whom the writ was brought; but as to the other moiety, it will be void for want of a tenant to the *præcipe*.

As it is absolutely necessary that the tenant to the *præcipe* should have an estate of freehold, it follows, that no person who has not an estate of freehold can of himself suffer a common recovery, because he cannot convey a freehold to the person against whom the writ is to be brought.

It has been long settled, that a devise to executors for payment of debts, and until debts are paid, only gives the executors a chattel interest in lands thus devised, and therefore does not prevent the disposal or descent of the freehold; so that if after such a devise the testator gives the same lands to a person for life, the freehold will vest in such devisee immediately on the death of the testator, and he will be enabled to make a good tenant to the *præcipe*.

So, if a testator gives his executors full power to receive the mesne profits of his estates in a particular place upon trust to pay his debts, and afterwards devises those estates to a person for life, the freehold will become vested in such devisee on the death of the devisor, and he may make a good tenant to the *præcipe*.

As it is necessary, that the person who suffers a common recovery should have not only an estate of freehold in the lands, but also an estate in possession, it followed that either where the lands are let out on leases for lives, or where there was an estate for life prior to the estate of inheritance, that the persons entitled to the inheritance were disabled from suffering recoveries of them. To remove the disability in the first instance, it was usual for the person who intended to suffer the recovery to get a conditional surrender from the lessee for life, in order to become seised of a freehold in possession, and be thereby enabled to make a good tenant to the *præcipe*. But this being productive of several obvious inconveniencies, it is enacted by stat. 14 G. 2. c. 20., with a retrospect and conformity to the ancient law (a), that a good tenant to the *præcipe* may be made, without the surrender of such leases, or the concurrence of the lessees. But estates for life, which are prior to the estate of which the recovery is intended to be suffered, must still be surrendered to the

lege case,
3 Rep. 58.
Griffin v.
Stanhope,
Cro. Ja. 454.

1 Vent. 358.
Paulin v.
Hardy,
Skin. 3. 63.
Touchst. 41.

Marquis of
Winchester's
case, 3 Co. 1.

1 Keb. 735.
785. 3 Atk.
135. 4 Br.
P. C. 405.

Co. Litt. 42. a.
8 Co. 96. a.

Carter v.
Barnardiston,
1 P. Wms. 505.
2 Br. P. C. 1.

(a) Fig. 41.
1 Burr. 115.

the person against whom the writ of entry is brought, this case being expressly excepted in the second section of the statute.

Pigot 50.

The prior estate for life ought to be surrendered to the person who has the remainder or reversion before he makes a tenant to the *præcipe*; but, if the surrender is made after the execution of the deed, by which the lands are conveyed to the person who is to be tenant to the *præcipe*, it must then be made to him; otherwise it will be void; because the person who is to suffer the recovery has then no reversion in him for the surrender to operate upon.

Cruise on
Recov. 36.
(a) Green
v. Froud,
3 Keb. 310.
1 Mod. 117.
1 Ventr. 257.
(b) Warren v.
Grenville,
2 Str. 1129.
(c) Goodtitle
v. Duke of
Chandois,
2 Burr. 1065
(d) Haines
Barley's case,
5 Mod. 210.

Common recoveries having been long considered as common assurances of lands, and in the nature of conveyances by consent, the judges have, in consequence of particular circumstances, sometimes presumed that the tenant for life had surrendered his estate, although a surrender was not actually proved. As, where the possession has accompanied a recovery for a long time (a). So, where collateral evidence has been given of a surrender by the tenant for life (b).] || But such a presumption will not be made where the possession has not gone with the recovery (c); or where any act has been done by the tenant for life, as owner, subsequent to the recovery; as, (d) where the person, by whom the recovery was suffered, had accepted a lease derived under the title of the jointress; so that there was an acknowledgment on his part that the estate for life was continuing.]

Gartside v.
Ratcliffe,
1 Ch. Ca. 292.

[Where indeed, after a recovery, the deeds were suppressed by the tenant for life, so that it could not be made out whether he had surrendered his estate for life to the tenant to the *præcipe* or not, it was decreed in Chancery for the recovery, without allowing a trial at law; for where deeds are suppressed, *omnia præsumantur*.]

2 Salk. 568.
Lloyd v.
Evelin. [But,
if the fine be
in itself void,
as, if the per-
son who levied it had no estate of freehold in the land; then the recovery will be void, be-
cause in that case the fine passeth no estate. Dornier v. Parkhurst. 3 Atk. 135. 4 Br. P. C.
405.]

In a writ of error to reverse a common recovery, the tenant to the *præcipe* was made by a fine, the recovery was suffered, and the fine was reversed; yet it was holden a good recovery, for there was a good tenant to the *præcipe* at the time.

Phetyplace
v. —,
3 Keb. 597.

[It hath been said by Sir *M. Hale*, that the cognizee of a fine *oct. purificat.* would be a good tenant to the *præcipe* in a recovery suffered the same day, and the court would presume a priority to support a conveyance.]

1 Prest. Con-
vey. 36.
Ld. Altham v.
Ld. Anglesey,
Gilb. Eq. Rep.
16. 2 Salk.
676. S. C.
11 Mod. 210.
S. C. Thrust-
out v. Peake,
§ 1. Str. 17.

|| A fine levied by tenant in tail in a *prior* term, without any declaration of the use, will, by construction, be deemed a fine levied to the conusee for his own use, so as to keep the freehold in him, to make him tenant; and this, though a long interval has elapsed, and there was at the time of levying the fine no declared intention of suffering a common recovery. The subsequent transaction rebuts the presumption of a resulting use in favour of the conusor. ||

If a fine be levied to a lessee for years of the same land for the purpose of making him tenant to the *præcipe* in a common recovery, the term for years will not be merged by the fine: for in the third section of the statute of Uses, 27 Hen. 8. there is a saving to all persons and their heirs, who shall be seised to any use, of all such former right, title, &c., as they had to their own use, in any manors, lands, &c., whereof they shall be seised to any other use.

A husband seised *jure uxoris* may make a tenant to the *præcipe* by fine without his wife's joining him in it.

It hath been heretofore thought that a good tenant to the *præcipe* might be made by a feoffment with livery of seisin: but this doctrine hath lately been denied. (a)

689. (a) || But notwithstanding the denial of this doctrine in the case of Taylor v. Horde, the better opinion is, that the feoffment of a tenant for years will gain the freehold. 3 Atk. 140. 339. Mr. Butler's note to Co. Litt. 330. b. Preston's Convey. vol. i. 59, 60. ||

A good tenant to the *præcipe* may be made by bargain and sale enrolled; and the bargainee may appear and vouch before entry, or before the bargain and sale is enrolled, provided it be enrolled within six months, as prescribed by the statute; for although the freehold does not pass from the bargainor until the enrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor at the time when the bargain and sale was executed, by relation.

As common recoveries are much favoured by the courts of law, a bargain and sale to make a tenant to the *præcipe*, will not be deemed void on account of any trifling mistake or inaccuracy.

A tenant to the *præcipe* may also be made by lease and release; and the reservation of a pepper-corn is a sufficient consideration to raise a use to support a common recovery.

In some cases a common recovery may operate by estoppel, although there be no tenant to the *præcipe*; but this is only where the person who suffers the common recovery is tenant in fee; for the issue in tail cannot be bound by estoppel, as they do not claim from their immediate ancestors, but from the first purchasers, *secundum formam doni*.

|| Hence a recovery suffered by a tenant in fee, without a good tenant to the *præcipe*, will have the effect of revoking a will; for the tenant in fee is estopped by what appears on the record, and if living, cannot say that there was no good tenant to the *præcipe*, and every person claiming under him must be estopped also.

By st. 14 G. 2. c. 20. § 4. reciting that "by the default or neglect of persons employed in suffering common recoveries, it had happened, and may happen, that such recoveries are not entered on record, whereby purchasers for a valuable consideration may be defeated of their just rights;" it is enacted, that where any person or persons hath or have purchased, or shall purchase for a valuable consideration any estate or estates in lands, tenements, or hereditaments, whereof a recovery or "recoveries

1 Vent. 195.
1 Mod. 107.
Cro. Ja. 643.
2 Ro. Rep. 245.

Cruise on
Recov. 58, &c.

Taylor v.
Horde, 1 Burr.
60. 5 Br. P. C.
247. Cowp.

Hynde's case,
4 Co. 71. Ca.
temp. Talb.
167.

Lloyd v. Ld.
Say and Sele,
1 Salk. 341.
10 Mod. 40.
1 Br. P. C. 379.

Barker v.
Keate, 1 Mod.
262. 2 Mod.
249.

10 Mod. 45.
God. 147.

Doe v. Bishop
of Landaff,
2 N. R. 504.
Bennett v.
Vade, 9 Mod.
312.

“ recoveries is, are, or were necessary to be suffered, in order to
 “ complete the title, such person or persons, and all claiming
 “ under him, her, or them, having been in possession of the pur-
 “ chased estate or estates from the time of such purchase, shall
 “ and may, after the end of twenty years from the time of such
 “ purchase, produce in evidence the deed or deeds making a
 “ tenant to the writ or writs of entry, or other writs for suffering
 “ a common recovery or common recoveries, and declaring the
 “ uses of a recovery or recoveries, and the deed or deeds so pro-
 “ duced (the execution thereof being duly proved) shall in all
 “ courts of law and equity be deemed and taken as a good and
 “ sufficient evidence for such purchaser and purchasers and those
 “ claiming under him, her, or them, that such recovery or reco-
 “ veries was or were lawfully suffered and perfected according to
 “ the purport of such deed or deeds, in case no record can be
 “ found of such recovery or recoveries, or the same should
 “ appear not to be regularly entered on record: Provided
 “ always, that the person or persons making such deed or deeds
 “ as aforesaid, and declaring the uses of a common recovery or
 “ recoveries, had a sufficient estate and power to make a tenant
 “ to such writ or writs as aforesaid, and to suffer such common
 “ recovery or recoveries.”

By § 5. Reciting that “ it had frequently happened, that the
 “ deeds for making the tenants to the writs of entry or other writs
 “ for suffering common recoveries had been lost, or that the
 “ fines or deeds making the tenants to the said writs had not
 “ been levied or executed till after the judgment given in such
 “ recoveries, and the writ of seisin awarded, by reason whereof
 “ great doubts had arisen, whether such recoveries, for want of
 “ proper tenants to the writs, are good and effectual in law:
 “ To prevent such doubts for the future, and in order to render
 “ common recoveries more certain and effectual, it is enacted,
 “ that every common recovery already suffered, or hereafter to
 “ be suffered, shall, after the expiration of twenty years from the
 “ time of the suffering thereof, be deemed good and valid to all
 “ intents and purposes, if it appears on the face of such recovery,
 “ that there was a tenant to the writ, and if the persons joining
 “ in such recovery had a sufficient estate and power to suffer the
 “ same, notwithstanding the deed or deeds for making the
 “ tenant to such writ, should be lost or not appear.”

By § 6. it is enacted, that “ from and after the commencement
 “ of this act, every recovery already suffered, or hereafter to be
 “ suffered, shall be deemed good and valid to all intents and pur-
 “ poses, notwithstanding the fine, or deed or deeds, making the
 “ tenant to such writ, should be levied or executed after the
 “ time of the judgment given in such recovery, and the award of
 “ the writ of seisin as aforesaid, provided the same appear to be
 “ levied or executed before the end of the term, Great Session,
 “ Session or Assizes, in which such recovery was suffered, and
 “ the persons joining in such recovery had a sufficient estate and
 “ power to suffer the same as aforesaid.”

Where

Where it appeared from the return of the writ of seisin, that seisin had been delivered prior to the date of the conveyance for making the tenant to the *præcipe*, yet as all the proceedings were in the same term, the recovery was holden to be good under the above statute of 14 Geo. 2. c. 20. § 7., that act being a remedial act, and therefore to be extended to all cases of similar incon-
[convenience.]

Goodright v. Righy, 2 H. Bl. Rep. 46.
5 T. R. 176.
S. C. affirmed in error.
2 Dow's P. C. 250. affirmed in Dom. Proc.

If a manor be given to a man and a woman, and the heirs of the body of the man begotten on the woman, and they intermarry, and then the husband suffer a recovery of the whole manor, this is good for a moiety; because the gift being made before marriage, they had each an undivided moiety, which they might transfer. But the recovery can operate but for a moiety, because the husband only was tenant to the *præcipe*, and, consequently, the demandant could recover only his interest in the manor, which was but a moiety.

Moor, 95.
Brabroke's case. If a husband tenant in tail suffers a *præcipe* to be brought against him and his wife, where she has nothing in the land; this is a

good recovery to bar the entail: for though the feme was made tenant to the *præcipe*, yet she shall have no share of the recompence in value, because she really lost nothing; but the whole recompence recovered against the vouchee shall go to the husband and his heirs, as the estate-tail should have done, because he only was seised of the land, and could lose it. Yet the feme shall lose her jointure or dower by joining in the recovery, because she is estopped to claim any thing in the land against her solemn act of record. Plowd. 514. Vent. 358. Hob. 27. 2 Co. 74. Plowd. 515.

If lands are given to a man and his wife, and the heirs of the body of the husband, and a recovery is had against him only, this recovery will neither bar the reversion, nor the tail: for the recompence being to go in succession, as the estate which the tenant lost would have done, the husband could not lose all the land, because he was not a legal tenant to the whole, his wife being joint-tenant with him, who was no party to the writ; nor could the recovery be good for a moiety, because there are no moieties between baron and feme, but both are considered as one person in law. But, if the husband had levied a fine, and the conusee suffered a recovery, and vouched the husband, who vouched the common vouchee; this had been a good bar of the entail; for here the husband came in to defend the estate-tail, which the wife was a stranger to, and the assets which he recovered over is a recompence for the estate-tail, which he only had a right to without the feme, and which the law gives him power to dispose of.

Moore, 210.
Owen and Morgan, 3 Co. 5. 2 Ro. Abr. 395. 4 Leon. 93. And. 162.
Clithero v. Franklin, 2 Salk. 568.

[*A.* being seised of a manor to him and his wife, and to the heirs male of the body of the husband; *A.* bargained and sold the manor to a stranger, who suffered a common recovery, in which *A.* was vouched, who vouched over the common vouchee. It was adjudged, that although *A.* alone was vouched, and not his wife, yet that the estate tail was barred; for the husband coming in as vouchee, the recovery barred all estates which were ever in him.]

Fitzwilliam's case, 6 Co. 32.

So, in ejectment, upon special verdict the case was, — *A.* seised in fee of the lands in question hath issue *B.* his eldest son, *C.* his

Hallet v. Saunders.
2 Lev. 107.
S. C.

second, and *D.* his third son; upon a marriage intended between *D.* his youngest son and one *E.*, he, before marriage, covenants to stand seised to the use of himself for life, remainder to *D.* and *E.* and the heirs male of their two bodies, remainder to *D.* and the heirs male of his body, remainder to *C.* and the heirs male of his body, remainder to *B.* and the heirs male of his body; the remainder to his own right heirs; *A.* dies, a *præcipe* is brought against one *Upton* as tenant of the freehold, and after before the return of the writ, *D.* by bargain and sale conveys the land to *Upton* and his heirs, and the deed was enrolled after the return of the writ, and within the six months: *Upton* vouches *D.* only without his wife, and a common recovery was suffered to the use of *D.* and his heirs; then *E.* dies, and after *D.* dies without issue male, having issue four daughters; and between them and *C.* in remainder was the question, what was barred by this recovery. 1st, It was agreed on both sides, that here was a good tenant to the *præcipe*, the bargain and sale being made to *Upton*

(a) That if the tenant to the *præcipe* gains a freehold before judgment, it is sufficient; for it is not enough in a counterplea of a voucher to say, the voucher had nothing in the lands at the time of the voucher, without adding, *nec unquam postea*, and so it is of non-tenure. *Lacy v. Williams*, 2 Salk. 568. *Carth.* 472. S. C. Comb. 425. S. C. *Ld. Raym.* 227. 475. Show. 347.

(a) before the return of the writ; and though the deed was not enrolled before the return, yet it being enrolled in due time, the freehold was in *Upton ab initio*. 2dly, That this settlement being made before marriage, when the husband and wife took by moieties and not by entierties, the husband had absolute power over his own moiety, and therefore for that the recovery was an absolute bar; wherein this differs from the case of *Owen* and *Morgan*, 3 Co. 5. where they took by entierties. 3dly, That this recovery was no bar to the other moiety of *E.* because she was not party, but her estate-tail in that continued untouched, though it was urged also to be a bar for her moiety, she dying first, and so her husband in as sole tenant of the whole *ab initio*, and that during the coverture the husband had power to make a good tenant of the whole; but the court held otherwise. 4thly, It was holden, that the estate-tail to *D.* and *E.* being determined, the remainder to *D.* in tail male general, and all the other remainders depending thereon were barred absolutely by this recovery; for *D.* coming in as vouchee, comes in, in privy and representation of all the estates he hath or had, and, consequently, he comes in representation of the remainder to himself in tail male general, and then the recompence in value goes to that, and also to all the other remainders depending thereupon, and by consequence, all are barred by the recovery.

[Where tenant in tail before marriage, conveyed his estate to the use of himself and his intended wife for their lives, with remainder to the heirs of their bodies, remainder to himself and his intended wife in fee, and afterwards suffered a recovery, in which he only was vouched; Lord *Camden* held, that the recovery was a severance of the jointure, and passed a moiety.]

Tenant in tail, in consideration of his son's marriage, covenanted to stand seised to the use of himself and his heirs till the marriage, and then to the use of himself for life, and after to the

Moody v. Moody, Ambler 649.

Yelv. 51. *Freshwater v. Rois.* See 2 Salk. 619.

use

use of his son and his wife, and the heirs of their bodies, and suffered a common recovery with single voucher to this purpose, and then died without issue. This recovery did not bar the remainder expectant on the estate-tail, for the covenant had changed the estate-tail into a fee, and, consequently, the recompence could not be in lieu of the entail, since the tenant to the *præcipe* was not seised of the estate-tail at the time of the recovery suffered. which seems contrary.

A. tenant for life, remainder to *B.* in tail, the remainder to *C.* in fee, *A.* and *B.* join in a fine *sur done*, grant and render, to a stranger, who renders it to *A.* for life, remainder to *B.* and his heirs; afterwards *A.* and *B.* suffer a recovery with single voucher to the use of *B.* and his heirs. This recovery did not bar the remainder in fee; because by the render they were seised of a new estate, and *B.* was not either tenant in possession, or seised in right of the entail; and, consequently, the recompence being given in lieu of the estate recovered, the tail could not be docked, nor the remainder-man barred by this recovery, because the tenants to the *præcipe* were not seised of it at the time of the recovery suffered.

[*A.* tenant for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son in tail male, remainder to the daughters in tail general, remainder to the heirs of his body, with remainders over. *A.* suffers a recovery with single voucher, being himself tenant to the writ. Adjudged by the House of Lords, that this recovery with single voucher did not bar the remainders over.] Peck v. Channel, Cro. Eliz. 827. Moore, 634. S. C. Owen, 129. S. C.

As to the use of the single and double voucher, it is to be observed, that the tenant who loses the land has, upon his vouching over, a recompence in value adjudged against his vouchee, which is to go in the same succession as the land recovered would have done: now a recovery with single voucher is sufficient to bar an estate-tail where the *tenant in tail* is tenant to the *præcipe*, and seised of the lands in tail at the time of the *præcipe* brought against him; for the recompence in value must follow the descent of the land which the tenant loses, and when that proves to be the estate-tail, then the issue is supposed to have an equivalent for it, and, consequently, not to be prejudiced by the recovery. But because a single voucher can bar *only the estate which the tenant is seised of at the time of the præcipe* brought, and not *any right* which he hath, it was found necessary to admit the use of a double voucher; for should tenant in tail discontinue the tail, and take back an estate or disseise the discontinuee, a recovery against him with a voucher over could not bar the estate-tail; for the recompence comes in lieu of the land recovered, which was the defeasible estate, and, consequently, the issue has nothing in value for the estate-tail, without which he cannot be barred. Meredith v. Leslie, 6 Br. P. C. 209.

But, if in this case the tenant in tail, after the disseisin, had either by fine, or lease and release, made a tenant to the *præcipe*, Bro. tit. Recovery. Yelv. 51. 3 Co. 5. Moore, 256.

Cro. Eliz. 562.
Poph. 100.
Moore, 365.
Hob. 263.
Doe v. Halley,
8 T. R. 6.

and come in himself as vouchee, and then vouched over the common vouchee; this double voucher had been sufficient to bar the tenant in tail and his heirs of every estate which he was at any time seised of. For when the tenant in tail comes in as vouchee, it is presumed he will, and he has an opportunity to, set up every title he had to defeat the demandant; and since what he offered was not sufficient to bar the demandant, the court takes it for granted, he had no other title than what he set up, and therefore will give him but one recompence for all.

3 Co. 58. b.
2 Ro. Abr.
395.

Thus, if *A.* be tenant for life, the remainder to *B.* in tail, and a stranger disseise *A.* and enfeoff *B.*; if a *præcipe* be brought against *B.* and a recovery suffered as usual; this shall not affect the estate-tail, because *B.* had only a *right* to that, and was not seised of it; and the recompence was not given in lieu of the tail, because the estate-tail was not in question on the recovery, for *B.* could not lose the estate he had not. But, if in this case *B.* had made another tenant to the *præcipe*, and come in himself as vouchee, this would have barred the entail.

2 Ro. Abr.
395.

If *A.* be tenant for life, remainder to *B.* in tail, and *B.* disseise *A.* and suffer a common recovery, himself being tenant to the *præcipe*; this recovery with a single voucher, is sufficient to bar the estate-tail in *B.* because he was actually seised of that at the time of the *præcipe* brought against him; for his disseisin did not divest his own estate, but only gave him a defeasible estate for life, which was immediately merged in his remainder; because the estate for life and his inheritance could not subsist together at the same time in him.

Co. Litt. 372.
a. 2 Ro. Abr.
396. Moore,
156. Bro. tit.
Recovery,
(28. 55.)

|| Although it
is now settled,
that where
tenant in tail
has also the
immediate re-
mainder or re-
version in fee
by descent, a
fine will *primâ*

Thus we see how estates-tail are barred by recoveries, and the use of the single and double voucher. And in this respect the operation of a recovery is correspondent to that of a fine; for they are but different ways of transferring estates-tail for the security of purchasers. But the operation of a *fine* differs from a recovery in respect to *strangers* who have *reversions* or *remainders expectant on estates-tail*; for a *fine* does not bar them, unless they omit to make their claim within *five* years after their reversion or remainder is to *execute*; but a recovery reaches them immediately, and at the same time bars the estate-tail and all reversions and remainders on account of this supposed and imaginary recompence.

facie enable him to acquire the fee simple in possession, and that a purchaser cannot object to the title for want of a recovery; unless he can shew that the reversion in fee has been aliened or incumbered, *Sperling v. Trevor*, 7 Ves. 497.; still a recovery would in this case seem to be advisable; for by means of the recovery the title will depend wholly on the estate-tail, and the remainder or reversion in fee will be immaterial, while the fine will bar the estate-tail, and convert it into a base or determinable fee; which will merge in the remainder or reversion in fee; and all the charges and incumbrances (as judgments, annuities, &c.) affecting the reversion or remainder in fee, will be accelerated and become an immediate, instead of a remote charge, on the possession. So also tenant in tail having the remainder or reversion in fee by descent, will become immediately chargeable with the debts of the ancestor, who was the owner of the remainder or reversion in fee simple. Thus these incumbrances, instead of being barred, as they may be by a recovery, will become an available charge.

1 Prest. Convey. 9, 10. ||

And as a common recovery suffered by tenant in tail bars all reversions and remainders expectant, so it avoids all charges, leases and incumbrances made by those in reversion or remainder, and the recoveror shall enjoy the land free from any such charge for ever. As, where he in remainder upon an estate-tail granted a rent-charge, and the tenant in tail suffered a recovery; it was adjudged, that the grantee could not distrain the recoveror; for since the rent was only at first good, because of the possibility of the grantor's remainder coming in possession; when that possibility ceases by the recovery of tenant in tail, such grant must then become void.

If there be tenant in tail, remainder for years, remainder in fee, and the tenant in tail suffer a recovery; this bars the remainder for years as well as the remainder in fee.

lands to *J. S.* his son for life, the remainder to the first son of *J. S.* and the heirs male of the body of such first son, and so to the other sons, remainder to *A.* and *B.* for their lives, to secure the several remainders before limited, *J. S.* suffered a recovery, yet the contingent remainders were not barred, nor the remainders to *A.* and *B.*, because the limitation to *A.* and *B.* being designed by the will to preserve the contingent estates limited to the first and other sons of *J. S.*, the Chancery transposed the estates to preserve the intention of the will; and therefore the remainders to *A.* and *B.* were decreed to precede the contingent estate, and by that means preserved them from the recovery. 2 Ch. Ca. 10. *Green v. Hayman.*

If a gift in tail be made reserving rent, and the donee suffer a recovery, this is no bar of the rent, but it remains a collateral charge on the land distrainable of common right; for since the tenant in tail took the land subject to that charge by the original donation, the recoveror who claims under him can only have the estate, as he who suffered the recovery had it; therefore if there be a limitation of a use upon condition, and the *cestui que use* suffer a recovery; this does not destroy the condition; for the estate of him who suffered the recovery being charged with it, he could not make his purchaser a better title than he himself had.

For the same reason, if tenant in tail grant a rent charge, and then suffer a common recovery, yet the land is still chargeable with the rent in the hands of the recoveror; for though the statute *de donis* render such charges void as to the issue, where the estate-tail descends according to the form of the gift; yet that statute makes no such provision for any person who claims the land by another title than the gift in tail; and therefore the recoveror, who is not comprised in the first donation, must take it subject to the charges which lay on it when he purchased it.

¶ So, where tenant in tail mortgage for years, and afterwards, in consideration of marriage, suffers a recovery for the purpose of settling a jointure on his wife; it will enure to make good the mortgage. So, where he confesses a judgment, &c., and suffers a recovery to any collateral purpose, it makes good all such incumbrances.

So, where tenant in tail by lease and release previous to his marriage, conveyed his estate to trustees to himself for life, remainder

Moore, 158.
Cro. Eliz. 718.
Co. 62. *Capell's case*,
2 Ro. Abr.
396. *Moore*,
154. 4 Leon.
150., &c.
Poph. 5, 6.

Mod. 110.
2 Lev. 30.
But, where a
man devised

White v. West,
Cro. Eliz. 727.
768. 792.
2 *Anders.* 170.
S. C. *Moore*,
575. *S. C.*
Pigot, 139.

Benson v.
Hodson,
1 *Mod.* 108.
2 Lev. 28.
S. C. *So*,
Beck v.
Welsh, 1 *Wils*,
276.

Goddard v.
Complin,
1 Ch. Ca. 119.

Goodright
v. Mead,
3 *Burr.* 1703.

mainder to his intended wife for life, remainder to the first and other sons of the marriage in tail male; the marriage took effect, and there was issue a son; nineteen years after the husband suffered a recovery, and declared it to be to the use of *A. B.* and his heirs in trust to sell the premises for the payment of his debts; *A. B.* sold the lands for the payment of the debts according to the trust reposed in him; the tenant in tail died, and his son claimed the lands; the Court were of opinion, that the recovery enured to the uses of the settlement, and the purchaser had no title.

Chency v.
Hall. Amb.
326. 2 Eden,
357. S. C.

So, where a father by settlement on his marriage conveyed an estate to the use of himself for life, remainder to the first and other sons of the marriage in tail; and afterwards the son on his marriage conveyed part of the estate by lease and release to the use of himself for life, remainder to his intended wife for life, remainder to the heirs of the body of the wife, remainder to his own right heirs; and some years after the father and son mortgaged the estate for a term of years, and declared the uses to the mortgagee, and then to the father for life, remainder to the son in fee; Lord *Northington* was clearly of opinion, that the recovery enured to the uses of the settlement on the marriage of the son.||

Cro. Eliz. 718.
Pledgard v.
Lake, Poph. 5.

But, if there be tenant for life, the remainder to *J. S.* in tail, and *J. S.* make a lease for years, to commence after the death of tenant for life, and the tenant for life suffer a common recovery and vouch *J. S.*, this recovery does not destroy the lease for years, but the lessee may falsify such recovery.

Smith v. Far-
naby, Carter,
52. Sid. 285.
Weeks v.
Peach, Lutw.
1224.

[*A.* devised a rent of 50*l.* per annum, to be issuing out of lands, to his son and his heirs; and if his son should die without heirs-male of his body, then he devised it over; the son suffered a recovery of this rent, and died without issue male. Lord Chief Justice *Bridgman*, and all the other judges were of opinion, that the recovery was good, and the remainder well barred; and this judgment was affirmed in the court of King's Bench.

Chaplin v.
Chaplin,
3 P. Wms. 229.
For the princi-
ples on which
this distinction
is founded, see
Mr. Butler's
note, Co. Litt.
298. a. n. 2.

A distinction has, however, been adopted between a grant of a rent-charge in tail, with a remainder over of the same rent-charge in fee, and a grant of a rent-charge in tail, without any subsequent limitation of it in fee. In the first case, the tenant in tail acquires an estate in fee simple in the rent-charge by means of the common recovery; but in the second he only acquires a base fee, determinable on his decease and failure of the issue.]

Hob. 259.
2 Lev. 29.

If baron and feme be tenants in special tail, the remainder to *A.* in tail, the remainder to *B.* in fee, and the husband levy a fine to *C.* in fee, and then die leaving issue, the conusee takes by the fine a qualified fee, and shall enjoy the land against the issue. But yet upon the death of the husband, the wife is again seised of the estate-tail, because she being no party to the fine, could not be barred by it, and the remainders are again revested: and

if

if the wife suffer a common recovery, either with single or double voucher, this shall bar the remainders in *A.* and *B.*, because she was seised of the tail at the time of the recovery, and, consequently, the recompence shall go to them when the tail is spent. But this recovery does not reach the intêrest which *C.* took by the fine, because the husband had power to bar the entail by the fine, and the recovery of the wife cannot transfer that which is already given by the fine; and therefore if the wife dies leaving issue, the conusee shall have the land while any issue inheritable to the entail is in being; and when the issue is spent, the recoveror shall have the land as they in the remainder should have had, if the recovery had not been suffered.

If tenant in tail be attainted of treason, and after suffer a common recovery, this shall not destroy the remainder; for a man attainted is not capable of taking any thing, but for the benefit of the king; and, consequently, the recompence in value must go to the king; and he in remainder can have no benefit by it, and without that the remainder-man cannot be barred. Besides, recoveries being common conveyances, this recovery of the person attainted seems to be void, as any other conveyance of his would be, and therefore the remainder cannot be barred.

grant his land to *J. S.*, who bargains and sells it to *B.*, and a *præcipe* be brought against *B.* who vouches *J. S.*, and he vouch over the common vouchee; this is no bar of the remainder; because *J. S.* was never seised of the estate-tail, but was always a stranger to the first gift; for the king's grant gave him a qualified fee, which was the estate he came in to defend, when he was vouched; and the remainder can never be barred when the tenant in tail is not concerned in the recovery. 2 Ro. Abr. 394.

|| But between the crime and attainder, it would seem from analogy, that a common recovery may be suffered. ||

If a husband, seised of land in right of his wife for life, the remainder to *A.* in tail, the remainder to *B.* in fee, bargain and sell the land to *J. S.* against whom a *præcipe* is brought, who vouches *A.* in remainder in tail, and he vouches over the common vouchee; this is good to bar the remainder, though not the wife; for here was a legal tenant to the *præcipe*, and he in remainder was called in to defend his estate-tail, and has recompence in value for the loss of it, which is to go in succession to *B.* when the estate-tail fails.

When common recoveries were allowed to be common conveyances, the judges would no more allow a recovery than any other conveyance, to divest the king of his interest in the land, but preserved his reversion or remainder, though they suffered the recovery to bar the estate-tail on which it depended; for it were unreasonable to strip the king of any part of his revenue upon the consideration of an imaginary recompence. But yet the estate-tail is barred, because otherwise, where the reversion or remainder was in the crown, the estate in the subject must be perpetuated, which is against the policy of the law.

ground, than a principle of tenure, that the estate of the crown is part of its ancient dominion;

2 Ro. Abr. 394.
Jenk. Cent.
250. In 1 Keb.
398. Barton
& Berner's
case,
37 & 38 Eliz.
B. R. is cited
as *contra*. If
tenant in tail
be attainted,
and the king

Stevens v.
Winning,
2 Wils. 219.
2 Ro. Abr. 394.

2 Ro. Abr.
393. 396. Co.
Litt. 372.
Moore, 195.
Bro. tit. Reco-
very, 31. tit.
Tail, 41. || The
origin of this
protection to
the crown can-
not be ac-
counted for on
any other

nion; and that as against the crown, the tenant in tail is in the same predicament, as if his estate was derived out of a base or determinable fee, or an estate subject to a condition. 1 Prest. Convey. 19.||

34 & 35 H. 8. c. 20. (a) [They must be of the gift of the king, by way of reward for services. Perkins v. Sewell, 4 Burr. 2223. 1 Bl. Rep. 654.] (b) As, if the king procures A. to make a gift in tail to B. by deed indented and enrolled, the remainder to the king in fee in tail; this entail in B. cannot be

But in the reign of H. 8. there was a statute made to invalidate recoveries, even against the issue in tail, where the reversion or remainder was in the crown. The intention of the act was, to perpetuate those estates in families which the king himself had given, or for money or other consideration, had procured to be given, to any subject as a *præmium* for his services to the crown; that the descendants of that stock might never forsake the interest of the crown that had so liberally rewarded their ancestor's loyalty; that where a generous emulation of their actions proved too weak a tie to engage them openly in the same interest, they might at least be prevailed on out of gratitude and prudence, not to attempt any thing to the prejudice of the crown, from whom they must acknowledge they derived their present support and splendor. But this statute does not preserve all estates-tail where the reversion or remainder is in the crown; but those only which were *given (a) by the king himself, or (b) procured to be given for money or other consideration.*

docked by a common recovery, because protected by the express words of the statute. Co. Litt. 372. b. But, if a reversioner or remainder-man upon an estate-tail grant his reversion or remainder to the king, this is no security to the issue in tail, because the estate-tail was neither of the gift nor other provision of the king, and consequently, not within the act. 2 Co. 15. Wiseman's case. Mo. 195. Yelv. 149. S. C. So, if the reversion on an estate-tail descend to the king from any collateral ancestor; this does not bring the estate-tail within the protection of the act, for the entail must be created by the king, and not by a subject, though the king be his heir; for the act specifies only gifts made to subjects, and none can have subjects but the king. Nor is it sufficient within the act, that the king creates the estate-tail himself, but the reversion must continue in the crown; for whenever he grants that over, the estate-tail, though originally of the gift of the king, is out of the protection of the act, and subject to a common recovery, because the statute only preserves them where the reversion is in the king. Co. Litt. 372. Donee in tail of the gift of the king, the reversion being in the crown, makes a gift in tail; the second donee suffers a common recovery. It was resolved by eleven judges, 13 Car. 1., that his issue was not within the privilege of 34 H. 8. c. 20. for his estate, as far as it could, disaffirmed the reversion of the king, though it could not take it out of him, and his possession was injurious to the estate given by the king, and therefore no colour to allow it the protection of that act. Sir T. Jon. 250-1. Earl of Ormond's case.

Raym. 288. 358. Henry 8. gave lands to Michael Stanhope and his wife, and Sir T. Jon. 251. the heirs of their bodies, in consideration of services: Michael Gardiner v. Bambridge, died, and his son and heir petitioned the queen to grant the reversion to some persons in fee, to the intent that he might make a lease for ninety-nine years by way of mortgage, and entered T. Raym. 288. into a recognizance to the queen, conditioned that nothing 358. & Sir should be done whilst the reversion was out of the crown, prejudicial to the queen, and accordingly the queen conveyed the T. Jon. 251. reversion to the Lord Burleigh and Sir Walter Mildmay in fee; Hardr 409. then the son made a lease for ninety-nine years, and suffered a S. C. || This recovery, and then the trustees reconveyed to the queen. And mode of evading the statute is now prevented by 1 Ann. st. 1. c. 5. § 7. which restrains the 2dly, That during the time the reversion was out of the crown, the son was not restrained from aliening within 34 H. 8. c. 20. and

and so the recovery good to bind the issue. (a) But a fine or recovery after the regrant of the queen would not have been good to bind the issue, as it seems, because that act doth not require that the reversion should always continue in the king; but it sufficeth if it be in him at the time of the fine levied, or recovery suffered.

crown from alienating its possessions for a greater estate than three lives or twenty-one years.

(a) By Jones in his argument.||

Richard 3., by letters patent, gave several lands to the Earl of *Derby*, and the heirs male of his body, in consideration of great services to the crown, &c. Afterwards, by a private act made 4 Ja. 1., several alterations were made in this estate; as that *Charles*, then Earl of *Derby*, should hold and enjoy them for his life, and after his death they should go to *James* his son and heir apparent, and the heirs male of his body, and so to the second, third, &c. and seventh son of Earl *Charles*, and then to several others in tail male, who by the limitation of the letters patent would have succeeded to the estate upon failure of issue male of Earl *Charles*, with power for Earl *Charles*, and the sons successively, to make leases for lives or years, and jointures for wives. After Earl *Charles's* death, his son Earl *James* levied a fine of these lands, and sold them to a stranger. Upon a special verdict in ejectment brought after his death by his son, it was resolved by all the judges of *England*, in the Exchequer-chamber, except three, that the fine was no bar, for that the reversion continued in the crown, and that these estates given by 4 Ja. 1. were no new estates, but all within the compass of the first estate-tail created by the letters patent, and only a distribution of the enjoyment of them, and all to the same persons who would have been entitled under the letters patent; and the power to make a lease was, with conformity to the power of tenant in tail; and that to make jointures was but in lieu of dower. Besides, there was a saving to the king, and all other persons, of all such rights, &c., so as the prerogative of the king, by his reversion, to restrain the tenant in tail from barring his issue, was saved, and the eighth and ninth, and all other sons inheritable by virtue of the entail let in, though the first, &c. and seventh only were named, and the alterations were only in accidents, not in the substantial parts of the limitations, and so within 34 H. 8. c. 20.

Sir T. Raym. 260. 286. 350. 351. &c.
Sir T. Jon. 249. 250. &c.
Earl of Derby's case, or Murray v. Eyton.

1 Wils. 275.

[*William* Earl of *Derby* conveyed lands to trustees, to the intent that they should convey the same to Queen *Elizabeth*, her heirs and successors, that the Earl might accept of a grant from the crown of the same lands to him and the heirs male of his body, leaving the ultimate reversion in the crown, which was accordingly done. It was determined, that this estate-tail was not within the protection of the above statute, it being a fraudulent contrivance to create a perpetuity.]

Johnson v. Earl of Derby, Pigot, 201. 11 Mod. 304. 2 Show. 104.
[The only mode of acquiring a good title to an estate-tail,

whereof the reversion is fairly in the crown, is by an act of parliament, enacting that the reversion shall be devested out of the crown, and vested either in the tenant in tail, or in some other private person, by which means it becomes barrable by a recovery. Cruise on Recov. § 277. *Vid.* Strickland's Act, 30 G. 3. § 51.]

When

When men observed the effect of recoveries, and that they were construed by the judges not only to transfer estates-tail, but even reversions and remainders dependent on them, except those vested in the crown, they began to grow as uneasy under this liberty, as they formerly were under the restriction of the statute *de donis*; for they thought it very severe that they could not carve what estate they pleased out of their own inheritance, without any other security for the reversion they reserved to themselves than the generosity or promise of the donee. Hence we find men themselves endeavouring to create perpetuities, by annexing conditions of their own invention, and restraining their donees from alienating, under the penalties of losing their estates. But the judges had so long struggled with perpetuities, and found them so much against the interest of the long robe, and of the whole nation in general, as a great discouragement to industry, that they constantly condemned all those settlements which came before them, and not only resolved that a common recovery is inseparably incident to an estate-tail, but that it is an undeniable argument against any settlement, if it be found to tend to a perpetuity, and in such case a recovery has been allowed to bar it.

Co. 84.
Corbett's case,
6 Co. 42.
Co. Litt. 224.
Mo. 73.

Pells v. Brown,
Cro. Ja. 591.
Palm. 131. S.C.
2 Ro. Abr. 394.
S. C. Lev. 12.
* It was said
in this case,
if the person
to whom the
executory de-
vise is limited
come in as
vouchee, in a
common re-
covery, that
his possibility
is thereby
given up, and his heir barred. *Vide* Fearn's Essay on Contingent Remainders, third edi-
tion, 307.

But in case of an executory devise, which is to vest upon a contingency to happen within a life in being, there a common recovery will not bar such future interest; as, if lands be devised to *A.* and his heirs, and if he die without issue, living *B.*, then to *B.* and his heirs; in this case, if *A.* suffer a common recovery, and die without issue in the life of *B.*, this recovery shall not bar the future interest of *B.*, for *B.* by the devise had only a possibility, and no present interest, and the recompence in value cannot go to those who were neither parties to the recovery, nor had any interest in the land at the time of the recovery suffered. Nor is there any danger of a perpetuity in this case, because here the future interest of *B.* must vest on a contingency which is to happen within the compass of a life in being. *

Cro. Ja. 593.

If lands be given to *J. S.* and his heirs, as long as *B.* has issue of his body, *J. S.* by recovery shall not bind him that made the gift, but that upon the death of *B.*, without issue of his body, the lands shall revert to the donor; for that the donor had no interest in the land, for there can be no fee upon a fee; and a common recovery against tenant in fee simple shall never bind any collateral title or possibility, because the recompence cannot go to those who had no interest in the land.

Palm. 135.
Cro. Ja. 593.

So, if the mortgagee in fee suffers a recovery, this shall not bind the mortgagor's right of entry upon performance of the condition. But in these cases, if the donor or mortgagor had been parties to the recovery, by way of voucher, then their right had been bound, not only on account of the recompence, but because they are estopped by the recovery to claim the land

against the recoveror, or his heirs, when they were called in before the judgment to defeat his title, but could not do it.

[Where one devised lands to *A.* and the heirs male of her body, upon condition and provided she intermarried with, and had issue male by a person surnamed *Searle*, and in default of both conditions to *E.* in the same manner, &c.; and *A.* married one whose surname was *Cliff*, and with him levied a fine, and suffered a recovery of the lands, in which she and her husband (with another party not material to the present point) were vouched; it was adjudged by the whole court, 1st, That the estate devised to *A.* was a good estate in special tail; that is, to her and the heirs male of her body begotten by a *Searle*. 2d, That the words *upon condition*, &c. though express words of condition, should be taken to be words of limitation. 3d, That the estate-tail of *A.* did not cease by her marrying a person whose name was not *Searle*, because she might possibly survive that husband, and afterwards marry a person whose name was *Searle*. 4th, That if the estate had been devised to *A.* and the heirs of her body by a *Searle* to be begotten, *provided* and *upon condition*, that if she married any but a *Searle*, the estate should go over: a common recovery suffered before marriage, would bar the estate-tail and remainders; and her subsequent marriage with another would not avoid the recovery. || And the court took a difference between a collateral condition, and a condition which runs with the land; for if a donor reserves a rent with a condition to re-enter, a recovery will not bar it; otherwise, if it be to enter for non-payment of a sum in gross.]

Page v. Hayward, 2 Salk. 570.

1 Mod. 108.
111. 2 Lev. 28.

So, lands were devised to several persons successively in tail, and a clause was inserted by the testator to the effect following; viz. "Provided always, and this devise is expressly upon this condition, that whenever it shall happen that the said estates shall descend or come to any of the persons hereinbefore named, that he or they do and shall then change their surname, and take upon them and their heirs the name of *W.* only, and not otherwise." But there was no devise over upon breach of the proviso. *A.* the first tenant in tail, two years after his coming to the possession of the estates, suffered a common recovery, in which he was vouched; but he never took upon him the surname of *W.* The person next in remainder entered for breach of the proviso in *A.*'s not having changed his name. The whole court agreed, that if this proviso were considered as a condition, it was collateral and subsequent, and was therefore destroyed by the recovery.

Gulliver v. Shuckburgh Ashby, 4 Burr. 1929.

A. devised to his daughter an *express estate-tail*, but afterwards said, that such devise should be void as to *inheritance of heirs* if she should die *without issue*, and that in such case the estate should descend to his heir male. The daughter suffered a recovery to the use of herself in fee; such recovery is good.

Driver v. Edgar, Cowp. 379.

A person devised lands to his eldest son *Thomas* for life, and if he died without issue living at the time of his death, then he devised the lands to another son and his heirs; but if *Thomas* had

Plunkett v. Holmes, 1 Lev. 11.

Sir T. Raym.
28. Gilb.
Uses, 133.

had issue living at the time of his death, then the fee should remain to right heirs of *Thomas* for ever. *Thomas* entered upon the death of his father, and suffered a common recovery, and afterwards died without issue. It was resolved that *Thomas* was tenant for life, with a contingent remainder in fee to his right heirs, and that the contingent remainder was destroyed by the recovery.

Loddington
v. Kime,
1 Ld. Raym.
203. Salk.
224. 3 Lev.
431. Fearne,
281. Carter
v. Barnardis-
ton, 1 P.

So, where lands were devised to *A.* for life, without impeachment of waste; and in case he should have any issue male, then to such issue male, and his heirs for ever, and if he should die without issue male, then to *B.* and his heirs for ever; *A.* entered, suffered a common recovery, and died without issue; and it was held, that the remainders over being contingent, were barred by the recovery.

Wms. 505. 2 Br. P. C. 1. S. P. Doe v. Holme, 3 Wils. 237. S. P. 2 Bl. Rep. 777. S. C. Goodright v. Dunham, Dougl. 264. Goodright v. Billington, *id.* 753. S. P. Doe v. Burnsell, 6 T. R. 30. Doe v. Elves, 4 East, 313.

Benson v.
Hudson,
2 Lev. 28.
1 Mod. 108.
S. C. 3 Keb.
274. 287. 292.
S. C.

Lands were given to the use of *A.* in tail, remainder to *B.* provided that if there be a failure of issue male of the body of *A.*, that *J. S.* shall have a rent-charge out of the land; *A.* makes a lease of the land for 100 years, and then suffers a recovery; it was adjudged, that this contingent rent was barred, and that *J. S.* should not charge the land during the term, for this grant is subsequent to the estate-tail, and cannot take effect till the determination of that, and then, consequently, can issue out of the remainders when they commence and execute; therefore, if the recovery bars the remainders dependent on the estate-tail, it must also destroy all charges which are to issue out of them; for when by the recovery it becomes impossible that the remainders should ever execute, the rent-charge, which is to issue out of those remainders when executed, must necessarily be lost.

Barton v.
Lever, Moore,
365. Cro.
Eliz. 388. S. C.
Poph. 100.
S. C. 2 Atk.
201.

If tenant in tail levies an erroneous fine, and the conusee suffers a common recovery, in which the tenant in tail comes in as vouchee; this recovery shall bar the tenant in tail and his issue of a writ of error to reverse the fine, and the recoveror may plead the recovery in bar of the writ of error; for, since the tenant in tail by coming in as vouchee is barred of all right or title which he can have to the land, the writ of error, which is but a means to restore him to his right, must likewise be barred, since the recovery has left him no right to be restored to.

Abbot v.
Burton,
11 Mod. 181.

¶ Where *A.* was seised in right of his wife of lands which she had by descent on the part of her mother; and he and his wife covenanted to levy a fine, which it was thereby declared should be to the use of the conusees and their heirs, to make them tenants to the *præcipe*, in order to suffer a common recovery, which recovery was afterwards suffered accordingly, and was by the same deed declared to enure to the use of the said *A.* for life, remainder to the wife for life, remainder to the first and other

other sons of their two bodies in tail male, remainder to the right heirs of the wife; and *A.* and his wife died without issue; a question was made, whether the lands should descend to the heir of the wife on the part of the mother, or on the part of the father? and judgment was given for the heir *ex parte materná*, for that the recovery did not alter the descent.

Where *John Tregonwell*, being seised in fee of the lands in question, upon the marriage of *Mary* his eldest daughter with *Francis Luttrell*, by indenture executed in 1680, covenanted to levy a fine, and suffer a recovery, to the use of himself for life, remainder to his daughter *Mary* for life, remainder to the first and other sons of the said *Mary* by the said *Francis Luttrell*, remainder to the first and other sons of the said *Mary* by any other husband, remainder to his own right heirs in fee; a fine was levied and a recovery suffered to the uses of this indenture; on the death of *Francis* without issue male, the said *Mary* married *Sir Jacob Banks*, and had issue by him a son named *Jacob*, who, on the death of his father and mother, became seised of an estate-tail in the premises, and of the reversion in fee *ex parte materná*, and in the year 1720 suffered a recovery in the usual form, having by a deed of bargain and sale enrolled made a tenant to the *præcipe*, and thereby declared that the recovery should enure to the use of himself and his heirs; upon his death without issue, the question was whether the lands should descend to his heirs *ex parte paterná*, or to those *ex parte materná*; and the Court of King's Bench gave judgment in favour of the heirs *ex parte paterná*, which judgment was affirmed in the House of Lords. The ground of the decision was, that the tenant in tail took under the settlement as a purchaser, and not by descent; and, consequently, he took the fee acquired by the recovery in like manner, and therefore it was descendible to the heirs general. Had he taken by descent *ex parte materná*, the recovery would not have altered the line of descent.

And the law is the same with respect to copyholds, as to freeholds, though a notion once prevailed, that a recovery of copyholds operated as a feoffment and re-ensfeoffment, and, consequently, altered the descent.

A tenant in tail of an equitable estate has the same power to bind his issue, as a tenant in tail of a legal estate; and a recovery suffered by him will have precisely the same operation, as a recovery suffered by a legal tenant in tail. It was once indeed (*a*) thought, that a recovery would not bar the remainders over; and it was afterwards holden (*b*), that equitable estates-tail with the remainders over, might be barred by a common conveyance, or even by will. (*c*) But it is now settled (*d*), that a fine or recovery is as essential to bar an equitable as a legal entail in a freehold estate; and the prevailing opinion (*e*) extends the rule even to copyhold estates, although Lord *Hardwicke* thought, that a surrender (*f*) would in all cases be sufficient.

Martin v. Strachan,
1 Str. 1179.
1 Wils. 66.
S. C. Willes,
444. *S. C.*
5 T. R. 107.
note *S. C.* This
and the pre-
ceding and
subsequent
cases shew, that
the point
stated in *Arm-
strong v. Wholesley*,
2 Wils. 19.
that under a
recovery, the
person suffer-
ing it gains a
new estate to
him and his
heirs general,
is not law.

6 Br. P. C. 319.

*Roe v. Bal-
dwere*, 5 T. R.
104.

*Sugden's Gilb.
Law of Uses*.
58. n. 9. *Wash-
bourn v. Downes*, 1 Ch.
Ca. 213.
(*a*) *Lord Digby
v. Langworth*,
Id. 68. (*b*) *Car-
penter v. Car-
penter*, 1 Vern.
440. *Beverley
v. Beverley*,
2 Vern. 131.
Bowater v. Elly, *Id.* 344.
that Lord *Clar-
endon*,

Br. Ch. 81. In 3 Ves. 277. Lord Chancellour *Loughborough*, after stating

rendon, the Chief Justice, and the Master of the Rolls, had thought a deed a sufficient bar in this case, is reported to have added, "I do not know why that was not adhered to, but that it makes more profit to the conveyancers." The reason why it was not adhered to, and a recovery was required, is neatly stated in the argument of the plaintiff's counsel in the case of *Pigott v. Waller*, 7 Ves. 105. "It appears at first surprising, that the same form of proceeding should be necessary to destroy an equitable as a legal estate-tail; the latter depending upon the recompence recovered over. The principle is however satisfactory. The party having the same quantity of interest ought to have the same disposing power for uniformity of judicial decision. If the equitable estate could be destroyed in any other way, the interest of the issue in tail would be less protected in equity, than at law." (c) *Woolnough v. Woolnough*, 2 Vern. 228. (d) *Legate v. Sewell*, 1 P. Wms. 87. *Kirkham v. Smith*, Amb. 518. *Boteler v. Allington*, 1 Br. Ch. Rep. 68. *Burnaby v. Griffin*, 3 Ves. 266. See *Fletcher v. Tollet*, 5 Ves. 13. (e) *Sugden's Law of Vendors*, 165, 166, 4th edit. and *Hale's case*, Dec. 1764, there cited. See also *Roe v. Lowe*, 1 H. Bl. 446. (f) *Radford v. Wilson*, 3 Atk. 815. See also tit. *Copyhold*, (C.) *supra*, Vol. ii. 193. and tit. *Estate in Tail*, *supra*, 174.

Salvin v.

Thornton,
1 Br. Ch. Rep.
73. note.

(a) In one
point, it would
seem that the

A recovery of an equitable estate must, it has been said, in all (a) respects imitate a recovery of a legal estate, and therefore the person suffering an equitable recovery must have such an equitable estate, as, had it been a legal estate, would have entitled him to suffer a legal recovery.

analogy between a legal and an equitable recovery must fail, and that is as to the right of the equitable tenant in tail to suffer a recovery where there is in any case an adverse possession. "To make a legal tenant to the *præcipe*," the Master of the Rolls observed, "it is absolutely necessary that there should be possession by seisin in fact or in law; but the equitable owner never has the legal seisin, often not the actual possession, and very frequently not even the right to call for either. In the one case, if you shew that the possession was not in the party, and, consequently, would not pass from him, the purpose of the conveyance is frustrated; no legal freehold is acquired: but in the other case, it is not the object, nor ever can be the effect of the conveyance, to transfer the possession, but only to pass the equitable interest. One should suppose therefore," he added, "that the only inquiry would be, whether there was in the party such a quantum of equitable interest as entitled him to suffer an equitable recovery." Such was the reasoning of that learned judge in the case of *Lord Grenville v. Blyth*, 16 Ves. 224. in which however, though the point was agitated, the question was not determined, His Honour being of opinion that upon the facts of that case the possession could not be considered as adverse. The point had been moved before the same learned judge in a preceding case, that of *Pigott v. Waller*, 7 Ves. 98. but it not appearing that there was any possession in any one, except the person who suffered the recovery, the question of course did not arise. See *Wynne v. Cooke*, 1 Br. Ch. Rep. 515.

Cruise on
Recov. 271.

A recovery suffered by *cestui que trust* in tail, who is in possession under the trustees, will effectually bar such estate-tail, and all equitable remainders, and the equitable reversion expectant thereon; although there be no legal tenant to the *præcipe*.||

North v.
Champernoon,
2 Chan. Ca. 63.
78. S. C.
1 Vern. 13.
S. C. 1 P. Wms.
91. S. C.

Sir *Francis North* purchased certain lands in *Essex* from *Richard Allington*, who was *cestui que trust* in tail of them, with remainders over; and had suffered a common recovery: but there was no legal tenant to the *præcipe*, the freehold being in the trustees, who were not parties to the recovery. Yet decreed that the remainders expectant on the estate-tail were well barred by this recovery.

Robinson v.
Cumming, Ca.
temp. Talb.
167. 1 Atk.
473. 3 Ves.
276.

Recoveries of this kind only operate on the trust estate whereof they are suffered, and the equitable remainders expectant thereon; but do not affect any legal estate, so that a legal remainder cannot be barred by an equitable recovery.

Thus,

Thus, *John Thornton* being seised of the premises for life, with remainder to his first son, *Thomas*, in tail, remainder to his second son, *James*, in tail, forfeited in the rebellion in 1745. The estate for life being put up for sale by the commissioners, was bought by *Thomas* (the tenant in tail), but in the name of a trustee. *Thomas* thus having the equitable estate for the life of his father, and the legal estate-tail, suffered a recovery, and soon after died, leaving issue a daughter, wife to the plaintiff. *James*, the second son, took possession, suffered a recovery, (after the death of his father and the trustee, in whom his estate vested,) and died, leaving two daughters, the defendants, who were in possession. The bill was filed by *Salvin*, in right of his wife, for an account of profits, and to have the estate delivered up. Upon the hearing at the *Rolls*, His Honour ordered the bill to be retained for a year, with liberty for the plaintiff to try the validity of the recovery at law. But it was the opinion of the court, that *Thomas's* estate for life being an equitable estate, and his estate-tail a legal estate, he was not enabled to suffer either a perfect legal or a perfect equitable recovery, and therefore the recovery suffered operated nothing.

Salvin v. Thornton, cited in Br. Ch. Ca. 73. Ambl. 545. 699. S. C. affirmed by Lord Camden on appeal from the *Rolls*.

In recoveries of this kind there must be an equitable tenant to the *præcipe*, that is, the trust estate must be conveyed to a third person, against whom the writ must be brought in the same manner as in recoveries of legal estates.

Cruise on Recov. 273.

If there be a *cestui que trust* for life before the *cestui que trust* in tail, so that in case the legal estate had been conveyed according to the trusts, the tenant in tail could not bar the estate-tail by a common recovery there, the *cestui que trust* in tail cannot bar his estate-tail by a recovery.

2 Ch. Ca. 64.

|| In analogy to the rule as to legal estates, the concurrence of the equitable tenant of the freehold is necessary to the validity of a recovery of an equitable estate. Although an equitable estate cannot, in suffering a recovery, be blended with a legal estate; yet it is no objection to a recovery by an equitable tenant in tail, that the tenant to the *præcipe* has the legal as well as equitable estate of freehold in him; for the analogy between recoveries of legal and equitable estates is sufficiently preserved by obtaining the concurrence of the person who is the beneficial owner.

1 Ch. Ca. 64. *Salvin v. Thornton*, *ubi supra*. *Goodrick v. Brown*, 2 Freem. 180. 1 Ch. Ca. 49. S. C. *Phillips v. Brydges*, 3 Ves. 120. and see Mr. Sugden's Treatise of the

Law of Vendors, 287. 4th edit. See also *Wykham v. Wykham*, 18 Ves. 417, 418, 419.

A testator devised his estates at *B.* to *C.*, *E.*, *F.*, and *K.* in fee, in trust to pay his mortgages and debts, and after payment he directed them to convey the estates to the persons to whom he had devised his estates at *T.* He then devised his estates at *T.* subject to a life-estate therein to his wife the said *C.* to the said *E.*, *F.*, and *K.* in fee, in trust out of the rents and profits to discharge his debts and mortgages, and to raise portions for his two grand-daughters: and from and after such payment he devised his estates at *T.* to the said *E.* and his heirs, to the use of him and his heirs, upon the trusts following, *viz.* to the use of his grandson

Phillips v. Brydges, *ubi supra*.

grandson *F. T. W.* during his life, and after his decease to the use of the heirs male of his body, remainder to the said *E.* in tail male, remainder to the said *F.* in tail male, remainder to the said *K.* in tail male, remainder to *D.* in tail male, with the reversion to his own right heirs. The testator's wife died in his life-time. On the death of the testator in 1764, a bill was filed in the name of *F. T. W.*, then an infant, to have the trusts of the will carried into execution; and by a decree in 1765 the will was established, and the usual directions were given. No farther proceedings took place. In 1772 *F. T. W.* came of age; and the trustees under the will having sold part of the estates for payment of the debts, put him in possession of the rest: but no conveyance of the legal estate was executed. In 1772 and 1780, *E.* and *F.*, two of the trustees and devisees in tail in remainder died. In 1785, the devised estates were conveyed by lease and release, by *F. T. W.* to *J. P.*, in order to make a tenant to the *præcipe*, and a recovery was shortly afterwards suffered of them to the use of *F. T. W.* in fee. *K.*, the only surviving trustee, in whom the legal estate was vested, did not join in this transaction. Part of the estates were afterwards settled on the marriage of *F. T. W.*, and by his will he devised the remainder, and died without issue male. *K.* also died. A bill being filed after the death of *F.* to revive the proceedings in the former cause, and praying that the defendant, the son of *K.*, might be decreed to convey the estates settled on the marriage of *F. T. W.* to the uses of the settlement, and to convey such of the estates as were sold to the use of the purchasers, and the residue to the uses of the will of *F. T. W.*; the defendant insisted, that by the union of the equitable and legal estates in his father *K.* he had a legal remainder in tail in the estates, whereof the recovery was suffered; and therefore such remainder was not barred for want of a legal tenant to the *præcipe*. But it was decreed, that *K.* was only trustee for himself in remainder after an estate-tail in *F. T. W.*; and that therefore the recovery well barred that remainder: that *K.*'s equitable interest did not merge in his legal interest, inasmuch as it was not commensurate and co-existent with it; that an estate in fee may exist in a trustee, and a partial interest in the equitable estate may at the same time subsist for the benefit of such trustee. his recovery will bar the equitable estate-tail, and all ulterior interests; for the estates are considered as totally distinct.

It had been already determined, in *Marwood v. Turner*, 3 P. Wms. 171. that where a man is seised of the legal fee in trust for himself in tail, the estates are

Burnaby v. Griffin, 3 Ves. 266.

Where an estate was devised to trustees, and their heirs in trust to receive and pay over the rents and profits to a married woman for life to her separate use; and after her decease, to convey the estate to her daughters as tenants in common in tail; Lord *Loughborough* held, that she took an equitable estate for life; and that a conveyance from her and her husband by lease and release was sufficient to make a good equitable tenant to the *præcipe*.||

Where an estate-tail is conveyed or devised to trustees and their heirs, upon trust to pay debts, or such debts as are specified,

See *Cruise on Recov.* 274.

cified, and after payment of such debts, or when such debts shall be paid, then in trust for *A. B.*, or in trust to convey such parts of the estate as shall remain unsold to *A. B.*; in either of those cases *A. B.* has a trust estate in the surplus, vested in him immediately upon the execution of the deed, or the death of the testator, and may suffer an equitable recovery of such estate.]

(D) Of erroneous and void Recoveries, who may avoid them, and by what Method.

IT is already observed, that a recovery suffered by an infant in person shall not bind him: but though he may avoid it, yet it cannot be done by an entry *in pais*, but by writ of error, and this too during his minority; for the judgment of the court being on record must be set aside by an act of equal notoriety. And an infant may avoid a recovery by writ of error, as well where he comes in as vouchee, as where he is tenant to the *præcipe*; for though strictly speaking the recovery is not against him where he is not tenant to the *præcipe*, yet for the greater security of the purchaser, and to strengthen the recovery by the use of the double voucher, the person who really has the right to the land in demand comes in as vouchee, and then by vouching over the common vouchee, has one recompence for all his titles; and consequently, if he be the person that really loses the land, he ought in reason to reverse the recovery, as well where he comes in as vouchee, as where he is seised of the land, and is tenant to the *præcipe*.

If tenant in tail within age comes in as vouchee by attorney in a common recovery, he in remainder may assign this for error, for he is party in (a) interest to the recovery; and where a man's interest is bound by another's act, it is but reasonable he should be allowed to free himself from the mischief of it by taking advantage of any error in it.

brought in *B. R.* to reverse a common recovery, and there was a *scire facias* issued against all the terre-tenants, and they made a default; though the recovery was reversed, yet it appearing afterwards that the plaintiff in the writ of error had no title, there being a remainder-man before him, the court reversed their former reversal. 5 Mod. 196. [The right to bring a writ of error descends to the person to whom the land would have descended in case the recovery had not been suffered. *Henningham v. Windham*, 1 Leon. 261. But it is not required of the plaintiff in error to set forth a complete title in the writ. *Sheepshanks v. Lucas*, 1 Burr. 412.]

[Although nothing can be assigned for error which contradicts the record; as incapacity in a vouchee, where he appeared in person; yet, if a vouchee appear by attorney, an averment may be then made, either that such vouchee died before the day on which judgment was given, or that he laboured under some personal disability which rendered him incapable of suffering a recovery; for this is matter collateral to the record, and triable by a jury.]

P. C. 132. *Hume v. Burton*, Cruise on Recov. Append.

Cro. Eliz. 2, 3.
Lord Norris v.
Marquis of
Winchester.

If *A.* be tenant in tail, the remainder to *B.*, and *A.* suffer an erroneous recovery, and the common vouchee release to the recoveror; yet, if *A.* die without issue, *B.* may, notwithstanding the release, reverse it by writ of error: for the common vouchee is only called in for form; and as he has really no interest in or title to the land, so really neither does he make any recompence to the person that loses the land; and therefore it were unreasonable to carry the notion of the imaginary recompence so far as to suppose him a real sufferer, thereby giving him the privilege of setting aside a conveyance by which he is no way affected.

Hesketh v.
Lee, 2 Saund.
94, 95. 1 Mod.
48. S. C.
1 Sid. 446.
S. C. 1 Ventr.
73. S. C.
2 Keb. 627.
S. C.

In a writ of error to reverse a recovery suffered by an infant, who appeared by guardian, the error assigned was in the entry of his admission by guardian, *viz. concess. est per curiam hic quod A. B. sequatur pro J. S. armig. qui infra atat. existit ut guardianus predict. J. S.* whereas it was objected, that since the infant was tenant to the writ, it ought to have been entered, that the guardian was admitted to defend for the infant; but this exception was disallowed, because the words *ad sequend.* for the infant signify the same with *ad defendend.* for the infant; for *ad sequend.* is to follow and attend the business and suit of the infant; and the guardian being assigned to do that, must likewise have been assigned to take care of, or take upon him the defence of the infant's suit.

Fortescue
Aland v.
Malone,
Fitzg. 114.

[In a writ of error in the King's Bench in *Ireland*, the case was, that in a writ of error to reverse a common recovery, the defendant pleaded that he was an infant, and prayed that the parol might demur. To this the plaintiff demurred; and judgment was given that the parol should demur; which judgment was affirmed. — *Note*, to the writ of error in this court, the defendant again pleaded his infancy, and prayed the parol might demur, which was disallowed. *Non datur enim exceptio ejusdem rei cujus petitur dissolutio.*

Lord Pembroke's case,
Rep. temp.
Holt, 614.
But the issuing
of writs of

A recovery ought not to be reversed, unless writs of *scire facias* are issued against the terre-tenants and the heir (*a*); because the errors in a recovery ought not to be examined, until all the parties interested in supporting it, are before the court.]

scire facias to the terre-tenants is not deemed to be *ex necessitate juris*, but only discretionary in the court. *Kingston v. Herbert*, 2 Show. 490. 3 Mod. 119. Carth. 111. Skin. 273. And *per Lord Mansfield*, by the established mode of proceeding, there must be a *scire facias* against the terre-tenants, otherwise it is an irregularity, but no more. *Hall v. Woodcock*, 1 Burr. 359. (*a*) || Against the heir there is no necessity for a *scire facias*. *Sheepshanks v. Lucas*, *Id.* 412. ||

Barton's case,
Poph. 100.
Cro. El. 388.

In a common recovery the writ of entry bears date 1 *Martii* 7 *Eliz. ret. die lune in quartâ septimanâ quadragesim. proxim. futur.*, the first day of *March* being that year the first day of *Lent*; the recovery past in the usual form that *Lent*; and in a writ of error to reverse it, the error assigned was, that the words *proxim. futur.* should be referred to *quadragesim.*, and then the writ of entry was not returned till *Monday* in the fourth week of *Lent*, 8 *Eliz.*, which was the time the tenant was to appear; and consequently,

consequently, this recovery must be void, because here was judgment upon a voucher, and a recovery in value, before the writ was returned, before which the court has no power to proceed. But it was answered and resolved, that since *proxim. futur.* were not written at large, they may be indifferently applied either to *die lune*, by supposing them to stand for *proximo futuro*, or to *quarta septimana*, by supposing them to stand for *proxima futura*; and where words abbreviated may be indifferently referred, it is but reasonable to give them such a relation, as will best support the recovery, which is but a voluntary conveyance, *ut res magis valeat quam pereat*. But, if the words had been at large *proxime futurae*, then they must necessarily be referred to *quadragesimae*, and then the objection had been good, and the recovery for that reason must have been void.

In error to reverse a recovery, the errors assigned were, Poph. 33.
5 Co. 40.

1. That the writ of entry was brought of an advowson of a rectory, and also of a rent issuing out of the same rectory, which was a *bis petitum*, and therefore the writ vitious. But this was disallowed, because the advowson and rectory are different things; for he that has the advowson has only the right of presentation, but he that has the rectory has the profits of the church, out of which the rent issues; and, consequently, there can be no *bis petitum* in this case, because by the demand of the advowson of the rectory, and of the rent issuing out of the rectory, the demandant recovers more than by a demand of the rectory only. Another error assigned was, in the demand of a rent or pension of four marks issuing out of the rectory, which is too uncertain a demand, a pension being a different thing from a rent, and recoverable in the spiritual court. But this too was disallowed, because it is plain there is but one sum of four marks demanded, and the pension or rent must be synonymous here, because they are demanded as issuing out of the rectory; and therefore, the pension cannot be in nature of an annuity, which charges the person only, because it is expressly to issue out of the rectory. 5 Co. 41. a.
Poph. 23.

[A common recovery was suffered, but no writ of entry was filed; in consequence of which, a writ of error was brought. It was moved that it might be examined, whether any writ of entry had been filed or not: but the court denied it, though if it appear upon record that a writ has been filed, then they would consider, whether a new writ should be filed or not. And it was said, that if a recovery was exemplified pursuant to the statute 23 Eliz. though some part of it was lost, yet it would be aided. Anon. Litt.
Rep. 299.

By a rule of the court of C. P. made Tr. 30 Geo. 3. "It is ordered, that from and after the first day of Michaelmas term then next ensuing, in every common recovery wherein the vouchee or vouchees shall personally appear at the bar of that court for the purpose of suffering such recovery, the writ of entry shall be sued out and produced, at the time of the re- 1 H. Bl. 526.

“cording of the vouchee’s or vouchees’ appearance at bar, at
“the foot of the *præcipe* in such recovery.”]

Win v. Floyd,
1 Sid. 213.
1 Lev. 130.
S. C. Raym.
70. 96. S. C.

In a writ of error to reverse a common recovery, the error insisted on was, that the warrant of attorney of the vouchee bore date before the *summeas ad warrantizand.* issued. Yet the judgment was affirmed, because the vouchee may come in, if he will, before the *summeas ad warrantizand.* and make his attorney; and therefore, to support the common recovery, it shall be presumed the vouchee was present in court and appointed his attorney; and so the *dedimus* for the warrant and the *summeas ad warrantizand.* void.

Barnard v.
Woodcock,
2 Bl. Rep.
1201. Gib-
bons v. Stevenson, *id.* 1223.

[The Court of Common Pleas will not enlarge the return of a writ of summons, so as to make a term intervene between the teste and return.]

Wakeman v.
Blackwell,
2 Mod. 70.
1 Mod. 218.
S. C. but the
plea adjudged
bad. See
2 Lutw. 1549.

In a *quare impedit* the plaintiff entitles himself to an advowson by a recovery suffered by tenant in tail; in pleading which recovery he alleges two to be tenants to the *præcipe*, but doth not shew how they came to be so, or what conveyance was made to them, by which it may appear that they were tenants to the *præcipe*; and after search of precedents as to the form of pleading common recoveries, the court inclined that it was not well pleaded, but delivered no judgment.

Lloyd v.
Vaughan,
2 Str. 1257.

[By statute 10 and 11 W. 3. c. 14. the writ of error to avoid a recovery must be brought within twenty years; which twenty years are to be reckoned, it hath been adjudged, not from the time when the title accrued to the person seeking to avoid it, but from the time when the recovery was suffered.

Cruise on Re-
cov. § 300.
Booth, 77.
Pigot, 156.
3 Reeves, 362.
Hence too it
may be invali-
dated on a
trial in eject-
ment, as in
2 Ves. 403.,
and 3 Atk. 313.
supr. B.

Although none but those who have an immediate interest in the lands are allowed to bring a writ of error to reverse a recovery; yet it is permitted to strangers whose interests are affected by a recovery to falsify it. And a recovery may be falsified by several ways: 1. By entry and plea. 2. By action. 3. By action and plea. 4. By plea only. By entry and plea, when the party’s entry is not taken away by the recovery and he brings an assise, and the recovery is pleaded against him, then he pleads matter to avoid the recovery.

Booth, 77.
6 Co. 8 b.

A recovery may also be falsified by action and plea, when the entry of the party that hath right is taken away by the recovery, and upon a real action brought, the recovery is pleaded in bar of his right. This may be falsified by plea.

Co. Litt. 46. a.

By the common law, if the tenant of the freehold had suffered a common recovery, it operated as a good bar to all terms for years derived out of the freehold; for the person who recovered the lands, was supposed to come in by a title paramount, so that he was not bound by the leases of the person against whom he recovered. Besides, a termor for years could not in any case falsify a common recovery.

Plowd. 83.

By

By the statute of *Gloucester*, 1 Edw. 1. c. 11. a remedy was given to the lessee for years, by way of receipt and trial, whether the recovery was upon good title, or by way of collusion, and in case it appeared that the recovery was by collusion, then the lessee for years was permitted to enjoy his term, and the execution was staid until the determination of the term.

The operation of this statute not having been found sufficiently extensive, another act was made 21 Hen. 8. c. 15. whereby it was provided that a tenant for years might falsify a feigned recovery had against the person in reversion; and that no estate held by statute-merchant, staple, or elegit, should be avoided by means of any feigned recovery.

A recovery, as well as a fine, may be invalidated by the court of Chancery: for where it appears to have been unduly obtained, that court will either compel the recoveror to convey the estate to the person who is entitled in equity to have it, or declare the recoveror to be a trustee for such person.]

¶ On the other hand, where a person is prevented from suffering a recovery by force and management, the court of Chancery will compel the parties to act as if a recovery had been suffered. As, where Lord *Waltham* being tenant in tail, and meaning to suffer a recovery, and by will to give real interests to his wife, Mr. *Luttrell*, who by his marriage had an interest to prevent the entail from being barred, did, by force and management, prevent the testator from executing the deed to make the tenant to the *præcipe*; Lord *Thurlow*'s opinion was clear, that though at law, Mr. *Luttrell*'s lady was tenant in tail, and, which made it stronger, was no party to the transaction, yet, neither he nor any one else could have the benefit of the fraud; and the jury, upon an issue directed, having found that the recovery was fraudulently prevented, Lord *Thurlow* held, even in favour of a volunteer, that the tenant in tail should not take advantage of the iniquitous act, though she was not a party to it; and the estate was considered exactly as if the recovery had been suffered.¶

[The court of Common Pleas will permit an amendment of recoveries, as well as of fines, where an evident mistake has been made in the names or descriptions of the parties (a), or in the description of the estates (b), or when there has been a clerical mistake in the entry of the judgment (c), or in the teste or return of the writ of entry (d), or in the return of the writ of seisin. (e)]

1230. Lord and Biscoe, Barnes, 24. (b) Skinner v. Land, Pigot. 172. Brooke v. Bid-
dolph, *id. ibid.* Henzel v. Lodge, 2 Bl. Rep. 747. '3 Wils. 154. Watson v. Cox, 2 Bl.
Rep. 1065. (c) Barnes, 20. 22. (d) 8 Co. 159. b. 4 Taunt. 644. 855. 5 Taunt. 259.
1 Bos. & Pul. 137. Wilton v. Fairfax, Barnes, 23. (e) Watson v. Lockley, 2 Wils. 2.

¶ So, where a recovery is erroneous, because no writ of seisin is awarded, nor the judgment executed by a writ of seisin returned on the roll, the court of Common Pleas will, after a writ of error is brought to reverse the recovery for that error, rectify the

Bro. Abstit.
Lease, 26.
Fitz. N. B.
198. & 220.
Vaugh. 127.

Ferres v.
Ferres, 2 Eq.
Ca. Abr. 695.
Stanhope v.
Thacker,
Pr. Ch. 435.

Luttrell v.
Olmus,
11 Ves. 638.

(a) Pinde v.
Norton, Dy.
105. Chapman
v. Bacon, Pigot,
170. Thurban
v. Pantry, *id.*
171. Mayor
v. Coulthaid,
2 Bl. Rep.

Brooke v. Bid-
dolph, 2 Bl.
Rep. 1065. 5
Taunt. 259.

Per Lord
Kenyon, in
Goodright v.
Rigby, 5 T. R.
179.

defect in the record, by ordering a writ of seisin to be awarded on the roll, and return executed; for no writ of seisin is ever in fact executed.||

1 H. Bl. 72. [But an amendment will not be permitted on affidavit only: it must appear on the face of the deed to lead the uses, that there is sufficient ground for it.

Acton v. Baldwin,
2 Bl. Rep. 874. Nor will it be allowed in the description of the estates comprehended in a recovery, where the recovery, as it stands, has lands of the vouchee to operate upon.

1 Wils. 35. And, in general, no amendment will be allowed unless there is
Cruise on an evident mistake of the clerk, or something to amend by.]
Recov. § 83.

Simeon v. Wakeford,
4 Taunt. 155. || In applying to amend, it is not necessary to shew more of the title, than a seisin in tail of the vouchee.

Steele v. Clennel,
6 Taunt. 145. Neither the deed of uses nor the warrant of attorney can be altered by the court.

Forster v. Forster, *id.* 373. Fox v. Benbow, *id.* 652.

By a rule M. 39 G. 3., no common recovery or fine shall be suffered to pass; unless the taking of the warrant of attorney for suffering any common recovery or caption of any fine be before any of the Justices or Barons of his Majesty's Courts of Record in *Westminster-Hall*, or one of the Serjeants at Law, unless an affidavit be made and filed, stating that the commissioners taking the same, are, to the best of the defendant's information and belief, either barristers of five years' standing, or solicitors or attornies of some of the courts in *Westminster-Hall*, the judges of the Court and Session and Exchequer, or advocates and clerks to the signet of five years' standing in *Scotland*.

Under this rule neither an attorney of the court of great sessions at *Chester*, nor an attorney of the court of great sessions in *Wales*, is competent to take the acknowledgment of the warrant of attorney. The warrant, if so taken, is a nullity.

Blagrove v.

Owen,

3 Taunt. 302.

Mullins v.

—,

4 Taunt. 584.

Mander v.

Hookney,

5 Taunt. 263.

(a) Hardy v.

Prior, *id.* 855.

Where the affidavit stated that the commissioner was an attorney of the court of King's Bench, it was suffered to pass, though the words "at *Westminster*" were omitted. In a subsequent case (a) those words were permitted to be added by a supplemental affidavit.

Rawley v. Pyke,

5 Taunt. 747.

(b) Shaw v.

Ware,

4 Taunt. 590.

Where the demandant was one of the two commissioners who had taken the acknowledgment, and returned the writ, the court would not permit the recovery to pass. Nor would they, (b) where the attorney upon the record was one of the commissioners.

Laidlaw v.

Cox, 2 Taunt.

205.

If the acknowledgment of the vouchees is taken abroad, the notarial certificate which is required by the rule of court of H. 14 G. 3. *supra*, 651., to authenticate the affidavit of the commissioners, must distinctly state, that the affidavit was sworn, it must not leave it to be collected by inference. But, if it be apparent that the signature of the magistrate before whom the affidavit

Hubert v.

Humphreys,

5 Taunt. 197.

affidavit

affidavit was sworn, must be his, the recovery will pass, though the notarial certificate omit to state it to be so.

Where the warrant of attorney was acknowledged in a part of the *East Indies* far distant from the residence of any notary publick or *British* magistrate, the affidavit of the acknowledgment made before the *British* consul or agent there was admitted; but the court required an affidavit of these facts from the chairman or secretary of the *East India* Company, and also an affidavit that the acknowledgment of the warrant of attorney was taken before two commissioners.

Although the warrant of attorney of the several vouches ought to be joint, that is, all on one piece of parchment; yet where two of three vouches had given one joint warrant of attorney, and the third had given his on a separate piece of parchment, the court allowed the recovery to pass. But, in a later case, where the several vouches had acknowledged separate warrants of attorney, though upon the same piece of parchment, the court were clearly of opinion that the warrant could not be amended, and the recovery could not pass; because, notwithstanding all the vouches had appointed the same attorney, yet it did not from thence follow but that he might be appointed by the different parties for separate purposes.

A recovery has been permitted to be amended, by inserting the words "*ac etiam advocationem, presentationem, donationem, nominationem, liberam dispositionem, et jus patronatus ecclesiæ de C. ac advocationem, presentationem, donationem, liberam dispositionem et jus patronatus de curatione de C.*" But in a later case upon an application to amend a recovery by inserting the words "*Advowson of Beeston St. Lawrence, and curacy of Ashmenhaugh,*" the court granted it as to the advowson, but as to the right of nominating a perpetual curate, they said it was not the subject of a recovery; it was a thing unknown to the law; it is parcel of the rectory.||

|| See st. 23 El. c. 3. § 10., and 27 El. c. 9. § 10. and *supra*, 112.

See st. 39 & 40 G. 3. c. 56. (commonly called "*Lord Eldon's act*,")
supra, 175. and st. 58 G. 3. c. 46. the same enactment in the very same words for *Ireland*.||

Domville v. Kinderley,
3 Taunt. 275.

Lang v. Lee,
1 Bos. & Pull.
31.

Jennings v. Street, 3 Bos. & Pull. 361.
So Balch v. Phelps, *id.*
368. *supra*, 650.

Millbanke v. Jolliffe, 2 Bos. & Pul. 579.
note.

Horne v. Lodge,
3 Taunt. 462.

FORCIBLE ENTRY AND DETAINER.

AT common law, if a man had a right of entry in him, he was permitted to enter with force and arms, and to detain his possession by force, where his entry was lawful. (a) This

Z z 4

Dalton's Justice, 297.
Lamb. 135.
Crom. 70.
created a. b. (a) || This

dictum, that at common law a party may enter by force into that to which he has a legal title, is not to be implicitly received; though it would rather seem that he had such a right, exercisable however under certain limitations, Bract. 162, 163. But there can be no doubt that an unlawful entry with force is an offence at common law, for which an indictment will lie, provided the indictment charge the defendants with having used such force as constitutes a breach of the public peace. *R. v. Bathurst*, Say. Rep. 225. *R. v. Storr*, 3 Burr. 1698. *R. v. Bate*, *id.* 1731.

The words "*vi et armis*" do not of themselves impute that degree of force, for it is no more than what the law ascribes to every common trespass or entry upon land. *R. v. Storr*, and *R. v. Bate*; but the words "*manu forti*" import something criminal in its nature, something more than is meant by the words "*vi et armis*," and sufficiently distinguish this kind of entry from an ordinary trespass. *R. v. Wilson*, 8 T. R. 357. Sty. 135. Rast. Entr. 354. ||

created great inconvenience by arming the tenants of the lords, and in a manner encouraging those in mischief, who were always too forward in rebellions and contentions in their neighbourhood: also, it gave an opportunity to powerful men, under the pretence of feigned titles, forcibly to eject their weaker neighbours. The legislature, therefore, finding it necessary to interpose, we will set down and consider,

(A) The several Statutes made relating to this Subject.

(B) What shall be a forcible Entry and Detainer within these Statutes.

(C) Of the Nature of the Possessions with respect to which one may be guilty of a forcible Entry or Detainer.

(D) What Persons may be guilty thereof.

(E) What ought to be the Form of a Record grounded upon these Statutes.

(F) Of the awarding of Restitution, by whom, and in what Manner: And herein of the Nature of the Possessions, and to whom such Restitution is to be made.

(G) What shall be a Bar or Stay to such Award of Restitution: And herein of superseding and setting it aside after it is executed.

(A) The several Statutes made relating to this Subject.

Plowd. 86. Upon this statute there was a writ formed to take and appraise the arms of such as rode armed, and

BY the 2 Ed. 3. c. 3. called the statute of *Northampton*, it is enacted, that "no man, great nor small, of what condition soever he be, except the king's servants in his presence, and the king's officers in doing execution of the king's precepts, (*mandementz le Roi*,) or of their office, and those who are in their company aiding them, and also upon a cry made for arms to keep the peace, and that in the places where such acts shall happen, be so hardy as to come, before the king's justices

“justices or other ministers of the king in the execution of their offices with force and arms, nor to bring any force in affray of the peace, nor to ride (a) nor go armed neither by night nor by day, in fairs, markets, nor in the presence of the justices, nor other ministers, nor in no part elsewhere, upon pain of forfeiting their arms to the king, and their bodies to prison at the king's pleasure. (b)

also to take and imprison their bodies; for which vide F. N. B. 249. But this was no sufficient provision against the

entering and detaining possession by force. (a) The word in the original is “chivaucher,” the proper meaning of which cannot be given now in a direct translation. It occurs in almost every chapter of *Froissart*, and generally implies a military armament with numbers. See 1 Luders' Tracts, 8. 141. (b) Lord Coke, in 3 Inst. 160., in reciting this statute, adds, “and make fine and ransom to the king.” But these words are not in the authentic edition of the statutes published by the King's command: nor do they appear in the writ in *Fitzherbert* formed upon this statute.||

By the 5 R. 2. c. 7. “The king defendeth, that none thenceforth make entry into any lands and tenements, but in cases where entry is given by the law; and in that case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner; and if any man henceforth do to the contrary, and thereof be duly convicted, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will.”

|| Rot. Parl. vol. iii. p. 114. nu. 71. In the time of *Bracton* a person disseised might recover seisin by force, with a multitude of friends to

assist him, provided he made the attempt *flagrante disseisina*. Bract. 162, 163. But these forcible vindications of a man's property being thought incompatible with a well-ordered government, this statute was made; so that a disseisee, if he entered with force, became punishable in the same manner as a disseisor with force had been before.|| But this statute gave no speedy remedy, leaving the party injured to the common course of proceeding by way of indictment, or action, and made no provision at all against forcible detainers.

By the 15 R. 2. c. 2. “It is accorded and assented, that the statutes and ordinances made and not repealed of them who make entries with strong hand into lands and tenements or other possessions whatsoever, and them hold with force, and also, &c. be holden, and kept, and fully executed; and added thereto, that at all times that such forcible entries be made, and complaint thereof come to the justices of peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly, after such entry made, they shall be taken and put into the next gaol, there to abide, convict by the record of the same justices or justice, until they have made fine and ransom to the king; and that all the people of the county, as well the sheriff as others, shall be attendant upon the same justices, to go and assist the same justices to arrest such offenders, upon pain of imprisonment, and to make fine (a) to the king. And in the same manner it shall be done of them that make such forcible entries into benefices or offices of holy church.”

(a) [The justices must set the fine, and they must do

it before they commit the offender, though they may take a reasonable time to consider of it. But, if no fine is set by the justices, the King's Bench cannot set it; but, upon having the proceedings removed before them by *certiorari*, will quash the conviction. R. v. Elwell, 2 Str. 794. 2 Ld. Raym. 1515. R. v. Layton, 1 Salk. 353. The conviction too will be quashed if

there

there be no adjudication that the person upon whom the fine is imposed shall be committed until it is paid. *R. v. Lord, Say. Rep. 176.* And the fine must be assessed upon every offender separately, and not upon the offenders jointly: and the justice ought to estreat the fine, and to send the estreat into the exchequer, that from thence the sheriff may be commanded to levy it for his majesty's use. *Dalt. c. 44.* But upon payment of the fine to the sheriff, or upon sureties found (by recognizance) for the payment thereof, it seemeth, that the justice may deliver the offenders out of prison again at his pleasure. *Ibid.]*

By the statute of 8 H. 6. c. 9. after reciting the statute of
 15 R. 2. " And for that the said statute doth not extend to en-
 " tries into tenements in peaceable manner and after holden
 " with force, nor if the persons who enter with force into lands
 " or tenements be removed and voided before the coming of the
 " said justices or justice, as before, nor any pain ordained, if the
 " sheriff do not obey the commands and precepts of the said jus-
 " tices, to execute the said ordinance, many wrongful and forcible
 " entries be made from one day to another into lands and tene-
 " ments by those who have no right. And also divers gifts,
 " feoffments, and discontinuances sometimes made to lords, and
 " other puissant persons, and extortioners within the counties
 " where they be conversant to have maintenance, and some-
 " times to such persons as be unknown to them so put out with
 " intent to delay and defraud such rightful possessors of their
 " right and recovery for ever, to the final disherison of divers of
 " the king's faithful liege people, and it is likely daily to increase,
 " if due remedy be not provided in this behalf: Our Lord the
 " King, considering the premises, hath ordained, that the said
 " statute and all other statutes of such entries and alienations
 " before made shall be holden and duly executed: in addition
 " thereto, that henceforth where any doth make any forcible
 " entry into lands, tenements, or other possessions, or them hold
 " forcibly after complaint thereof made, within the same county
 " where such entry is made, to the justices of the peace, or to
 " one of them by the party grieved, that the justices or justice
 " so warned within a convenient time, shall cause the said
 " statute to be duly executed, and that at the costs of the party
 " so grieved."

" And moreover, though such persons making such entries be
 " present, or else departed before the coming of the said jus-
 " tices or justice, nevertheless the same justices or justice, in
 " some good town next to the tenements so entered, or in some
 " convenient place, according to their discretion, shall have,
 " and each of them shall have authority and power to inquire
 " by the people of the same county, as well of them that make
 " such forcible entries into lands and tenements, as of them who
 " hold the same with force; and if it be found before any of
 " them, that any doth contrary to this statute, then the said
 " justices or justice shall cause to rescize the lands and tene-
 " ments so entered or holden as aforesaid, and shall put the
 " party, so put out, in full possession of the same lands and
 " tenements so entered or holden as before."

" And also, that when the said justices or justice make such
 " inquiries

“ inquiries as before, they shall make, or one of them shall
“ make, their warrants and precepts to be directed to the
“ sheriff of the same county, commanding him, on the king’s
“ behalf, to cause to come before them, and every of them,
“ sufficient and indifferent persons, dwelling next about the
“ lands so entered as before, to inquire of such entries; whereof
“ every man who shall be impanelled to inquire in this behalf,
“ shall have land or tenement of the yearly value of forty shil-
“ lings by the year at the least, above reprises; and that the
“ sheriff return issues upon every of them; at the day of the
“ first precept returnable twenty shillings, and at the second day
“ forty shillings, and at the third time an hundred shillings, and
“ at every day after the double. And if any sheriff or bailiff
“ within a franchise, having return of the king’s writ, be slack
“ and make not execution duly of the said precepts to him di-
“ rected to make such inquiries, that he shall forfeit to the king
“ twenty pounds for every default, and moreover shall make
“ fine and ransom to the king.

“ And that as well the justices or justice aforesaid, as the
“ justices of assises, at their coming into the country to take
“ assises, shall have, and every of them shall have, power to
“ hear and determine such defaults and negligences of the said
“ sheriffs and bailiffs, and every of them, as well by bill at the
“ suit of the party grieved, for himself, as for the king, to sue
“ by indictment, only to be taken for the king.

“ And moreover, if any person be ousted, or disseised of any
“ lands or tenements in a forcible manner, or put out peaceably,
“ and afterwards kept thereout with strong hand; or after such
“ entry any feoffment or discontinuance in any wise thereof be
“ made to defraud and take away the right of the possessor,
“ that the party grieved in that behalf shall have assise of novel
“ disseisin, or writ of trespass against such disseisor. And if
“ the party grieved recover by assise, or by action of trespass,
“ and it be found by verdict or in other manner by due form in
“ law, that the party defendant entered with force into the
“ lands and tenements, or them with force after his entry held,
“ that the plaintiff shall recover his treble damages against
“ the defendant; and moreover, that he make fine and ransom
“ to the king. And that mayors, justices or justice of the
“ peace, sheriffs and bailiffs of cities, towns, and boroughs, hav-
“ ing franchise, have in the said cities, towns, and boroughs,
“ like power to remove such entries, and in other articles afore-
“ said, arising within the same, as the justices of peace and
“ sheriffs in counties and countries aforesaid have.”

“ Provided always, that they who keep by force their
“ possessions in any lands or tenements, whereof they or
“ their ancestors, or they whose estate they have in such lands
“ and tenements, have continued their possessions therein
“ by *three* years or more, be not endamaged by force of this
“ statute.”

Note: this statute having founded a remedy by assise of novel disseisin, or action of tres-

pase,

pass, to recover the treble damages, if the defendant pleads the matter in bar to it, he must also traverse the force; but, if the matter in bar be found for the defendant, so that he hath good title at law, the defendant is excused from the force, for the plaintiff cannot recover in the action if he hath no right. But, if the plaintiff prevails, then the force must be inquired of, and treble damages assessed to the plaintiff. But a person is punished criminally for entering with force even where he has a right, though not for peaceably detaining a possession by force, especially, if he has holden it for *three* years in quiet. F. N. B. 249. Bro. tit. Force, 5. 11. 29. 17 H. 7. 17. b.

By the 31 Eliz. c. 11. the proviso in the last statute is farther enforced and explained, and it is declared and enacted, "That no restitution upon any indictment of forcible entry, or holding with force, be made to any person, if the person so indicted hath had the occupation, or been in quiet possession for the space of *three* whole years together next before the day of such indictment so found, and his estate therein not ended, which the party indicted may allege for stay of restitution, and restitution to stay till that be tried, if the other will deny or traverse the same; and if the same allegation be tried against the same person so indicted, he is to pay such costs and damages to the other party, as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied, as is usual for costs and damages contained in judgments upon other actions."

By the 21 Jac. 1. c. 15. it is enacted, "That such judges, justices or justice of the peace, as by reason of any act or acts of parliament now in force, are authorised and enabled upon inquiry, to give restitution of possession unto tenants, of any estate of freehold of their lands or tenements which shall be entered upon with force, or from them with-holden by force, shall by reason of this present act have the like and the same authority and ability from henceforth (upon indictment of such forcible entries, or forcible with-holdings before them duly found) to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight-service, tenants by *elegit*, statute-merchant and staple, of lands or tenements by them so holden, which shall be entered upon by force, or holden from them by force."

(B) What shall be a forcible Entry and Detainer within these Statutes.

H. P. C. 138.
Dalt. 300.
Hawk. P. C.
c. 64. § 25.

A FORCIBLE entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb.

Dalt. 299. But threatening to spoil his goods, or destroy his cattle, if he will not quit his possession, will not make a forcible entry. Bro. tit. Duress, 12-16. 2 Inst. 257.

If a man enters peaceably into an house, but turns the party out of possession by force, or by threats frights him out of possession, this is a forcible entry.

If a house be bolted, it is forcible to break it open, but it is not so to (a) draw a latch and enter into the house; and if a man, whose entry is lawful, shall notice the other out of the house and enter, the door being open or only latched, his entry is justifiable.

2 Ro. Rep. 2.
2 Inst. 235.
Crom. 70. a.
(a) Noy, 136,
137. cont. who
says, that there
can be no enter-

ing if the door be latched; vide 1 Hawk. P. C. c. 64. § 26. cont. who says, that such an inconsiderable circumstance as this, which commonly passes between neighbour and neighbour, will never bring a man within the meaning of these statutes; and it hath been holden, that an entry into a house through a window, or by opening a door with a key, is not forcible. Lamb. 143. 2 Ro. Rep. 2. ¶ It was not so holden, in the note in Rolfe's Reports, nor was it the point on which the judgment of the court was required. It was an opinion merely thrown out, *semble per eum.*¶

If one find a man out of his house, and forcibly with-hold him from returning to it, and send persons to take peaceable possession thereof in the party's absence, this, by some opinions, says *Hawkins*, is no forcible entry, inasmuch as he did no violence to the house, but only to the person of the other. But he himself is of a contrary opinion, for though the force be not actually done upon the land, nor in the very act of entry, yet since it is used with an immediate intent to make such entry, and the manner of doing it only prevents the opposition, it cannot be said to be without force, which, whether it be upon or off the land, seems equally within the statute.

1 Hawk. P. C.
c. 64. § 26.

If a man enters to distrain for rent in arrear with force, this is a forcible entry; because though he doth not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force. But, if a man hath right to lands, and rides over them with company armed to church or market, without expressing any intent to claim them, this is no forcible entry, because his actions shall be interpreted according to his intent. But, if a man that has a rent be resisted from his distress by force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assise, or may fine and imprison the party: but he cannot have a writ of restitution; for though the statute gives a remedy by fine and imprisonment for the unjust force that is offered to any person's right, yet it doth not give the justices power to reseat the rent, but only the lands and tenements themselves; and therefore no writ of restitution can be awarded.

Bridg. 175.
20 H. 6. 11. a.
Crom. Just. 62.
Dalt. 300.

A man may be guilty of a forcible entry in a dwelling-house, though there be nobody in the house at the time; and so he may by an entry into lands where any person's wife, children, or servants are upon the lands to preserve the possession; because whatsoever a man does by his agents is his own act: but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and therefore their being upon the land continues no possession.

2 Ro. Rep. 2.
Perk. 45.
Crom. Just.
164. Dalt. 315.
Moore, 656.

If several come in company where their entry is not lawful, and all of them, saving one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because

Dalt. 303.
9 Co. 67. 112.
115. Fitz. tit.
Coron. 314,

they

315. Co. Litt.
157.

they come in company to do an unlawful act; and, therefore, the act of the one is the act of them all, and he is presumed to be only the instrument of the rest. But otherwise it is, where one had a right of entry, for there they only come to do a lawful act, and therefore it is the force of him only that used it.

2 H. 7. 16. b.
20 H. 6. 11. a.
Cromp. Just.
62. a. Dalt. 300.

If divers enter by force to the use of *A.*, and *A.* afterwards agrees to it, this makes it a disseisin in *A.*, but not a forcible entry within the statute, because the statute doth not punish an agreement, but only the force and violence of an actual entry.

Hawk. P. C.
c. 64. § 34.

If he, who hath an estate in land by a defeasible title, continues with force in the possession thereof, after a claim made by one who had a right of entry thereto, he shall be adjudged to have entered forcibly.

Cro. Ja. 199.
Crom. 70.
Lamb. 145.
Hawk. P. C.
c. 64. § 30.

The same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also. Hence it follows, that whoever keeps in the house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter. And it hath been said, that he also shall come under the like construction, who places men at a distance from the house, in order to assault any one who shall make an attempt to enter into it; and that he also is in like manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in. But it is said, that a man ought not to be adjudged guilty of this offence for barely refusing to go out of a house, and continuing therein in despite of another.

Dalt. 301.
Yelv. 99, 100.
Cro. Ja. 151.
Sid. 97. 414.
H. P. C. 149.
quod vide, and
Hawk. P. C.
c. 64. § 32.

If a man holds the possession by force, though his entry was peaceable, the justices may remove him, if he had no right to enter; but, where the entry is at first peaceable and lawful, there, whether the justices may remove a forcible detainer, where it hath not been peaceably holden for three years, is a question; for that the justices are not judges of the right, but of the possession only; and if a man be gotten peaceably into his own, it seems he may defend it by force; and where the jury have found *quoad* the entry *ignoramus*, and *quoad* the detainer *billa vera*, such indictment hath been quashed, and the restitution granted upon it set aside, and a re-restitution awarded.

Dalt. 315.

If two are in possession of a house, and the one enters by one title, and the other by another, he that hath right shall be supposed to be in the possession; but the justices have nothing to do to intermeddle, because there is no appearance of any force in either; and therefore either party that thinks himself injured must apply himself to an action at law to be redressed.

(C) Of the Nature of the Possessions with respect to which one may be guilty of a forcible Entry and Detainer.

ONE may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage houses, &c. as much as if the same were done to any temporal inheritance. Sid. 101. Lev. 99. Keb. 438. Cro. Ja. 41.

Also, an indictment of forcible detainer lies against one, whether he be terre-tenant or stranger, who shall forcibly disturb any in the enjoyment of an incorporeal inheritance, as rent, tithes, (a) common, or an office. Cro. Car. 201. 486. but the justices cannot award restitution for these,

because no man can be put out of possession of them but at his own election. || In the anonymous case in Cr. Car. 201. restitution was awarded of tithes. As to rent, vide 32 H. 6. 2 a. F. N. B. 249. || (a) *Quere*, Whether such indictment will lie for a common or office, and vide Hawk. P. C. c. 64. § 31., who says, that he can find no good authority that such indictment will lie; and note, that a man cannot be convicted upon view, by force of the 15 R. 2. c. 2. of a forcible detainer of any incorporeal inheritance, because he cannot be said to have made a precedent forcible entry.

No one can come within the danger of these statutes by a violence offered to another, in respect of a way, or such like easement, which is no possession. R. v. Holmes, Mod. 73. 2 Keb. 709. S. C. Note, It

is said to be a general rule, that one may be indicted for entering into any inheritance, for which a writ of entry will lie. Hawk. P. C. c. 64. § 31. Cro. Car. 201. 20 H. 6. 11 a. 22 H. 6. 23 a.

(D) What Persons may be guilty thereof.

A MAN who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within the statutes. (b) Lady Russell's case, Cro. Ja. 18. Moore, 786. S. C. 2 Keb. 495. but Serjeant Hawkins makes a *quare*,

whether a man's entering forcibly into the land in the possession of his own lessee at will, be within these statutes. Hawk. P. C. c. 64. § 32. || (b) The possession in law is in the owner of the house in this case, for the possession of the person claiming the custody is his possession. ||

A jointenant or tenant in common may offend against the purport of these statutes, either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my & per tout*, so that he cannot in any case be punished in an action of trespass at the common law; yet the lawfulness of his entry no way excuses the violence, or lessens the injury done to his companion, and, consequently, an indictment of forcible entry into a moiety of a manor, &c. is good. Latch. 224. Palm. 419. Hawk. P. C. c. 64. § 33. Dalt. 315, 316. Ca. temp. Hardw. 174.

A man cannot be indicted for entering into the king's possession by force, for that he cannot be disseised. Co. 69. 10 Co. 112.

Bridg. 173.
Crompt. Just.
62. Dalt. 300.

An infant at the age of eighteen, and some say fourteen, or a feme covert, by their own acts, may be guilty of a forcible entry, and they may be fined for the same. But it is doubted, whether the infant may be imprisoned, because his infancy is an excuse by reason of his indiscretion; and he shall not be subject to corporal punishment by force of the general words of any statute, wherein he is not expressly named. But it is clearly agreed, that the command of an infant or feme covert to enter is void, and therefore only the person entering is punishable.

(E) What ought to be the Form of a Record grounded upon these Statutes.

Style, 135.
2 Bulst. 258.
2 Ro. Abr. 80.
Cro. Eliz. 461.
Warner v.
Collins. Noy,
155. Vent. 265.
2 Keb. 133.
R. v. Wilson,
8 T. R. 357.

THESE statutes seem to require, that in the indictment the entry must be laid *manu forti*, or *cum multitudine gentium*, and that without these words the statute is not pursued. But some have holden that equivalent words will be sufficient, especially, if the indictment concludes *contra formam statuti*, and that these words in the statute are put in *ex abundanti cautela*. But it is not sufficient to say only, he entered *vi & armis*, since that is the common allegation in every trespass.

Ellis's case,
Palm. 277.
Cro. Ja. 633.
S. C.

It is sufficient in the caption of such an indictment to say, that it was taken before *A. B. and C. D. justiciariis ad pacem domini regis conservandam assignatis*, without shewing, that they had authority to hear and determine felonies and trespasses; for the statute enables all justices of the peace, as such, to take such indictments.

(a) Dal. 15.
2 Ro. Rep. 46.
2 Ro. Abr. 80.
pl. 8. 3 Leon.
102. (b) Co.
Litt. 6. a.
(c) 2 Ro. Abr.
80. pl. 4. 5.
Ro. Rep. 334.
Cro. Ja. 633.
Palm. 277.
(d) 2 Ro. Abr.
81. pl. 4.
(e) Bulst. 201.
(f) 2 Leon.
186. 3 Leon.
101. Bro. tit. For. Ent. 23.

An indictment of forcible entry into a (a) tenement, (which may signify any thing whatsoever (b) wherein a man may have an estate of freehold,) or into a house (c) or tenement, or into two closes of meadow or (d) pasture, or into a rood (e) or half a rood of land, or into (f) certain lands belonging to such a house, or into such a house, without shewing in what (g) town it lies, or into a (h) tenement with the appurtenances called *Truepenny* in *D.* is not good, for the place must be described with convenient certainty, for otherwise the defendant will neither know the special charge to which he is to make his defence, nor will the justices or sheriff know how to restore the injured party to his possession.

(g) 2 Leon. 186. (h) 2 Ro. Abr. 80. pl. 7.

Cro. Ja. 633.
Palm. 277. An
indictment for
an entry into a

But it hath been resolved, that an indictment for a forcible entry in *domum mansionalem sive messuagium*, &c. is good, for these are words equipollent.

close, called Serjeant Hern's Close, &c. without adding the number of acres, is good, for here is as much certainty as is required in ejectment. Cro. Eliz. 458. 2 Ro. Abr. 80. pl. 8.

2 Leon. 186.
3 Leon. 102.
Hawk. P. C.
c. 64. § 37.

Also, such indictment may be void as to such part thereof only as is uncertain, and good for so much as is certain; therefore an indictment

indictment for a forcible entry into a house and certain acres of land thereto belonging may be quashed as to the land, and stand good as to the house. || If there be two counts in an indictment, one upon the

statute, and the other at common law, and the former be bad, and the other be good, the indictment may be supported. *R. v. Bathurst, Say. Rep. 225.*||

An indictment on the 5 R. 2. c. 8. or 15 R. 2. c. 2. needs not shew who had the freehold at the time of the force, because these statutes equally punish all force of this kind, without any way regarding what estate the party had on whom it was made: yet it seems that such indictment ought to shew, that such entry was made on the possession of some person who had some estate in the tenements, either as of freehold or as lessee for years, &c. for otherwise it doth not appear that such entry was made injuriously to any one. 2 Keb. 495. 3 Bulst. 71. Vent. 23.

But it is said, that an indictment on 8 H. 6. c. 9. must shew, that the place was the freehold of the party grieved at the time of the force, and therefore that it is not sufficient to say, that the defendant entered into such a house *existens liberum tenementum J. S.* without saying *adtunc existens liberum tenementum J. S.*, for otherwise it may be intended, that it was his freehold at the time of the indictment only. 2 Keb. 495. Salk. 260. Hetley, 73. Latch. 109.

It is therefore a general rule, that an indictment cannot warrant a restitution, unless it find that the party was seised at the time; but yet such seisin (a) is sufficiently shewn by a necessary implication. (a) As, where it is said, that the defendant disseised *J. S.* which could

not be unless *J. S.* had been seised; and it hath been holden, that the words *possessionatus pro termino vite*, though not strictly proper in such indictment, are sufficient; neither is it necessary to shew in particular what estate the party had. *Palm. 426. Sid. 102. Yelv. 28. Cro. Ja. 633. Bulst. 177. Vent. 306.*

An indictment on the 8 H. 6. c. 9. for entering and forcibly expelling my farmer, and disseising me, is good, without shewing what estate he had; for the forcible disseisin to me being the main point of the indictment, it is sufficient to set it forth in substance. 2 Ro. Abr. 80. pl. 3. adjudged; but in this case the want of shewing that the farmer was ousted, would have been an incurable fault. *Yelv. 165.*

Also, an indictment on 21 Ja. 1. c. 15. must shew, that the party injured was possessed of such an estate as will bring him within that statute; and therefore it is not sufficient for it to shew in general, that he was possessed, or that he was possessed of a certain term, without adding, for years; for in the first case it may be intended, that he was tenant at will, and in the second, that he was possessed for term of life; in neither of which cases is he within the statute: but it is said to be sufficient, to set forth a possession within the statute in the reciting part of an indictment, as thus, *quod cum J. S.* was possessed for a certain term of years, &c. Vent. 306. Sid. 102. Mod. 73. 2 Keb. 709. Salk. 260. pl. 1. Ld. Raym. 610.

[In a late case in which the court of *K. B.* quashed an indictment, because it did not appear, what estate the person expelled had in the premises; they said, that it was absolutely necessary that R. v. Wanhope, Say. Rep. 142. R. v. Bathurst, *id.* 225.

that this should appear, otherwise it will be uncertain, whether any one of the statutes relative to forcible entries does extend to the estate from which the expulsion was. The 5 R. 2. c. 7. the 15 R. 2. c. 2. and the 8 H. 6. c. 9. extend only to freehold estates; and the 21 Ja. 1. c. 15. extends only to estates holden by tenants for years, tenants by copy of court roll, and tenants by elegit, statute merchant, and statute staple.]

Poph. 205.
Raym. 67.
Keb. 423. 428.
435. 472.
Alleyn, 50.
Vent. 108.

A repugnancy in setting forth the offence in an indictment on these statutes is an incurable fault; as, where it is alleged, that the defendants *pacifice intraverunt, et J. S. adtunc et ibidem vi et armis disseiserunt*; or that the party was possessed of a term for years, or of a copyhold estate, and that the defendants disseised him; or that the defendants disseised J. S. of land, then and yet being his freehold; for it implies that he always continued in possession; and if so, it is impossible he could be disseised at all. But some say, that this may be reconciled, by intending that he re-entered after the disseisin, and before the indictment. But it seems clear, that if the words *adhuc extra tenet* be added, such a repugnancy cannot be helped by any indictment, and that no restitution can be awarded on such indictment, whether these words be added, or not, because the party grieved appears by the indictment to have had the freehold at the time it was so found.

2 Ro. Rep.
311. Show.
272. 2 Bulst.
121. Sid. 102.

2 Ro. Abr. 80.
pl. 10. Palm.
195, 196, 197.
Cro. Ja. 19,
20. Cro.
Eliz. 915.
Salk. 353.

A conviction on 15 R. 2. c. 2. of a forcible detainer on view, cannot be good, unless it shew, that the defendant was also guilty of a forcible entry; for it seems plain from the express words of that statute, that the justices have no jurisdiction by it over a forcible detainer, where there has not been a forcible entry. But it seems, that such forcible entry is sufficiently set forth in the complaint recited in the conviction; and it seems a reasonable opinion, that an indictment on 8 H. 6. c. 9. setting forth an entry and forcible detainer is good, without shewing whether the entry was forcible or peaceable, for the words of the statute are, *where any doth make forcible entry in lands, &c. or them hold forcibly*. But it must set forth an entry; for otherwise it appears not, but that the party hath been always in possession, in which case he may lawfully detain it by force.

Cro. Ja. 41.
Hawk. P. C.
c. 64. § 42.

The time and place of the disseisin are sufficiently set forth in an indictment, alleging that the defendant *tali die intravit, &c. et ipsum A. B. manu forti disseisivit*, without adding the words *adtunc et ibidem*; for the entry and disseisin being both of the same nature, and the one plainly tending to the other, it is a natural intendment that they both happened together.

Noy, 125.
Cro. Ja. 32.
Cro. Eliz. 186.
Noy, 120. cont.
* If the conviction is in the præterperfect tense, *accessimus et vidimus*, instead of the present tense, it shall be quashed. Stra. 443.

It has been resolved, that a disseisin is sufficiently set forth, by alleging, that the defendant entered, &c. into such a tenement, and disseised the party, without adding either the words *illicite* or *expulit* or *inde*, for the word *disseisivit* implies as much.*

(F) Of the awarding of Restitution, by whom, and in what Manner: And herein of the Nature of the Possessions, and to whom such Restitution is to be made.

THE same justice or justices, before whom an indictment of forcible entry or detainer shall be found, may award restitution; but no other justices, but those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the King's Bench, and they by the plenitude of their power can restore, because that is supposed to be implied by the statute; for that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter-sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to reseise, it may as well be done by them in court as out of it; but the justices of *oyer and terminer* or general gaol-delivery, though they may inquire of forcible entries, and fine the parties, yet they cannot award a writ of restitution.

H. P. C. 140.
Bridgm. 175.
Kel. 204.
11 Co. 59. 65.
Dallison, 25.
pl. 8. 9 Co.
118. Dalton's
Just. 314.
Lamb. Just.
160, 161.
Vent. 308.
Keb. 88. Sid.
156. The
justices or
justice may
execute the
same in per-
son, or may
make their
precept to the
sheriff to do it. Dyer, 187. Hawk. P. C. 152.

The sheriff, if need be, may raise the *posse comitatús* to assist him in the execution of the writ of restitution; therefore if he return, that he could not make restitution by reason of resistance, he shall be amerced.

Lamb. Just.
157. Hawk.
P. C. c. 64.
§ 52.

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man, who has right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions, is to have the force removed, and those who are guilty of it punished; which may be done by 15 R. 2. c. 2.

Lamb. Just.
133. Co.
Litt. 323.
Hawk. P. C.
c. 64. § 45.
Vide *supra* (C).

Restitution shall only be awarded to him who is found by the indictment to have been put out of *actual* possession, and, consequently, it shall not be awarded to one who was only seised in law; as to an heir on whom a stranger abateth upon the death of the ancestor, before any actual entry made by such heir. And from the same ground it followeth, that it shall not be granted to an heir upon an indictment finding a forcible entry made upon his ancestor.*

Lamb. 153,
154. Dal.
c. 83. Cro.
Ja. 199.
Hawk. P. C.
c. 64. § 46.
*If the indict-
ment is re-
moved by
certiorari,
B. R. may

award a restitution, discretional; and will do it, unless defendant plead very soon, and take notice of trial within term. R. v. Marrow, Ca. temp. Hardw. 174.

(G) What shall be a Bar or Stay to such Award of Restitution: And herein of superseding and setting it aside after it is executed.

Hawk. P. C.
c. 64. § 53.
and the author-
ities cited are
Dal. c. 79.
Crom. 71.
H. P. C. 139.
Dyer, 141.
pl. 48.
22 H. 6. 18.
Bro. tit. Force,
22. 29.
Inst. 256.

IT appears by the proviso in the statute of 8 H. 6. c. 9., and also by the 31 Eliz. c. 11., that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction whereof, saith Serjeant *Hawkins*, it hath been holden, that such possession must have continued, without interruption, during three whole years next before the indictment; and therefore that he who, having been in possession of land for three years or more, is forcibly ousted, and then restored by force of the statute of 8 H. 6. c. 9. cannot justify a forcible detainer till he hath been in possession again for three years after such restitution. And also for the same reason it hath been said, that he who, under a defeasible title, hath been never so long in possession of land to which another hath a right of entry, cannot justify such a detainer at any time within three years after a claim made by him who hath such right, and the subsequent continuance in possession amounted to a new entry.

Dalt. c. 79.
22 H. 6. 18. b.
Crom. 71. For
by *Hawkins*,
such disseisor
may justify
against a
stranger, or even
against the disseisee,
if his right of entry
is taken away. Hawk. P. C.
c. 64. § 54.

Also it is said, that the three years' possession must be of a lawful estate, and therefore that a disseisor can in no case justify a forcible entry or detainer against the disseisee having a right of entry, as it seems that he may against a stranger, or even against the disseisee, having by his laches lost his right of entry.

Keb. 538.
Salk. 261.
Hawk. P. C.
c. 64. § 56.
Sid. 149.
Keb. 538.
Raym. 84.
Vent. 265.

Wherever such possession is pleaded in bar of a restitution, either in the King's Bench, or before justices of the peace, no restitution ought to be awarded till the truth of the plea be tried; and such plea need not shew under what title, or of what estate such possession was, because not the title, but the possession only is material.

Hawk. P. C.
c. 64. § 57.

If one, who has been three years in possession, be afterwards ousted, and the same day re-enter with force, and be also indicted on the same day; yet it seems that, by the plain meaning and reason of the statute, he can no more bar the restitution of the party forcibly entered upon, than if he had been indicted on another day, though the words of the statute are, *that there shall be no restitution, &c. if the person indicted have been in quiet possession for three years next before the day of the indictment found*; for the import hereof seems to be no more than if it had been said, *for three years next before the indictment*.

Al. 78, 79.
Hawk. P. C.
c. 64. § 60.

The justices must not award restitution in the defendant's absence, and without calling him to answer for himself; for it is implied by natural justice, in the construction of all laws, that

no one ought to suffer any prejudice, without having an opportunity to defend himself. Savil, 68. pl. 141.

If the defendant tender a traverse of the force, (which must be in writing,) no restitution ought to be till such traverse be tried, in order to which the justice, before whom the indictment is found, ought to award a *venire* for a jury. But, if such jury find so much of the indictment to be true as will warrant a restitution, it will be sufficient, though they find the other part of it to be false.

The same justices, who have awarded a restitution on an indictment of forcible entry, &c., or any two or one of them, may afterwards supersede such restitution upon an insufficiency in the indictment appearing unto them; but no other justices or court whatsoever have such power, except the court of King's Bench. But a *certiorari* from thence wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into a contempt without notice. Dyer, 187. pl. 6. H. P. C. 140. Crom. 165. Dalt. c. 81. 84. Cro. Eliz. 915. Yelv. 32. Mo. 677. pl. 921. Keb. 93.

Also, the court of King's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been illegally awarded or executed, the said court may set it aside, and grant a re-restitution to the defendant; as, where the indictment on which the justices proceeded is quashed for insufficiency; or where it appears that the justices of peace were irregular in their proceedings, as by refusing to try a traverse of force, &c.; or where the defendant traverses the force and gets a verdict in the King's Bench; but the defendant cannot get such verdict if the force be pardoned by a general statute-pardon before the trial, because the offence appearing to the court to be discharged, it can no longer be proceeded upon, though the defendant would waive the benefit of the pardon. Savil, 68. pl. 141. H. P. C. 140. Cro. Eliz. 31. Noy, 119. Yelv. 99. Cro. Ja. 148. Ca. temp. Hardw. 176.

Neither can a defendant in any case whatsoever *ex rigore juris* demand a restitution, either upon the quashing of the indictment, or a verdict found for him on a traverse thereof, &c. for the power of granting a restitution is vested in the King's Bench only by an equitable construction of the general words of the statutes, and is not expressly given by those statutes, and is never made use of by that court, but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor. Raym. 85. Keb. 343. 808. 2 Keb. 505. H. P. C. 141. Cro. Eliz. 916. 2 Salk. 587. pl. 3. Dyer, 123. pl. 34. 2 Keb. 571. Savil, 68. pl. 141. || But see R. v. Jones, 1 Str. 474.

where, upon the quashing of a conviction of forcible entry, restitution was opposed, on an affidavit, that the party's title (which was by lease) was expired since the conviction; but the court said, they had no discretionary power in the case, but were bound to award restitution on quashing the conviction. ||

The court of *B. R.* hath been so favourable to one, who, upon his traverse of an indictment upon these statutes being found for him, hath appeared to have been unjustly put out of his possession, that they have awarded him a re-restitution, notwithstanding

Cro. Eliz. 41. Hawk. P. C. c. 64. § 66.

standing it hath been shewn to the court, that since the restitution granted upon the indictment, a stranger hath recovered the possession of the same land in the lord's court.

Foreign Attachment see
see Vol 2 p 593.

FORESTALLING.

Forest see County of - page 576 - Vol 2

(A) What it is at Common Law, and how punished.

(B) What it is by Statute, and how restrained and punished.

(A) What it is at Common Law, and how punished.

3 Inst. 105.
 43 Ass. 38.
 Bro. Indictment, 40.

ALL unlawful endeavours to enhance the price of any commodity, practices so prejudicial to trade and commerce, and injurious to the publick in general, come under the notion of forestalling, which includes engrossing, regrating, and all other offences of the like nature. It is punishable by fine and imprisonment, answerable to the heinousness of the offence, upon an indictment at common law.

Crom. 80.
 Hawk. P. C.
 c. 80. § 1.

Offences of this kind are those of spreading false rumours, buying things in a market before the accustomed hour, or buying and selling again the same thing in the same market, and other such like devices.

R. v. Waddington,
 1 East, 143.

||So, spreading rumours with intent to enhance the price of hops in the presence and hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c., that so they might be induced not to bring their hops to market for sale for a long time, and the price might be thereby greatly enhanced.

Ibid.

So, spreading such rumours generally with intent to enhance the price of hops.||

3 Inst. 196.
 Hale's P. C.
 152, (a) But
 any merchant,
 whether he
 be a subject
 or a foreigner,
 bringing victuals,
 or any other merchandise,
 into the realm, may sell the
 same in gross.

Also, if a person (a) within the realm buys any merchandize in gross, and sells the same again in gross, it is an offence of this nature, for hereby the price is enhanced, because, passing through several hands, each will endeavour to make his profit of it.

3 Inst. 196. Hale's P. C. 152.

Cro. Car. 231.

So, the bare engrossing of a whole commodity with an intent to

to sell it at an unreasonable price, is an offence indictable at the common law; for if such practices were allowed, a rich man might engross into his hands a whole commodity, and then sell it at what price he should think fit.

Hawk. P. C.
c. 80. § 3.

Also, even the buying of corn in the sheaf is an offence at common law, because it tends to enhance, which shews how jealous the law is of all practices of this kind.

3 Inst. 197.
Hale's P. C.
152.

¶ So, the buying of hops growing by forehand bargains, with intent to re-sell at an exorbitant profit, and thereby enhance the price, is an offence at common law.

R. v. Wad-
dington,
1 East, 168.

The forestalling of any commodity, which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law.¶

Id. 169.

(B) What it is by Statute, and how restrained and punished.

THE statutes relating hereunto are 23 E. 3. c. 6. 6 Rich. 2. c. 10. 11 Rich. 2. c. 7. 1 H. 4. c. 17. 14 H. 6. c. 6. 25 H. 8. c. 2. 2 & 3 E. 6. c. 15. 3 & 4 E. 6. c. 21. 5 & 6 E. 6. c. 14. 5 Eliz. c. 5. & 12. 13 Eliz. c. 25. 21 Ja. 1. c. 22. and 2 & 3 P. & M. c. 13. 31 Geo. 2. c. 40.

But the principal statute was (for it is now repealed by 12 Geo. 3. c. 71.) the 5 & 6 E. 6. c. 14. by which it is enacted, "that whosoever shall buy, or cause to be bought, any merchandize, victual, or any other thing whatsoever (a) coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek, or road of this realm, or *Wales*, from any parts beyond the sea to be sold, or make any bargain, contract, or promise, for the having or buying the same, or any part thereof so coming as aforesaid, before the same shall be in the market, fair, city, or port, &c. ready to be sold, or shall make any motion by word, letter, message, or otherwise, to any person or persons, for the enhancing of the price or dearer selling of any thing above mentioned, or else dissuade, move, or stir any one coming to the market, or fair, to abstain or forbear to bring or convey any of the things above rehearsed, to any market, fair, city, or port, &c. to be sold, shall be deemed a forestaller."

(a) On this clause it hath been adjudged, that an indictment, charging the defendant with meeting *J. S.* at such a place near *B.*, and there buying of him certain goods, which he was about to sell in the market of *B.*, is insufficient, without alleging expressly, that the goods were coming
Ro. Rep. 421.

to the market to be sold.

And by the said statute, § 2. it is enacted, "that whosoever shall by any means regrate, obtain, or get in his hands or possession, in any fair or market, any (b) corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead (c) victual whatsoever that shall be brought to any fair or market to be sold, and do sell the same again in any fair

(b) That the buying of corn, with an intent to make starch of it, and then to sell it, is not
" or

within the statute, because it is

“ or market holden in the same place, or within four miles thereof, shall be taken for a regrator.”

not bought to be sold again in the same nature in which it was bought, but to be first altered by a trade or science, and then sold again. *Bridg.* 5, 6. *Hawk. P. C.* c. 80. §. 18. — Nor for the same reason does the buying of corn in order to make meal of it seem to be within the statute. *Moore*, 595. pl. 810. *Cro. Car.* 231. *cont.* *Owen*, 135. Nor the buying of barley with an intent to make malt of it. *Cro. Car.* 231. 3 *Inst.* 196. *cont.* *Owen*, 135. But this last is excepted by an express proviso, § 7. in the statute. — But the buying of corn, and turning it into malt in another's house, being so large a quantity that it could not be malted in the buyer's own house, is not within the benefit of this exception. *Owen*, 135. (c) It hath been holden, that buying salt is a victual within this statute, as being necessary for the food and health of man, and seasoning and making wholesome other victuals. 3 *Inst.* 195. *Hale's P. C.* 152. *Cro. Car.* 231. — But neither apples, cherries, nor other such like fruits, are within the intent of the statute. 3 *Inst.* 195. *Hale's P. C.* 152. *Cro. Car.* 231. *Owen*, 135. *Cro. Ja.* 214. — Nor hops. *Cro. Car.* 231. — Nor malt. 3 *Inst.* 196. *Hale's P. C.* 152. *cont.* *Owen*, 135. *Ro. Rep.* 12.

(a) That an indictment, which charges the defendant with having bought so much corn, &c. is insufficient, for the

And it is further enacted by the said statute, § 3., “ that whosoever shall (a) engross or get into his hands, by buying, contracting, or promise of taking, other than by (b) demise, grant, or lease of land, or tithe of any corn, growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of *England*, to the intent to sell the same again, shall be reputed unlawful engrosser.”

words are, *shall engross or get into his hands by buying*, &c., and therefore must be precisely pursued. 2 *Leon.* 39. (b) That there is no necessity in an information or indictment to say that the defendant did not come by it by a demise of land, &c.: but that the defendant, if he have any such matter to allege in his defence, may give it in evidence. *Jon.* 157.

And it is further enacted by the said statute, § 4, 5, and 6., “ that whoever shall offend in any of the things before recited, and be thereof duly convicted, shall for the first offence suffer imprisonment for two months, and forfeit the value of the goods so by him bought or had; and for the second offence shall suffer imprisonment for one half year, and forfeit the (b) double value of the goods, &c. and for the third offence shall be set on the pillory, and forfeit all his goods, and be committed to prison during the king's pleasure.”

(b) And therefore no information for engrossing

corn, &c. contrary to the statute, is good, which doth not expressly shew the quantity of the thing engrossed; and on this foundation it was adjudged, that an information for engrossing corn, the quantity whereof was expressed by the word *cumulus*, was insufficient. 2 *Bulst.* 317. *Cro. Car.* 381. — But it is said by *Powell J.*, that an indictment for engrossing *magnam quantitatem frumenti* is sufficient. 6 *Mod.* 32. || But this is too general. *R. v. Gibbs*, 1 *Str.* 497. *R. v. Gilbert*, 1 *East*, 583. || — The stat. 12 *Geo.* 3. c. 71. repeals 3 & 4 *Ed.* 6. 5 & 6 *Ed.* 6. 3 *Ph. & M.* 5 *Eliz.* 15 *C.* 2. and part of 5 *Ann.* and all acts enforcing them.

FORFEITURE.

FORFEITURE is a word often made use of in the law, and Co. Litt. 59. a.
in civil cases is usually applied to alienations and dispositions made by those who have but a particular estate or interest in lands or tenements, to the prejudice of those in remainder or reversion. Also, the omission or neglect of a duty which the party binds himself to perform, or to the performance of which he is enjoined by the law, is upon the breach or neglect thereof called a forfeiture, that is, the advantages accruing from the performance of the thing are by his omission defeated and determined.

In this sense of the word the principal matters relating to forfeiture are considered under the titles *Estates for Life, Copyhold, Conditions, Obligations*, and title *Offices*; and therefore in this place we shall consider it only as it relates to crimes and offences, for which the party is punished in his estate and posterity.*

* See this subject fully

considered in *Considerations on the Law of Forfeiture for High Treason*. — In high treason, the forfeiture accrues to the crown (of whomsoever the land is holden) *propter delictum tenentis*, and this though the blood of the heir is saved, for the offence is purged by that; but in felony, saving the blood preserves the descent to the heir, because the lord is entitled by *escheat propter defectum sanguinis*. Foster, 223.

- (A) For what Crimes an Offender shall forfeit his Lands at Common Law.
 - (B) For what Crimes his Goods and Chattels.
 - (C) For what Crimes by Statute.
 - (D) To what Time the Forfeiture shall have Relation.
 - (E) What is to be done with the Offender's Goods before Conviction.
 - (F) Where the Wife shall lose her Dower.
 - (G) How far the Blood of the Offender is corrupted.
-

- (A) For what Crimes an Offender shall forfeit his Lands at Common Law.

BY the common law, all lands of inheritance whereof the offender is seised in his own right, and also all rights of entry to lands in the hands of a wrong-doer, are forfeited to the king Co. Litt. 8.
3 Inst. 19.
on

on an attainder of high treason, although the lands are holden of another; for there is an exception in the oath of fealty, which saves the tenant's allegiance to the king; so that if he forfeits his allegiance, even the lands holden of another lord are forfeited to the king, for the lord himself cannot give out lands but upon that condition.

3 Inst. 19.

Also, upon an attainder of petit treason or felony, all lands of inheritance whereof the offender is seised in his own right, as also all rights of entry on lands in the hands of a wrong-doer, are forfeited to the lord of whom they are immediately holden. For this by the feudal law was deemed a breach of the tenant's oath of fealty in the highest manner, his body with which he had engaged to serve the lord being forfeited to the king, and thereby his blood corrupted, so that no person could represent him; and, consequently, dying without heir, the lord is in by escheat.

Stamf. P. C.
191. 2 Hawk.
P. C. c. 49.
§ 3.

But the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony without a special grant, till it appear by due process, that the king hath had his prerogative of the year, day and waste.

2 Inst. 36, 37.
4 Co. 124. &
vide 2 Hawk.
P. C. c. 49.
§ 8.

And as to this, since the statute of *prærogativa regis*, it seems to have been generally holden, that the king has a right, not only to waste the lands of inheritance, which a person attainted of felony held immediately of any other lord, but also to hold them over for a year and day; and by some he had always this right, but according to others he had anciently a right only to the waste, and the year and day was given him in lieu of it.

Co. Litt. 2.

4 Co. 58.

Leon. 21.

(a) But by the
common law

such lands were not vested in the actual possession of the king during the life of the offender. 3 Co. 10. Stamf. P. C. 191. Bro. Coron. 208. 210. Leon. 21. Co. Litt. 2.

3 Inst. 19, 21.
2 Hawk. P. C.
c. 49. § 4.

It is said, that the inheritance of things not lying in tenure, as of rent-charge, rent-seck, commons, &c. are forfeited to the king by an attainder of high treason; and that the profits of them are also forfeited to him by an attainder of felony during the life of the offender, and that the inheritance shall be extinguished by his death; for it cannot escheat, because it lies not in tenure; neither can it descend, because the blood is corrupted.

(b) 3 Co. 2, 3.

7 Co. 17.

(c) 3 Inst. 19.

3 Co. 2, 3.

(d) 3 Inst. 19.

(e) 2 Ro.

Abr. 34.

(f) 3 Inst. 19.

(g) 3 Inst. 19.

Stampf. P. C.

187. Plow.

554. Dyer, 289. pl. 55. Co. Litt. 130. 372. 391. The case of Captain John Gordon, Post. 95.

The

The profits of lands, whereof one attainted of felony is seised of an estate of inheritance in his wife's right, or of an estate for life only in his own right, are forfeited to the king, and nothing shall go to the lord.

3 Inst. 19.
Fitz. Assise.
166. For-
feiture, 23.
4 Ass. pl. 4.

All customary estates of inheritance are forfeited by an attainder of treason or felony, unless there be some particular custom to the contrary, as in *Gavelkind*; because the person is *civiliter mortuus* by the attainder, and therefore is disabled to have or hold any estate, or to have any property in any thing. And therefore if a person be seised in fee of a copyhold, and be attainted of treason or felony, the copyhold is in the lord without any presentment of the homage, because it is against the nature of a court-baron to inquire of criminal matters or offences against the king; and such homage is at the will of the lord, and often influenced by him. But, if a copyholder be convicted of felony, and presented by the homage, by *special custom* the estate may be forfeited to the lord. But this is *only* by the *special custom*, since the copyholder is not disabled by the *conviction* to hold the estate, as he is, if he was *attainted*; and therefore since it is by the *custom only* that such forfeiture accrues, it must be in the manner which the custom has settled it, which is, by presentment of the homage. But, if a copyhold is granted for life, and by another copy the reversion is granted to another, *habend.* after the death of the first copyholder, or surrender, forfeiture or other determination of the first estate; the first copyholder commits murder, and is thereof attainted, the king pardons the murder and the attainder and all forfeitures thereby; in this case, he in the reversion is entitled to the estate: for the king cannot have it for the baseness of the tenure, since he cannot be tenant at will to any person; and the lord cannot have it, because he cannot be tenant to himself; therefore the particular estate of tenant for life being extinguished, the reversion immediately commences.

Bulstr. 13.
2 Brownl.
217, &c.
Leon. 1.
Godb. 267.
2 Jon. 189.
Lev. 263.
2 Keb. 451.
466. 2 Vent.
38. 5 Co.
117. Co.
Cop. § 58.
Pollex. 615.
to 621.

(B) Of the Forfeiture of Goods and Chattels.

ALL things whatsoever, which come under the notion of a personal estate, and which a man is entitled to in his (a) own right, whether they be in action or possession, are forfeitable in the following instances to the (b) king, for the trouble and charge he has been at in holding courts and bringing the offenders to justice.

Staundf.
Prerog. 45, 46
12 Co. 12.
(a) But not
those which
he hath as
executor or
administrator

to another. Cro. Car. 566. — Also, a term limited to executors, and not vested in the party himself, is not forfeitable. 2 Leon. 5, 6. And. 19. Moore, 100. Dyer, 309, 210. (b) That the lord of the manor, or other private person, may have *bona felonum & fugitivorum*, but they must be claimed by way of grant, and not by prescription, because no man can prescribe for them; for every prescription must be immemorial; and the goods of felons and fugitives cannot be forfeited without matter of record, which presupposes the memory of that continuance. 5 Co. 109. 46 E. 3. 16.

Also, personal things, settled by way of trust on the offender, are as much forfeited as if he had the legal interest, or were in possession

Cro. Ja. 312.
Hob. 214.

possession of them; as, if a bond be taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of treason or felony; these are as much liable to be forfeited; as a bond made to him in his own name, or a lease in possession.

2 Keb. 564.

608. 644.

763. 772.

Lev. 279.

Lane, 54.

113. Mod.

16. 38.

Hard. 466.

And. 294.

Raym. 120.

2 Ro. Abr. 34.

Ro. Abr. 343.

March, 45. 88.

Also, the trust of a term granted by a man for the use of himself, his wife and children, &c. is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture, but it shall be forfeited so far only, as it is reserved to the benefit of the party himself, if made *bonâ fide*, whether before or after marriage, for good consideration without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court where it is not expressly found.

Sid. 260. 403. Keb. 909.

2 Keb. 564.

Lev. 279.

Mod. 16. 38.

Vent. 128.

But the power of revocation of the trust of a settlement reserved to the grantor is not liable to be forfeited, if it depend upon something personal to be done by the grantor himself, as, making the deed of revocation under his hand and seal.

A man forfeits all such personal estate in the following instances:

5 Co. 109.

(a) And therefore a person

convicted of manslaughter, and making purgation, as was the ancient practice, or burnt in the hand according to the present, forfeits his goods and chattels, but not his lands, for the king hath lost a subject; and therefore the party is punishable, though in a more gentle manner than when there is a sedate and deliberate revenge. 5 Co. 110. — That a person convicted of heresy forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*. Doct. and Stud. l. 2. c. 29. Hale's P. C. 5.

Staundf. P. C.

813. Hale's

P. C. 271.

Keilw. 68. b.

Dyer, 239.

pl. 36. 5 Co.

110. (b) And

that in such cases where the coroner cannot have the view of the body, the king shall entitle himself to the goods and chattels upon a presentment. 5 Co. 109. (c) *Secus*, if he be found accessory after, for the indictment is so far void. Staundf. P. C. 184.

Keilw. 68.

5 Co. 110.

Hale's P. C.

271. Staundf.

184.

3. Upon a jury's finding that the defendant fled at the same time that they acquit him of an indictment of capital felony, or, as some say, of larceny, before justices of *oyer*, &c. But such a finding causes no forfeiture of the issues of the land, because by the acquittal the land is discharged; neither will it have any effect as to the goods, if the indictment were insufficient, or if the flight be disproved on a traverse, which, as all agree, may be taken to any such finding, except that by a coroner's inquest, and as (d) some say, even to that, as well in respect of the flight, as of the particulars of the goods.

(d) For this
vide tit.
Coroner.

4. The goods of persons outlawed are forfeited to the king; for the retiring from the inquiries of justice is holden so criminal in the eye of the law, that it is punished with the loss of goods so long as the outlawry stands in force. So, (a) if a person make default till the award of an *exigent*, either upon an appeal or indictment of a capital felony, he forfeits his goods, unless he was pardoned before the *exigent* was awarded. And it is (b) holden, that the law is the same as to such a default upon an indictment of petit larceny, and that wherever goods are so forfeited they are not saved by an acquittal at the trial. (c) But by a reversal of the award of the *exigent* they are saved, whether such reversal be for an error either in fact or in law, as for the imprisonment of the defendant at the time when the *exigent* was awarded, or for a defect in the indictment, appeal or process.

(c) 5 Co. 110, 111. 43 E. 3. 17. Hale's P. C. 271. Co. Litt. 259. Cro. Ja. 464. Staundf. Prerog. 47.

5 Co. 110, 111. *vide tit.* Outlawry. (a) Fitz. Coron. 181. Forfeiture, 28. Staundf. P. C. 183, 184. Staundf. Prerog. 47. Bro. Coron. 8. Finch. 352. Ro. Abr. 793. 41 Ass. pl. 13. 22 Ass. pl. 11. Cro. Eliz. 4. 72. (b) Hale's P. C. 271.

5. If a man be *felo de se*, or if a felon be killed in the robbery, or by resisting in order to escape, he forfeits his goods and chattels; for when a man thus forsakes life, all his goods and chattels are derelict; and therefore the king shall have them as the maintainer of publick justice.

5 Co. 109, Fitz. Coron. 289. 312. Staundf. P. C. 184. 3 Inst. 56. 227. Plow. 260.

6. If a felon waives, that is, leaves any goods in his flight from those who either pursue him, or are apprehended by him so to do, he forfeits them, whether they be his own goods, or goods stolen by him. And at common law, if the owner did not pursue and appeal the felon, he lost the goods for ever; but by the (d) 21 H. 8. c. 11. for encouraging the prosecution of felons it is provided, that if the party come in as evidence on the indictment, and attain the felon, he shall have a writ of restitution.

5 Co. 109. 3 Inst. 134. Cro. Eliz. 694. (d) But for this *vide* 2 Hawk. P. C. c. 23. § 53. And that a sale in a market overt does not so far alter the

property of the goods, but that upon a prosecution by the person from whom they were stolen, he shall have them again. Tit. *Fairs and Markets*.

And here we may observe a difference between goods waived, strays and the like, and goods forfeited for felony or flight; for, as it has been observed, goods forfeited for felony are not in the king without an office found of such felony or flight, because the property cannot alter without matter of record; but goods waived are in the king without office, because there the property is in no body; and therefore by publick agreement they are put out of the finder, in whom they were by the state of nature, and are vested in the king as a recompence for his trouble and charge in the execution of justice.

5 Co. 109. Foxley's case.

(C) For what Crimes by Statute.

BY the 26 H. 8. c. 13. § 4. it is enacted, "That every offender
 " and offenders, being hereafter lawfully convict of any
 " manner of high treasons by presentment, confession, verdict
 " or process of outlawry, according to the due course and cus-
 " tom of the common laws of this realm, shall lose and forfeit to
 " the king's highness, his heirs and successors, all such lands, tene-
 " ments and hereditaments, which any such offender or offenders
 " shall have of any estate of inheritance in use or possession, by
 " any right, title, or means, within the realm of *England*, or
 " elsewhere within any of the king's dominions, at the time of
 " any such treason committed, or at any time after; saving to
 " every person and persons, their heirs and successors, other
 " than the offenders in any treasons, their heirs and successors,
 " and such person and persons as claim to any their uses,
 " all such rights, titles, interests, possessions, leases, rents,
 " offices and other profits, which they shall have at the day
 " of committing such treasons, or at any time afore, in as
 " large and ample manner, as if this act had never been had
 " nor made."

||So, to the
 same effect
 the statute of
 5 & 6 E. 6. c. 11.
 § 9. (which is
 not repealed
 by st. 1. Mar.
 Sess. 1. c. 1.)||

Dowtie's
 case, 3 Co.
 10. b.

||This statute, extending only to lands, &c. which the person
 attainted had in possession or use, but not to rights, conditions,
 &c. nor to parliamentary attainders, or where the party stood
 mute;|| it is, by the 33 H. 8. c. 20. § 3., enacted, "That if any
 " person or persons shall be attainted of high treason, by the
 " course of the common law or statutes of this realm, in every
 " such case every such attainder by the common law shall be of
 " as good strength, value, force, and effect, as if it had been done
 " by authority of parliament; and that the king's majesty, his
 " heirs and successors, shall have as much benefit and advantage
 " by such attainder, as well of uses, rights, entries, conditions,
 " as possessions, reversions, remainders, and all other things,
 " as if it had been done and declared by authority of parlia-
 " ment; and shall be deemed and adjudged in actual and real
 " possession of the lands, tenements, hereditaments, uses, goods,
 " chattels, and all other things of the offenders so attainted,
 " which his highness ought lawfully to have, and which they,
 " so being attainted, ought or might lawfully lose and forfeit, if
 " the attainder had been done by authority of parliament, with-
 " out any office or inquisition to be found of the same; any law,
 " statute, or use of the realm to the contrary thereof in any wise
 " notwithstanding.

||By st. 7 Ann.
 c. 21. § 10.
 after the de-
 cease of the
 Pretender, no
 attainder for
 high treason
 was to preju-

§ 4. "Saving to all and every person and persons, and bodies
 " politick, and their heirs, assigns, and successors, and every of
 " them, (other than such person and persons which hereafter
 " shall be attainted of high treason, and their heirs and assigns,
 " and every of them, and all and every other person and persons
 " claiming by them or any of them, or to their uses, or to the uses
 " of

" of any of them, after the said treasons committed,) all such right, title, use, possession, entry, reversions, remainders, interests, conditions, fees, offices, rents, annuities, commons, leases, and all other commodities, profits and hereditaments whatsoever they or any of them should, might, or ought to have had, if this act had never been had ne made."

dice the right and title of any person, other than the right of the offender during his life.
By 17 G. 2.

c. 39. § 3. the operation of this clause in the statute of Ann was postponed till the death of the Pretender's sons. By 39 G. 3. c. 93. the act of Ann was wholly repealed.||

In the construction of these statutes the following opinions have been holden.

1. That neither of these statutes is repealed by 1 Ma. Sess. 1. c. 1. which enacts, " That no pains of death, penalty, or forfeiture, shall ensue to any offender, for the doing any treason, petit treason, or misprision of treason, other than such as be within the statute of 25 E. 3. st. 5. c. 2. ordained and provided;" for the words, *other than such*, &c. have been construed not to extend to the pains, &c. mentioned in the beginning of the sentence, but to the offences mentioned in the end of it.

Staundf. P. C. 387. 3 Inst. 19. Dyer, 28. 2 Hawk. P. C. 452. 1 H. H. P. C. 241. 356.

2. That estates in tail are forfeited by force of these words in 26 H. 8. c. 13. *of any estate of inheritance*, which must be void, if they do not include estates in tail. (a) Also, lands given to a man and his wife and the heirs of their two bodies, are as much forfeited by his attainder, as lands given to him and the heirs of his body. * If A. entails his estate in Scotland on himself for life, remainder to B. his eldest son, and the heirs male of his body, remainder to the heirs male of A.'s own body, with subsequent limitations, and the reversion to the heirs and assigns whatsoever of A. with prohibitive, irritant, and resolute clauses; and A. dies, leaving B., and another son, C.; B. is attainted of high treason; the estate is forfeited to the crown during his life, and the continuance of such issue male of his body as would have been inheritable to the said estate *tailzie*, and also for such estate and interest as vests in him by the limitation to the heirs whatsoever of A. after the substitutions determined; and after the death of B., and failure of his issue male, C. shall succeed, by virtue of the substitution to the heirs male of the body of A. Foster, 95. — If the estate is limited to A. and the heirs male of his body, without any previous limitation to his son B., and B. on his father's death becomes entitled as heir of his body, and is attainted of high treason, the whole entail is forfeited by his attainder, as long as there are heirs male of the body of A. Foster, 102.

Staundf. P. C. 187. Co. Litt. 372. b. (a) Dyer, 322. pl. 27. adjudged. * If A. entails his estate in Scot-

3. That neither a *right* to (b) a writ of error to reverse an erroneous common recovery, (c) nor a mere *right of action* to lands in the hands of a stranger, as of a discontinuee, or of the heir of the disseisor, are forfeited by either of these statutes; (d) but *rights of entry* are as much forfeited as lands in possession. Yet the king shall (e) not be adjudged in possession, by virtue of such a right, without an office, and a *scire facias* or seisure on such office; for the words, *the king shall be deemed in possession without office*, &c. shall have this construction, that he shall be in possession without office, in the same manner as he should have been on an office found at common law. But at common law, if a disseisee had been attainted of high treason, the king should

(b) 3 Co. 2, 3. agreed in the Marquis of Winchester's case, Leon. 270, 271. Moore, 125. Hob. 340. Cro. Eliz. 389. Cro. Car. 428. 7 Co. 13. Litt. Rep. 100. S.P. agreed. (c) 3 Co. 2, 3. Hob. 340.

7 Co. 13. should not have been in possession without office, and a *scire*
 4 Co. 58. a. *facias* or seizure thereon.
 (d) 3 Co. 2, 3.
 20. (e) 3 Co. 11. a. 4 Co. 58. a. Leon. 21. 9 Co. 95. a.

Cro. Car. 427.
 Stone and
 Newman's
 case, & *vide*
 Plow. 552.

4. If tenant in tail of the gift of the crown makes a feoffment in fee, and then is attainted of high treason, the right of the entail is forfeited; for it could not be discontinued, because the reversion continued always in the crown; and though it be put in abeyance by the feoffment, as to any benefit which the feoffor could have claimed from it; yet since it is not turned to a right of action, but would have still continued in him for the benefit of the heir, if there had been no attainder, it shall likewise continue in him for the benefit of the crown.

Hob. 334.
 Palm. 351.
 2 Ro. Rep. 305.

5. That if one attainted of high treason is seised of a defeasible estate-tail, and hath also a right to an ancient entail, which is discontinued, he forfeits both; for the first is within the express words of 26 H. 8. c. 13. and the other within those of 33 H. 8. c. 20. and it doth not follow, that because naked rights to lands in the hands of a discontinuee, or of the heir of a disseisor, are not within the meaning of the statute, therefore a right in the party himself is not; for the forfeiture of such naked rights might not only be of dangerous consequence in unsettling possessions, but might also be prejudicial to strangers, whom the statute, by an express saving, plainly intends to favour. But a forfeiture of the offender's right to his own lands can prejudice none but himself and his heirs.

(a) In Englefield's case,
 7 Co. 12, 13.
 Poph. 18.
 And. 293.
 Moore, 303.
 4 Leon. 135.
 Palm. 433. Ro.
 Rep. 142.
 (b) Englefield's
 case adjudged
 in 7 Co. 12.
 and the books
 cited *supra*,
 and agreed to
 be law, 2 Keb.
 566. 763. 773.
 Lev. 279.
 Lane, 44. Ro.
 Rep. 142.
 (c) As in the
 Duke of Nor-

6. In the construction of the statute of 33 H. 8. c. 20. it is (a) agreed, that a power of revoking the uses of a settlement may be forfeited by force thereof, if the execution of it require nothing but what may be as well performed by any other person, as by the party himself by whom it was reserved; as the tender of a ring, &c. (b) Neither doth the mention of such considerations, and inducements for the reserving of such a power in the preamble of it, as are inseparable from the person, alter the case, if nothing of this kind be inserted in the proviso itself, by which it is reserved; but, (c) if such proviso require any thing of this kind, it prevents the forfeiture; as, if it be worded thus, that if the party should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal; or (d) if it only require, that the revocation be under his hand and seal, without saying any thing about his changing his mind; or as (e) some say, if it only require the tender of a ring by the party, *ipso ad-tunc declarante* his intent, &c." *

folk's case, where there was this proviso, that if the duke should be minded to alter and revoke the uses, and signify his mind in writing under his hand and seal, that then, &c. and it was clearly adjudged, that the power of revocation was not forfeitable, because it depended on the duke's signifying his mind in writing under his proper hand and seal, which none but himself could do. 7 Co. 13. cited and agreed. Lev. 279. 2 Keb. 566. 763. 773. 3 Inst. 19. (d) Mod. 16. 38. Lev. 279. Main's case. (e) *Vide* Palm. 429. Latch. 25, 26. 70. 102. Jon. 135. Vent. 129. Mod. 40. — * A. who is tenant for life, with power to make leases for three lives, or twenty-one years, makes a lease to trustees for ninety-nine years, if he so long live, for payment of his debts; and appoints them his attorneys, to make leases pursuant to the power;

power; *A.* is outlawed for high treason: ||agreed, that the authority given to the trustees to act as attorneys was destroyed by the attainder. Attorney General v. Bradyll, Bunb. 92. But, *A.* having in this case only a particular power could not make a lease by letter of attorney by force of his power. Lady Gresham's case, 9 Co. 76. a. cited; 2 Ro. Rep. 393. ||

7. That neither an (a) annuity granted *pro consilio impendendo*, (a) Plowd. 381.
(b) nor an office granted for life, and requiring skill and confidence, (b) Plowd. 379. & vide tit. Office and Officers.
is forfeitable by these statutes; but such office in fee may be forfeited without the aid of them, because the grantor, in giving an estate descendible to all the heirs of the grantee, however qualified, appears not to have been induced to make his grant from the consideration of the peculiar merit of the persons who are to execute the office.

|| A dignity is forfeited by the attainder for treason of the person possessed of it; as, where *Charles Nevill*, Earl of *Westmoreland*, to him and the heirs male of his body, by letters patent, was attainted of high treason by outlawry, and by act of parliament, and died without issue male; whereupon *Edward Nevill* claimed to be Earl of *Westmoreland*, as heir male of the body of the first grantee; it was resolved by all the judges, that although the dignity was within the statute *De donis conditionalibus*, yet that it was forfeited by a condition in law *tacite* annexed to the estate of the dignity. For an earl has an office of trust and confidence; and when such a person, against the duty and end of his dignity, takes not only council, but also arms against the king to destroy him, and therefore is attainted by due course of law, by that he hath forfeited his dignity; in the same manner as if tenant in tail of an office of trust misuse it, or use it not; these are forfeitures of such office for ever by force of a condition in law *tacite* annexed to their estates. It was also resolved, that if it had not been forfeited by the common law, it would have been forfeited by the statute of 26 H. 8.; for it was an *hereditament*, and *Charles* had an estate of inheritance in it.

But, where a tenant in tail of a dignity is attainted of felony, the dignity is forfeited only during his life, and after his decease it vests in the person entitled to it *per formam doni*. The statute of 26 H. 8. does not extend to this case. Thus, where *Lawrence Earl Ferrers*, to whose ancestor the dignity had been granted by letters patent in 1711, to hold to him and the heirs male of his body, was convicted and executed for murder in the year 1760; the dignity was not forfeited, but, upon his death without issue, it descended to his brother *Washington Ferrers*, who took his seat accordingly.

Although the statute of 33 H. 8. c. 10. made attainders at common law as effectual as parliamentary attainders, as well in regard to uses as possessions; yet in the *King v. Dacombe*, the judges all held, and so it was resolved in *Abington's case*, that a trust in a freehold was not forfeited by an attainder of treason. || Cr. Ja. 513. With this decision, says Mr. Sugden, Lord Hale quarrels, and gives it as his opinion that the statute of 33 H. 8. extends to trusts, such as were then in practice and retained in Chancery, 1 H. H.P.C. 248.; and accordingly, in a case which came before him, when he was Chief Baron, he and Baron *Turner* agreed, that a trust in fee, or fee-tail, was forfeited under the statute by attainder of treason; Attorney General v. Sands, 2 Freem. 120.
Vol. III, 3 B Hardr.

Hardr. 495.; but see *ib.* 494., and so the law is laid down by modern writers. But the observation in Sands's case was merely an *obiter dictum*, and there is an express decision the other way, which may be thought to be founded in reason, because it is not pretended that the statute of 26 H. 8. can embrace trusts which have succeeded to uses (the uses referred to in that act having been destroyed by the statute of uses 27 H. 8. c. 10.); and it does not appear to have been the intention of 33 H. 8. to create a forfeiture of any equitable estates which had sprung up since the act of 26 H. 8. The statute had other objects. Sugden's *Gillb. Uses*, 78. note.

Browne v. Wayte, 2 Lev. 169. 2 Jon. 57. S.C. 2 Mod. 130. S.C. 3 Keb. 459. 651. 712. S.C. Vent. 299. S.C. Pollex. 181. S.C. By an act of parliament made 13 Car. 2. it was enacted, *that all the manors, messuages, lands, tenements, possessions and reversions, remainders, rights, interests, hereditaments, leases, chattels real, and other things of what nature soever, that Sir John Danvers, or any other to his use, or in trust for him, had the 25th of March 1646, or at any time after, should be forfeited to the king*; and it was adjudged, that by force of these words, *all interests of what nature soever*, an estate-tail was forfeited.

Co. Litt. 130. But it is holden, that the statutes of *præmunire*, which give a general forfeiture of all the lands and tenements of the offender, extend not to lands in tail.

Hale's P. C. 8. 3 Inst. 47. It is agreed, that a saving against corruption of blood in a statute concerning *felony* saves the land to the heir, because the escheat to the lord for felony is only *pro defectu tenentis*, occasioned by the corruption of blood: also, the saving of the land to the heir saves the corruption of blood and loss of dower.

Sir Salathiel Lovel's case, Salk. 85. But a saving against the corruption of blood in a statute concerning *high treason* does not save the land to the heir, because the land goes to the king by way of *immediate forfeiture*, and not by way of escheat.

(D) To what Time the Forfeiture shall have Relation.

Plowd. 488. b. Co. Litt. 2. b. 8 Co. 170. (a) That if the time proved varies from that laid in the indictment, and the jury find the defendant guilty generally, the forfeiture shall relate to the time laid, till the verdict be falsified by the party interested, as it may be in this respect, though not as to the point of the offence. Hale's P. C. 264. 270. 3 Inst. 230. — But, if the jury find the defendant guilty on the day on which the fact is proved, whether before or after the day laid in the indictment, in such case the forfeiture shall relate to the day so specially found. Kelynge, 16. Hale's P. C. 264. 2 Inst. 318. 3 Inst. 230.

8 Co. 170. Plowd. 488. (b) Whether in a *præmunire* the forfeiture shall relate to the time of the offence, or only to that of the judgment, Q. & vide Cro. Car. 172. Jon. 217. & tit. *Præmunire*.

The forfeiture of a person becoming *felo de se* has relation to the time the mortal wound was given, so that all intermediate alienations are avoided. Plowd. 260.
5 Co. 110.
Hale's P.C. 29.

(E) What is to be done with the Offender's Goods before Conviction.

IT hath always been holden, that one indicted or appealed of treason or felony may, *bonâ fide*, sell any of his chattels, real or personal, for the sustenance of himself and family, until they be actually forfeited. 8 Co. 171.

But, where a person being in *Newgate* for robbery and burglary, before conviction, made a bill of sale of all his goods to his son; on trover brought by the son against the sheriffs of *London*, it was holden by *Holt* that the bill was fraudulent, and that though a sale, *bonâ fide*, and for a valuable consideration, had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet that such a conveyance as this cannot be intended to any other purpose than to prevent a forfeiture and defraud the king; and this he said was a fraud at common law. Skin. 357.
Jones and Ashurt.

It seems the better opinion, that at (a) this day, before indictment, the goods of the offender cannot be searched and inventoried, and that after indictment they cannot be seised and taken away till the felon is convicted, for till the conviction the property remains in the felon. 3 Inst. 229.
Bridg. 77.
Hale's P. C. 269.
(a) That according to the general tenor

of the old books, the goods of one arrested for treason or felony may, by the purview of an ancient statute, which seems to continue still in force, be immediately inventoried and appraised; after which, and on surety found that they shall be forthcoming, they shall be kept by the bailiffs of the party arrested, and for want of such surety by his neighbours, till he be convicted, or found to have fled, &c., whereby they are actually forfeited, *vide* 2 Hawk. P. C. c. 49. § 35. and the authorities there cited.

And by the 1 R. 3. c. 3. it is enacted, "That no sheriff, under-sheriff, nor escheator, bailiff of franchise, nor any other person, take or seise the goods of any person arrested or imprisoned for suspicion of felony, before that the same person so arrested and imprisoned be convicted or attainted of such felony according to the law, or else the same goods otherwise lawfully forfeited, upon pain to forfeit the double value of the goods so taken to him that is so hurt in that behalf by (b) action of debt, to be pursued by like process, judgment and execution, as is commonly used in other actions of debt sued at the common law; and that no essoin or protection be allowed in any such action; nor that the defendant in any such action be admitted to wage or do his law." (b) For precedents of such actions, *vide* Lutw. 132.
Cro. Eliz. 749.

This statute is said to be in affirmance of the common law, (c) and hath been (d) adjudged to extend as well to the seizure of money, as of any other chattel. (c) || It certainly is so. *Vide* Bract. 136. b. 137.
(d) Raym. 414.

Co. Litt. 391.
2 Hawk. P. C.
c. 49. § 40. and
several ancient
authorities
there cited.

It seems plain from this statute, that goods may be seised as soon as they are forfeited; and it seems the whole township is answerable for them to the king, and may seise them wherever they can be found.

2 Hawk. P. C.
c. 49. § 41.

And at common law it was no plea for such township, that the goods were delivered to the custody of *J. S.* who embezzled them, &c., but it is enacted by 31 E. 3. c. 3., "That if any man or town be charged in the Exchequer by estreats of the justices of the chattels of fugitives and felons, and will allege in discharge of him another which is chargeable, he shall be heard, and right done to the other."

(F) Where the Wife shall lose her Dower.

Co. Litt. 31. b.
37. a. 41. a.
392. b. F. N. B.
150. Perk.
§ 308. Bro.
tit. Dower, 82.
Plowd. 261.

BEFORE the statute of 1 E. 6. c. 12. the wife not only lost her dower at common law, but also her dower *ad ostium ecclesiae*, or *ex assensu patris*, or by special custom, (except that of Gavelkind,) by the husband's attainder of treason or (a) capital felony, whether committed before or after the marriage.

(a) That the wife of a *felo de se* shall have dower. Plowd. 261, 262. Dame Hale's case. — So, if the husband be outlawed in trespass or any civil action; for this works no corruption of blood, or forfeiture of lands. Perk. § 388. Co. Litt. 31. a. — So, if the husband be attainted of heresy, for this is only a spiritual offence. Co. Litt. 31. — So, if the husband or wife be excommunicated. Co. Litt. 31. — So, if either the husband or wife be attainted in a *præmunire*, she shall be endowed; but for this *vide* Co. Litt. 134. and tit. *Præmunire*.

Co. Litt. 37.
3 Inst. 216.

But the wife never forfeited lands given jointly to her husband and her, whether by way of frank-marriage, or otherwise, but only for the year and day, and waste.

(b) || This had been attempted in former parliaments in cases of felony, but without success. See a petition to this effect from the

It is enacted by 1 E. 6. c. 12. § 17., "That albeit any person shall be attainted of any treason or felony (b) whatsoever; yet that notwithstanding every woman, that shall fortune to be the wife of the person so attainted, shall be endowable and enabled to demand, have, and enjoy her dower, in like manner and form as though her husband had not been attainted, &c."

Commons in 1 E. 3. Rot. Parl. Vol. ii. 8. 13. ||

(c) This act extends to an attainder of petit treason, as well as to an attainder of high treason. Staundf. 195.

But this is repealed as to treason by 5 & 6 E. 6. c. 11. § 13. by which it is enacted, "That the wife, whose husband shall be attainted of any treason (c) whatsoever, shall in no wise be received to ask, challenge, demand, or have dower of any the lands, tenements, or hereditaments of the person so attainted, during the said attainder in force."

Dyer, 140. pl. 42. Co. Litt. 37. a. 392. b. — But not to misprision of treason. Co. Litt. 37. a. Moore, 639.

Dyer, 97. pl. 49. 13 Co. 19.

Gate v. Wiseman, Pendl. 56. Dyer, 140. S. C. Co. Litt.

If the husband seised of lands in fee makes a feoffment, and then commits treason and is attainted of it, the wife shall not recover dower against the feoffee.

41. a. S. C. See note (3) in Co. Litt. 41. a.

So,

So, (a) if the husband is attainted of treason, and afterwards pardoned, yet the wife shall not recover dower; but (b) of lands purchased by the husband after the pardon the wife shall be endowed.

|| If a woman be attainted of treason or felony, she will thereby lose her dower; but, if she be pardoned in her husband's lifetime, she may then demand it, though he should have aliened in the mean time; for when this impediment is once removed, her capacity to be endowed is restored. ||

If a husband having levied a fine with proclamations is erroneously attainted of treason, and the five years pass after his death, and then the outlawry is reversed, the fine and nonclaim are no bar till five years are passed after the reversal, because the wife could not sue for her dower while the attainder stood in force, neither could she any way reverse it.

After the making of the statute : E. 6. c. 12. it seems to have been doubted, whether the wife should not lose her dower in case of any new felony made by act of parliament; and therefore where several offences have been made felony since, care has been taken to provide for the wife's dower.

(G) *How far the Blood of the Offender is corrupted.*

IT is clearly agreed, that by an attainder of treason or (c) felony, the blood of the offender is so far stained or corrupted that the party loses all the nobility or gentility he might have had before, and becomes ignoble.

piracy corrupts not the blood. Co. Litt. 391. — Nor of petit larceny. 3 Litt. 41. a. Noy, 170.

Also, it is clearly agreed, that he can neither inherit as heir to any ancestor, nor have an heir; and the policy of the law herein is to make men more mindful of their allegiance, and to deter them from taking up arms against the crown; for as the natural love men have for their posterity often restrains them from actions which would prejudice them, either by entailing the infamy of such actions on them, or making them sharers in the punishment which the law has appointed for such offences; so men are less careful of their persons, when their miscarriages will not involve their children in the guilt or punishment of them.

Therefore it is (d) laid down as a sure rule, that wherever it is necessary for any one, who would make a title to another, to derive the descent through him, the attainder is an effectual bar to such title, (e) unless the lands were entailed, in which case he claims *per formam doni*, and paramount his title.

§ 746. 3 Co. 10. 8 Co. 166. a. — And therefore, if the grandfather be seised in tail, and the father be attainted of treason since the 26th H. 8. c. 13. and die in the life of the grandfather, the son shall inherit the grandfather; for the son is heir *per formam doni* to the tail, which is originally not forfeitable, and by that statute the father forfeits only the lands and rights that he hath in him. Co. Litt. 8. 3 Co. 10. Dowty's case. || And the law is the

same in the case of a dignity entailed; for the son surviving an attainted father, who never was possessed of the dignity, may claim from the first acquirer, *per formam doni*, as heir male of his body, within the description of the gift, without being affected by the attainder of his father, or any other lineal or collateral ancestor. See the Duke of Athol's case, Journ. vol. 30. 466—469. On the other hand, if the dignity be descendible to heirs general, the attainder for treason or felony of any ancestor of a person claiming the dignity through whom the claimant must derive his title, though the person attainted was never possessed of the dignity, will bar the claim; for the blood of the person attainted being corrupted, no pedigree can be derived through him, so that the dignity becomes vested in the crown by escheat, and is thereby destroyed. See the case of the Barony of Lumley, and Cruise's Dig. 106.||

Co. Litt. 392. As, if there be grandfather, father and son, and the father be
Dalis. 14. pl. 3. attainted, the son cannot claim as heir to the grandfather of the
Vent. 416. lands in fee-simple, because he must of necessity derive the
descent through the father, which by reason of the attainder he
cannot do.

Dyer, 274. So, if there be two brothers, and one of them having issue a
pl. 40. Cro. son be attainted, and either the son or uncle purchase land,
Car. 543. and die without issue, the other cannot be his heir, because the
Vent. 413. blood of the father, through whom the descent must be con-
416. 425. veyed, is corrupted.

Litt. Rep. 28. But it is also a general rule, that the attainder of a person,
Noy, 159. 166. who needs not be mentioned in the conveyance of the descent,
Lev. 60. does no hurt, let the ancestor be never so remote; and that
Sid. 200. therefore where any one may claim as immediate heir to another,
Vent. 413. without deriving the descent through any other, he shall not be
barred by the attainder of any other.

Vent. 416. As, if the son of one attainted purchase land, and have a son
and die, such son shall inherit, because he derives his descent
immediately from him.

Co. Litt. 8. a. So, if a man have two sons, and be attainted, and one of the
4 Leon. 5. sons purchase lands, and die without issue, the other shall be
Cro. Ja. 539. his heir, because he may make his title without mentioning
Ro. Abr. 625. the father; and therefore there is no disability in the one to be
pl. 5. Cro. represented, or in the other to represent.
Car. 543.
Palm. 19.

Lev. 59. Vent. 425. 2 Ro. Rep. 93. 2 Sid. 25. 27. Moore, 569. pl. 775. Noy, 158.
Litt. Rep. 28. — But my Lord Coke says, that the reason of this case is, because the at-
tainder of the father corrupts only the lineal blood, and not the collateral blood between the
brethren, which was vested in them before the attainder; but he saith, that some have
holden, that if a man, after he be attainted, have issue two sons, the one cannot be heir to
the other, because they could not be heir to their father, for that they never had any inhe-
ritable blood in them. Co. Litt. 8. a. — But the ground of this opinion is overthrown by
the resolution in the case of Collingwood and Pace, wherein it was adjudged in the Exche-
quer-chamber by seven judges against three, that the sons of an alien might be heirs one to
another, if born in *England*, or naturalized, though it is certain they could not be heirs to
their father. Sid. 193. Hard. 224. Vent. 413. Lev. 59. And therefore it seems now set-
tled, that such sons, whether born before or after the attainder of their father, may inherit
each other. As to this see tit. *Aliens*.

Noy, 159. 167. So, where a person attainted hath issue by a woman seised of
Staundf. P. C. lands of inheritance, such issue may inherit the mother, though
196. 2 Sid. he never had any inheritable blood from the father.
248. Cro. Ja.

539. Litt. Rep. 28. Lev. 59. Sid. 201. Vent. 422. Co. Litt. 84. b.

If the father of a person attainted die seised of an estate of inheritance during his life, no younger brother can be heir, but the land shall rather escheat; for the elder brother, though attainted, is still a brother, and no other can be heir to the father while he is alive; but if he die before the father, the younger brother shall be heir, because there is no default in the father to be represented, nor in the younger son to represent the father after the death of his brother.

Co. Litt. a.
13. a. Noy,
166. 170.
Lev. 60.
Sid. 195.
Vent. 413.

But, if the eldest son had left issue and died, such issue could not have inherited, but such lands must have escheated, because the eldest son could not have represented the grandfather, but by the mediation of the father, and as standing in his stead; and that in this case he could not do, because the father can have no representatives; and the younger son could not inherit, because the elder line is still continuing, which excludes the younger.

Dyer, 48.

If a man be seised of lands in fee, and have issue two daughters, and one of them be attainted of felony, and the father die, both daughters being alive, one moiety shall descend to the innocent daughter, and the other moiety shall escheat.

Co. Litt. 163.
b.

But, if a man make a lease for life, remainder to the right heirs of A. being dead, who hath issue two daughters, whereof one is attainted of felony, it seems the remainder is not good for a moiety, but void for the whole.

Co. Litt. 163.
b.

For in the first case the lord by escheat must make a title to divest the estate which was once lawfully vested in the ancestor; which he cannot do, because there is no defect in this case. since the ancestor may be legally represented, and the innocent daughter may legally represent; and therefore there can be no title in the lord to evict that moiety, though he has title to the moiety of the offending daughter, who after her crime can represent no man. But in the second case, the sisters are to make title to the remainder, which they cannot do, because to make title to the remainder, they must bring themselves within the words of the gift; and the innocent daughter cannot take upon her the character of an heir alone, since they both make but one heir to the ancestor; and both cannot join, because one is attainted and incapable of that character.

Co. Litt. 163.
b.

Although a person attainted be to many purposes looked upon as dead in law, yet he hath a capacity to purchase land, which the king shall have upon office found, and not the lord of the fee, because his person being forfeited to the king he cannot purchase but for the king.

Co. Litt. 2. b.

But, if a man attainted be pardoned by act of parliament he may purchase as before, for he is totally restored and inheritable to all persons. But, if he be pardoned by charter, he may thenceforth purchase lands, but cannot inherit his former relations; for the king's charter cannot alter the law or take away the right of others, or restore the relation that was lost.

Co. Litt. 8. a.
391. b. 392. b.
Stam. P. C.
195. 3 Inst.
233. Dalis.
14. pl. 3.

If a man be attainted and after pardoned by charter, the children born before such pardon shall not inherit; but, if they fail,

Noy, 170.
Co. Litt. 8. a.
3 Inst. 233.

fail, the children born after such pardon may inherit him; for the pardon makes him capable of *new relations* as well as of *new purchases*, though all the old legal benefit and relations are lost.

|| By st. 54 G. 3. c. 145., "No attainder for felony, save and " except in cases of the crime of high treason, or of the crimes of " petit treason or murder, or of abetting, procuring, or coun- " selling the same, shall extend to the disinheriting of any heir, " nor to the prejudice of the right or title of any person or per- " sons, other than the right or title of the offender or offenders, " during his, her, or their natural lives only; and that it shall " be lawful to every person or persons to whom the right or " interest of any lands, tenements, or hereditaments, after the " death of any such offender or offenders should or might have " appertained, if no such attainder had been, to enter into " the same."||

FORGERY.

Hawk. P. C.
c. 70. § 1.
4 Bl. Com.
247.

FORGERY at common law is an offence in falsely and fraud-
ulently making or altering any matter of record, or any other
authentick matter of a public nature, as a parish register, or
any deed or will, and punishable by fine and imprisonment, and
such other corporal punishment as the court in discretion shall
think proper.

But the mischiefs of this kind increasing, it was found neces-
sary to guard against them by more sanguinary laws. Hence
we have several acts of parliament declaring what offences
amount to forgery, and inflicting severer punishments than there
were at the common law.

Therefore it will be necessary to consider,

- (A) In what Cases the making or altering of a Writ-
ing shall be said to be so far false and fraudu-
lent as to amount to Forgery.
- (B) Of what Nature or Kind the Writing must be
to constitute the Offence Forgery at Common
Law.
- (C) What Offences of this Kind are made Forgery by
Statute, and of the Punishment to be inflicted
on Persons guilty of Forgery.

(A) In

(A) In what Cases the making or altering of a Writing shall be said to be so far false and fraudulent as to amount to Forgery.

THE notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity; and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and justice it ought not to have.

that it is no answer to the charge of forgery to say that there was no *special intent* to defraud any particular person, because a *general intent* to defraud is sufficient to constitute the crime; for if a person do an act, the *probable* consequence of which is to defraud, it will, in contemplation of law, constitute a fraudulent intent.] || In an indictment for forgery it is sufficient to aver a *general intent to defraud a particular person*, which intention may be made out by the facts in evidence at the trial. R. v. Powell, 1 Leach's Ca. 77. 2 Bl. Rep. 787. S. C. ||

Hence it is holden to be forgery for a man to make a (a) feoffment of certain lands to J. S. and afterwards make a deed of feoffment of the same lands to J. D., of a date prior to that of the feoffment to J. S., for herein he falsifies the date in order to defraud his own feoffee by making a second conveyance, which at the time he had no power to make.

had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antiquated conveyance endeavoured to avoid it. Moore, 665.

Also, it is forgery for a man, who is ordered to draw a will for a sick person, to insert legacies in it of his own head.

Hawk. P. C. c. 70. § 2. cont. Dyer, 288. b.

So, if one inserts in an indictment the names of those against whom in truth it was not found, this is forgery.

So, where one finding another's name at the bottom of a letter, at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, and then takes off the seal and fixes it under the release.

Also, the making any fraudulent alteration of the form of a true deed, in a material part of it, is forgery; as the making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into S., or by making a bond for five hundred pounds expressed in figures seem to have been made for five thousand, by adding a new cypher.

is more properly to be called a false than a forged deed. But by *Hawkins* this is forgery; for a man's hand and seal are as falsely made use of to testify his assent to an instrument, which after such an alteration is no more his deed than a stranger's. Hawk. P. C. c. 70. § 2. [In all forgeries, indeed, the instrument itself must be false: and therefore, if a person give a

Hawk. P. C. c. 70. § 2.
2 Ro. Abr. 28,
29. 11 Co. 27.
[It was said in argument, and seemingly adopted by the court in the case of Tatlock v. Harris, 3 T. R. 176.,

3 Inst. 169.
Pult. 46. b.
27 H. 6. 3.
Hawk. P. C. c. 70. § 2.
(a) So, if by his first conveyance he

Noy, 101.
Moore, 170.
3 Inst. 170.
Dyer, 288. b.

3 Mod. 66.
Hawk. P. C. c. 70. § 2.
3 Inst. 171.
Hawk. P. C. c. 70. § 2.

Moore, 619.
Hawk. P. C. c. 70. § 2.
But in 3 Inst. 169. my Lord Coke seems to think, that a deed so altered

note entirely *as his own*, and *on his own account*, his subscribing it with a fictitious name will not make it a forgery. But, if he gives the note in a different character than that which he really bears, as, if pretending to be the executor of *A.* he receives money from *B.* on account of his supposed testator, and gives a note for it as and in the name of executor of *A.*, this is a forgery; for in this case the instrument is false in itself. *Dunn's case. Leach's Cases, 54.]*

R. v. Treble,
2 Taunt. 328.

|| So, if a note be made payable at a country banker's, or at his banker's in *London*, who fails; it is forgery to alter the name of that *London* banker to the name of another *London* banker, with whom the drawer makes his notes payable after the failure of the first; for this act is a false making, in a circumstance material to the value of the note and its facility of transfer, by making it payable at a solvent instead of an insolvent house.||

Pult. 46.
21 H. 6. 4. b.
Hawk. P. C.
c. 70. § 3.

But, as the fraud and intention to deceive, by imposing upon the world that as the act of another, which he never consented to, are the chief ingredients which constitute this offence; so it hath been holden, that he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this as the other's hand and sealing, being done by his approbation and command.

Moore, 760.

So, if a man writes a will for another without any directions from him, and he for whom it is written becomes *non compos* before it is brought to him, it is not forgery; for it is not the bare writing of an instrument in another's name without his privity, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery.

Moore, 619.
Noy, 99.
Salk. 375.

Also, he cannot be punished as guilty of forgery, who raseth the word *libris* out of a bond made to himself, and putteth in *marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it. Yet it seems to be forgery, if by the circumstances of the case it should any way appear to have been done with an eye of gaining an advantage to the party himself, or of prejudicing a third person. Also, it is holden, that such an alteration, even without these circumstances, is a misdemeanour though it be not forgery.

Moore, 762.
Noy, 101.

It seems, that by a bare nonfeasance a man cannot be said to be guilty of forgery; as, if a man in drawing a will omits a legacy which he is directed to insert: yet it hath been holden, that if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as, where the omission of a devise of an estate for life to one man causeth a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, he who makes such an omission is guilty of forgery.

Hawk. P. C.
c. 70. § 7.

But it seems to be no way material, whether a forged instrument be made in such a manner, that if it were in truth such as it is counterfeited for, it would be of validity or not; and upon this ground it hath been adjudged, that the forgery of a protection in the name of *A. B.* as being a member of parliament, who

Sid. 142.

in truth, at the time, was not a member, is as much a crime as if he were.

(B) *Of what Nature or Kind the Writing must be to constitute the Offence Forgery at Common Law.*

IT is clearly agreed, that at common law the counterfeiting of a matter of record is forgery; for, since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the public to have them either forged or falsified.

Also, it is agreed to be forgery to counterfeit any other authentic matter of a publick nature, as (a) a privy seal, or (b) a licence from the Barons of the Exchequer to compound a debt, or (c) a certificate of holy orders, or (d) a protection from a parliament man.

Ro. Abr. 65.
76. Yelv. 146.
Cro. Eliz. 178.
3 Mod. 66.

(a) Ro. Abr.
68. pl. 33. Cro.
Car. 326. Jon.
325. (b) Ro.
Abr. 65. pl. 5.
(d) Sid. 142.

2 Buls. 137. (c) Lev. 138.

It is also unquestionable, that a man may be in like manner guilty of forgery at common law by forging (e) a deed; and therefore it seems, that one may be equally guilty by forging (f) a will, which cannot be thought to be of less consequence than a deed.

(e) Ro. Abr.
66. pl. 10.
Raym. 81.
Owen. 47.
Sid. 278.

3 Leon. 170.

(f) Moore,

760. Noy, 101. Dyer, 302. and Hawk. P. C. c. 70. § 10., where it is said, that he cannot find this point any where directly holden. — [But see *infra*, and the next head.]

There seem to be some strong opinions in the (g) books, that the counterfeiting of any writings of an inferior nature to those above mentioned, is not forgery at the common law. Also, it hath been (h) holden, that the forging of another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all. But by (i) *Hawkins*, it cannot surely be proved by any good authorities, that such base crimes are wholly disregarded by the common law, as not deserving a publick prosecution; for the opinion, that they are punishable by no law, seems by no means to be maintainable, since many of them are most certainly punishable by force of 33 H. 8. c. 1. Neither can it be a convincing argument, that they are not punishable by common law, (k) because they are of a private nature; since deeds concerning private matters are also of a private nature, as much as other writings concerning other matters; yet no one will say, that the making of a false deed concerning a private matter, is not punishable at common law. But, perhaps, says he, it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof, as in the above cases, is properly punishable as forgery, and the counterfeiting of other writings of an inferior nature; that the former is in itself criminal, whether any third person be actually injured thereby or not; but that the latter is no crime unless some one receive a prejudice from it.

(g) Ro. Rep.
431. Sid. 16.
155. 451. Ro.
Abr. 66. pl. 8,
9. Winch. 40.
90. 3 Leon.
231. Leon.
101. Cro. Eliz.
296. 853.
3 Buls. 265.
(h) Cro. Eliz.
166. Yelv. 146.
3 Buls. 265.
(i) Hawk. P.C.
c. 70. § 11.
(k) Yelv. 146.

But

The King v.
Ward, Mich.
12 Geo. 1.
Barnard. K. B.
10. 2 Ld.
Raym. 1461.
2 Str. 747.

But these opinions came fully to be considered in a late noted case, where it was holden, that the principle extended to instruments of every sort, though without seal; and that it would be the most injurious notion, and even a reflection on the common law, to suppose it so defective as not to provide a remedy against offences of this nature.

(C) What Offences of this Kind are made Forgery by the Statute, and of the Punishment to be inflicted on Persons guilty of Forgery.

BY the 5 Eliz. c. 14. it is enacted, " That if any person or persons, upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely forge or make, or subtilly cause, or wittingly assent, to be forged or made, any false deed, charter or writing sealed, court-roll, or the will of any person or persons in writing, to the intent that the estate of freehold or inheritance of any person or persons, of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest of any person or persons, of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered, or charged, or shall pronounce, publish, or shew forth in evidence, any such false and forged deed, charter, writing, court-roll, or will as true, knowing the same to be false and forged, as is aforesaid, to the intent above remembered, and shall be thereof convicted either upon action or actions of forger of false deeds, to be founded upon this statute, at the suit of the said party grieved or otherwise, according to the order and due course of the laws of this realm, &c. he shall pay unto the party grieved his double costs and damages, to be found or assessed in that court where such conviction shall be; and also shall be set upon the pillory in some open market-town, or other open place, and there have both his ears cut off, also his nostrils to be slit and cut, and seared with a hot iron, &c. and shall forfeit to the king the whole issues and profits of his lands and tenements during his life, and suffer perpetual imprisonment during his life.

And by § 3. it is enacted, " That if any person or persons, upon his or their own head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly, and falsely forge or make, or wittingly, subtilly, and falsely cause or assent to be made and forged, any false charter, deed, or writing, to the intent that any person or persons shall or may have or claim any estate or interest for term of years, of, in, or to any manors, lands, tenements, or hereditaments, not being copyhold, or any annuity in fee-simple, fee-tail, or for term of life, lives, or years; or shall, as is aforesaid, forge, make, or cause, or assent to be made or forged, any obligation or bill obligatory, or any acquittance, release,

" or

“ or other discharge of any debt, account, action, suit, demand,
 “ or other thing personal, or shall pronounce, publish, or give
 “ in evidence, except as is before excepted, any such false or
 “ forged charter, deed, writing, obligation, bill obligatory, ac-
 “ quittance, release, or discharge as true, knowing the same to
 “ be false and forged, and shall be thereof convicted by any of
 “ the ways and means aforesaid, he shall pay unto the party
 “ grieved his double costs and damages, to be found and assessed
 “ in such court where the said conviction shall be had, and shall
 “ be also set upon the pillory in some open market town, or
 “ other open place, and there have one of his ears cut off, and
 “ also shall suffer imprisonment for one year, &c.”

And by § 7. it is further enacted, “ That if any person or
 “ persons, being convicted or condemned of any of the offences
 “ aforesaid, by any the ways and means above limited, shall,
 “ after any such his or their conviction or condemnation est-
 “ soon commit or perpetrate any of the said offences in form
 “ aforesaid, that then every such second offence or offences shall
 “ be adjudged felony, and the parties being thereof convicted or
 “ attainted according to the laws of this realm, shall suffer such
 “ pains of death, loss, and forfeiture of their goods, chattels,
 “ lands, and tenements, as in cases of felony by the common
 “ laws of this realm ought to be lost or forfeited, without having
 “ any advantage or benefit of clergy or sanctuary: saving to
 “ every person and persons, bodies politick and corporate, their
 “ heirs and successors, other than the said offenders, and such as
 “ claim to their uses, all such rights, titles, interests, possessions,
 “ liberties of distresses, leases, rents, reversions, offices, and other
 “ profits and advantages, which they or any of them shall have
 “ at the time of such conviction or attainder, of, in, or to any
 “ the lands, tenements, or hereditaments of any such person so
 “ as is aforesaid convicted or attainted, or at any time before in
 “ as large and as ample manner to all intents and purposes, as
 “ if this act had never been had ne made.”

By § 8. “ Any such conviction or attainder of felony as is
 “ aforesaid, or any forfeiture by reason of the same, shall not in
 “ any wise extend to take away the dower of the wife of any
 “ such person attainted, nor to the corruption of blood, or dis-
 “ herison of any the heir or heirs of any such person or persons
 “ so attainted.”

In the construction of this statute the following points have
 been holden :

1. That a false customary of a copyhold manor made in parch-
 ment, under the seals of several tenants of the manor, and con-
 taining in it divers false customs, apparently tending to the
 disherison of the lord, and falsely pretending by its title to
 be set forth by the consent of all the tenants and allowance of
 the lord, is within the first branch of the forgery mentioned in
 the statute, as being a sealed writing made to the intent to
 molest the inheritance of the lord.

Dyer, 322.
 pl. 26.
 3 Leon. 108.
 Hawk. P. C.
 c. 70. § 17.

2. That

3 Inst. 170.
Noy, 42.
Hawk. P. C.
c. 70. § 18.

2. That the forgery of a lease for years, or of a grant of a rent-charge for years, in the name of one who is seised of a freehold or inheritance, is also within the said first branch of the statute, because the said branch is penned in general words extending to any molestation whatsoever of such estate, without mentioning any estate or interest, in the claim whereof such molestation shall consist; and from this ground it follows, that these words in the second branch of forgery mentioned in the statute, *to the intent that any person shall claim any estate or interest for term of years, &c.* are meant only of such forgeries as relate to such an estate or interest *in esse* before.

Dyer, 302.
pl. 43.
Hawk. P. C.
c. 70. § 19.

3. That the forgery of a will in writing of one possessed of such an estate, mentioning a bequest thereof, is within the said second branch of the statute, as being a false writing, made to the intent that some person may claim an estate for years; notwithstanding the said branch makes no express mention of a will, as the first doth.

3 Leon. 170.

4. That the forgery of a lease of lands in *Ireland* is not within either of the branches of the statute.

3 Leon. 170.
Hawk. P. C.
c. 70. § 21.

5. That the forgery of a deed, containing a gift of mere personal chattels, is also no way within the statute, the words whereof to this purpose are, *If any person shall forge any obligation, or bill obligatory, or any acquittance, release, or other discharge of any debt, account, action, suit, demand, or other thing personal.*

15 H. 7. 15. a.
2 Ro. Abr.
466. Hawk.
P. C. c. 70.
§ 22. 3 Inst.
171. *contr.*

6. That the forgery of a statute merchant, or of a recognizance in the nature of a statute staple, by acknowledging them in the name of another, are within the statute, as being obligations, because they must have the seal of the party, by the express words of the statute, which appoint in what manner such statute or recognizance shall be taken; but that the forgery of the statute staple is no way within the statute, because it needeth not the seal of the party, but only the seal of the staple provided for it.

3 Inst. 171.
Hawk. P. C.
c. 70. § 23.

7. That he, who is truly informed by another that a deed is forged, is in danger of the statute, if he afterwards publish the same to be true, for the words of the statute are, *If any one shall publish, &c. such false and forged deed, &c. knowing the same to be false or forged.*

3 Inst. 172.
Hawk. P. C.
c. 70. § 24.

8. That the double damages to be awarded to the party grieved by a forged release of an obligation, &c. shall be governed by the penalty, and not by the true debt appearing in the condition.

3 Inst. 171.
Hawk. P. C.
c. 70. § 25.

9. That one, who hath been convicted of publishing a forged deed, may become guilty of felony by forging another deed afterwards, as well as by publishing any such deed, notwithstanding the second offence be not of the very same nature with the first; for the words of the statute are, *If any person being convicted or condemned of any of the offences aforesaid, &c. shall after any such conviction or condemnation afterwards commit any of the said offences.*

10. That

10. That notwithstanding it be necessary, in every prosecution upon the statute, strictly to pursue the very words of it; (for which cause it hath been resolved, that an indictment, setting forth the forgery of a writing indented, without adding that it was sealed, is insufficient;) yet there was no necessity that the translation of the words of the statute should be in proper classical *Latin*, so that it were intelligible; and upon this ground it hath been adjudged, that an indictment setting forth, that the defendant *super caput suum proprium* did forge, &c., meaning thereby to express that he did it of his own head, is sufficient.

11. That upon an indictment of trespass, forgery and publication of a deed, a verdict finding the defendant guilty *de transgressionem & forgeria predictis, prout superius in indictamento supponitur*, is sufficient, because these words *de transgressionem predictis* include the whole: also, perhaps such a verdict may be sufficient for another reason, because the offence is equally within the statute, and the punishment the very same, whether the party be guilty both of the forgery and publication, or of one of them only.

12. That if the conveyance be defective, so as not to pass the thing intended to be conveyed, yet it is within the act; as, where to an indictment of forgery the error assigned was of a deed enrolled, and the acknowledgment laid eleven months after the enrolment; and it being objected, that it being of a bargain and sale it could have no force, nor be any way binding to the party without the acknowledgment; the court held, that admitting the acknowledgment essential, so that the enrolment was not good, unless that appeared; (which they seemed to deny,) yet that it was within the statute; and that though there be a flaw in the conveyance forged, which counsel learned may espy and avoid, yet the party may be impeached, molested, and troubled by such deed, which makes it within the statute.

By the 2 Geo. 2. c. 25. reciting, that the laws already in force were not effectual for preventing the abominable crimes of forgery, it is enacted, "That if any person shall falsely make, forge, or counterfeit, or cause or procure to be falsely made, forged, or counterfeited, or willingly act or assist in the false making, forging, or counterfeiting, any deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange, or promissory note for payment of money, or any acquittance or receipt either for money or goods, with intention to defraud any person, (or corporation,) (a) or shall utter or publish as true any false, forged, or counterfeited deed, will, testament, bond, writing obligatory, bill of exchange, promissory note for payment of money, indorsement or assignment of any bill of exchange or promissory note for payment of money, acquittance or receipt, either for money or goods, with intention to defraud any person, (or corporation,) knowing the same to be false, forged, or counterfeited, then every such person, being thereof lawfully

3 Keb. 356.
367.
3 Inst. 369.
Keb. 849.
2 Keb. 129.
2 Lev. 221.
Vent. 23, 24.
Salk. 376.
Hawk. P. C.
c. 70. § 26.

2 Lev. 111.
221.
3 Keb. 353.
Hawk. P. C.
c. 70. § 27.

Keb. 707.
742. 803. 848.
The King v.
Ring, and
Pasch.
4 Geo. 2. S. P.
determined
between The
King and
Croke, 2 Stra.
901. Barnard.
K. B. 168.
441. 451. (B).

Made perpetual by
9 Geo. 2.
c. 18. & vide
31 G. 2. c. 22.
§ 81.

Russell's case.
Leach's cases,
8.

(a) By st. 31.
G. 2. c. 22.
§ 78.

" convicted

“ convicted according to the due course of law, shall be deemed
 “ guilty of felony, and suffer death as a felon, without benefit
 “ of clergy.”

§ 5. Provided, “ That no attainder for any offence hereby made
 “ felony, shall make or work any corruption of blood, loss of
 “ dower, or disherison of heirs.”

And by the 7 Geo. 2. c. 22. reciting the last statute, and
 that the same doth not extend to the forging of any acceptance
 of any bill of exchange, &c. it is enacted, “ That if any
 “ person shall falsely make, alter, forge, or counterfeit, or
 “ cause or procure to be falsely made, altered, forged, or coun-
 “ terfeited, or willingly act or assist in the false making, alter-
 “ ing, forging, or counterfeiting any acceptance of any bill of
 “ exchange, or the number or principal sum of any accountable
 “ receipt for any note, bill, or other security for payment of
 “ money or delivery of goods, with intention to defraud any
 “ person whatsoever, or shall utter or publish as true, any
 “ false, altered, forged, or counterfeited acceptance of any bill
 “ of exchange, or accountable receipt for any note, bill, or other
 “ security for payment of money, or warrant or order for pay-
 “ ment of money, or delivery of goods, with intention to de-
 “ fraud any person, knowing the same to be false, altered,
 “ forged, or counterfeited; then every such person being
 “ thereof lawfully convicted, according to the due course of
 “ law, shall be deemed guilty of felony, and shall suffer death
 “ as a felon, without benefit of clergy.”

By 45 G. 3. c. 89. entitled, “ An Act to alter and extend the
 “ provisions of the laws now in force for the punishment of the
 “ forgery of bank notes, bills of exchange, and other securities,
 “ to every part of *Great Britain*,” “ if any person or persons
 “ shall falsely make, forge, counterfeit, or alter, or cause or
 “ procure to be falsely made, forged, counterfeited, or altered,
 “ or willingly act or assist in the false making, forging, counter-
 “ feiting, or altering any deed, will, testament, bond, writing
 “ obligatory, bill of exchange, promissory note for payment of
 “ money, indorsement or assignment of any bill of exchange or
 “ promissory note for payment of money, acceptance of any bill
 “ of exchange, or any acquittance or receipt either for money
 “ or goods, or any accountable receipt for any note, bill, or
 “ other security for payment of money, or any warrant or order
 “ for payment of money or delivery of goods, with intention to
 “ defraud any person or persons, body or bodies politick or cor-
 “ porate whatsoever; or shall offer, dispose of, or put away any
 “ false, forged, counterfeited, or altered deed, will, testament,
 “ bond, writing obligatory, bill of exchange, promissory note
 “ for payment of money, indorsement or assignment of any bill
 “ of exchange or promissory note for payment of money, ac-
 “ ceptance of any bill of exchange, acquittance, or receipt,
 “ either for money or goods, accountable receipt for any note,
 “ bill, or other security for payment of money, warrant or
 “ order for payment of money or delivery of goods, with inten-
 “ tion

“ tion to defraud any person or persons, body or bodies politick
 “ or corporate, knowing the same to be false, forged, counter-
 “ feited, or altered, then every person or persons so offending,
 “ and being thereof lawfully convicted according to the due
 “ course of law, shall be deemed guilty of felony, and shall
 “ suffer death as a felon without benefit of clergy.

By § 2. “ If any person or persons shall forge, counterfeit, or
 “ alter any bank note, bank bill of exchange, dividend warrant,
 “ or any bond or obligation under the common seal of the
 “ governor and company of the bank of *England*, or any in-
 “ dorsement thereon, or shall offer or dispose of or put away
 “ any such forged, counterfeit, or altered note, bill, dividend
 “ warrant, bond, or obligation, or the indorsement thereon, or
 “ demand the money therein contained or pretended to be due
 “ thereon, or any part thereof, of the said company, or any
 “ their officers or servants, knowing such note, bill, dividend
 “ warrant, bond, or obligation, or the indorsement thereon, to
 “ be forged, counterfeited, or altered, with intent to defraud the
 “ said governor and company, or their successors, or any other
 “ person or persons, body or bodies politick or corporate what-
 “ soever, every person or persons so offending, and being there-
 “ of convicted in due form of law, shall be deemed guilty of
 “ felony, and shall suffer death as a felon without benefit of
 “ clergy.”

“ If any person or persons (other than the officers, work- § 3.
 “ men, servants, or agents for the time being of the governor
 “ and company of the bank of *England*, to be authorized and
 “ appointed for that purpose by the said governor and company,
 “ and for the use of the said governor and company only) shall
 “ make or use, or cause or procure to be made or used, or
 “ knowingly aid or assist in the making or using, or without
 “ being authorized or appointed as aforesaid shall knowingly
 “ have in his, her, or their custody or possession without lawful
 “ excuse, (the proof whereof shall lie upon the party accused,)
 “ any frame, mould, or instrument for the making of paper with
 “ curved or waving bar lines, or with the laying wire lines
 “ thereof in a waving or curved shape, or with any number,
 “ sum, or amount, expressed in a word or words in Roman
 “ letters, visible in the substance of such paper; or shall manu-
 “ facture, make, use, vend, expose to sale, publish, or dispose
 “ of, or cause or procure to be manufactured, made, used,
 “ vended, exposed to sale, published, or disposed of, or aid or
 “ assist in the manufacturing, making, using, vending, ex-
 “ posing to sale, publishing, or disposing of, or without being
 “ authorized or appointed as aforesaid shall knowingly have in
 “ his, her, or their custody or possession, any paper whatsoever
 “ with curved or waving bar lines, or with the laying wire lines
 “ thereof in a waving or curved shape, or having any number,
 “ sum, or amount expressed in a word or words in Roman let-
 “ ters appearing visible in the substance of such paper; or if
 “ any

“ any person or persons (except as before excepted) shall, by
 “ any art, mystery, or contrivance, cause or procure the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words to appear visible in the substance of the paper whereon the same shall be written or printed, or shall knowingly aid or assist in causing the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters to appear visible in the substance of the paper whereon the same shall be written or printed, every person or persons so offending in any of the cases aforesaid, and being convicted thereof according to law, shall be adjudged a felon, and shall be transported for the term of fourteen years.

§ 4. “ Provided that nothing herein contained shall extend, or be construed to extend, to restrain any person or persons from issuing or negotiating any bill or bills of exchange, promissory note or promissory notes, having the sum or amount thereof expressed in guineas, or in a numerical figure or figures, denominating the sum or amount thereof in pounds sterling, appearing visible on the substance of the paper upon which the same shall be written or printed; any thing herein contained to the contrary thereof in anywise notwithstanding.

§ 5. “ Provided that nothing in this act contained shall restrain or prevent any person or persons from making, using, vending, exposing to sale, publishing, or disposing of any paper having waving or curved lines, or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not contrived in such manner as to form the ground-work or texture of the paper, or to imitate or resemble the waving or curved laying wire lines or bar lines of the said paper of the governor and company of the bank of *England*, or to imitate or resemble the watermarks used by the governor and company of the bank of *England* in the bank notes, bank bills of exchange, and bank post bills, issued by the said governor and company; any thing herein contained to the contrary thereof in anywise notwithstanding.

§ 6 “ If any person or persons shall purchase or receive from any other person or persons any forged or counterfeited bank note, bank bill of exchange, bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged or counterfeited, or shall knowingly or wittingly have in his, her, or their possession or custody, or in his, her, or their dwelling house, outhouse, lodgings, or apartments, any forged or counterfeited bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill,
 “ knowing

“ knowing the same to be forged or counterfeited without law-
 “ ful excuse, (the proof whereof shall lie upon the person ac-
 “ cused,) every person or persons so offending, and being there-
 “ of convicted according to law, shall be adjudged a felon, and
 “ shall be transported for the term of fourteen years.

“ If any person or persons shall engrave, cut, etch, scrape, or § 7.
 “ by any other means or device make, or shall cause or procure
 “ to be engraved, cut, etched, scraped, or by any other means
 “ or device made, or shall knowingly aid or assist in the en-
 “ graving, cutting, etching, scraping, or by any other means or
 “ device, making, in or upon any plate of copper, brass, steel,
 “ pewter, or of any other metal or mixture of metals, or upon
 “ any wood or any other materials, or any plate whatsoever, any
 “ bank note, bank bill of exchange, bank post bill, or blank
 “ bank note, blank bank bill of exchange, or blank bank post
 “ bill, or part of a bank note, bank bill of exchange, or bank
 “ post bill, purporting to be the note, or bill of exchange, or
 “ bank post bill, or blank bank note, or blank bank bill of ex-
 “ change, or blank bank post bill, or part of the note, or bill of
 “ exchange, or bank post bill of the governor and company of
 “ the bank of *England*, without an authority in writing for that
 “ purpose from the said governor and company of the bank of
 “ *England*; or shall use any such plate so engraved, cut, etched,
 “ scraped, or by any other means or device made, or shall use
 “ any other instrument or device for the making or printing
 “ any such bank note, bank bill of exchange, or bank post bill,
 “ or blank bank note, or blank bank bill of exchange, or blank
 “ bank post bill, or part of a bank note, or bank bill of ex-
 “ change, or bank post bill, without such authority in writing
 “ as aforesaid; or if any person or persons shall, from and after
 “ the passing of this act, without such authority as aforesaid,
 “ knowingly have in his, her, or their custody, any such plate,
 “ instrument, or device, or shall, without such authority as
 “ aforesaid, knowingly and wilfully utter, publish, dispose of, or
 “ put away any such (a) blank bank note, blank bank bill of (a) Bank note,
 “ exchange, or blank bank post bill, or part of such bank note, bank bill of
 “ bank bill of exchange, or bank post bill, every person so exchange,
 “ offending in any of the cases aforesaid, and being convicted bank post bill;
 “ thereof according to law, shall be adjudged a felon, and shall these words
 “ be transported for the term of fourteen years. are in the
 41 G. 3. and
 seem omitted
 here by accident.

“ All and every the clauses and provisions in this act con- § 8.
 “ tained shall extend, and be deemed and construed to extend
 “ by all courts, judges, and magistrates whatsoever, to every
 “ part of *Great Britain*; any thing herein-before contained, or
 “ any law, statute, or usage to the contrary notwithstanding.”

By 52 Geo. 3. c. 138. § 5. reciting, that “ divers frauds had
 “ been practised by making and publishing papers with certain
 “ words and characters so nearly resembling the notes and bills

“ of the governor and company of the bank of *England*, as to
 “ appear to ignorant and unwary persons to be the notes or
 “ bills of the said governor and company; for prevention thereof
 “ it is enacted, that if any person shall engrave, cut, etch,
 “ scrape, or by any other means or device make, or shall
 “ cause or procure to be engraved, cut, etched, scraped, or by
 “ any other means or device made, or shall knowingly aid or
 “ assist in the engraving, cutting, etching, scraping, or by any
 “ other means or device making, in or upon any plate of cop-
 “ per, brass, steel, pewter, or of any other metal or mixture of
 “ metals, or upon wood or any other materials, or upon any
 “ plate whatsoever, any word or words, figure or figures, cha-
 “ racter or characters, the impression taken from which shall
 “ resemble or be apparently intended to resemble the whole or
 “ any part of any of the notes or bills of the said governor
 “ and company commonly called bank notes and bank post
 “ bills, or shall contain any word, number, figure, or charac-
 “ ter in white on a black, sable, or dark ground, without an
 “ authority in writing for that purpose from the said governor
 “ and company, to be produced and proved by the party ac-
 “ cused, or shall without such authority as aforesaid use any
 “ such plate, wood, or other material so engraved, cut, etched,
 “ scraped, or by any other means or device made, or shall
 “ use any other instrument or device for the making or print-
 “ ing upon any paper or other material, any word or words,
 “ figure or figures, character or characters, which shall be ap-
 “ parently intended to resemble the whole or any part of any
 “ of the said notes or bills of the said governor and company,
 “ or any word, number, figure, or character in white on a
 “ black, sable, or dark ground; or if any person or persons
 “ shall, without such authority as aforesaid, knowingly have in
 “ his, her, or their custody, any such plate, instrument, or
 “ device, or shall knowingly and wilfully utter, publish, or dis-
 “ pose of or put away any paper or other material contain-
 “ ing any such word or words, figure or figures, character
 “ or characters as aforesaid, or shall knowingly or wittingly
 “ have in his, her, or their custody or possession, any paper
 “ or other material containing any such word or words, figure
 “ or figures, character or characters as aforesaid, without law-
 “ ful excuse, (the proof whereof shall lie upon the person
 “ accused,) every person so offending in any of the cases afor-
 “ said, and being convicted thereof according to law, shall be
 “ adjudged a felon, and shall be transported for the term of
 “ fourteen years.”

||These, I be-
 lieve, are all

the general statutes upon the subject. For the particular ones, I refer the reader to the Index to the Statutes, or rather to that happy arrangement of them which we owe to the industry and ability of Mr. *Evans*.||

Post. 116.

[A man may be guilty of forgery, though the person whose name or signature he purports to forge be not in existence.

Bolland's case. As, if a person alter his own name indorsed on a bill of ex-
 change

change to the name of a person beginning with the same initial, although there is no known person in existence answering to the name forged. So, where a person in possession of a promissory note, which had been lost, indorses it in a fictitious name in order to get it discounted. Upon the same principle a man may be indicted for forging a *last* will and testament, although the supposed testator be alive.

If a bill of exchange payable to *A.* or order get into the hands of another person of the same name with the payee, and such person, knowing that he is not the person in whose favour it was drawn, indorse it, he is guilty of forgery.]

¶ If a person authorize another to sign a note in his name, dated at a *particular place*, and made payable at a *banker's*, and the person in whose name it is drawn represent it to be the name of *another person*, with intent to defraud, and no such person, as the note and representation import, exist, this is forgery.¶

[A forged draught on a banker is an order for the payment of money within the 7 Geo. 2., although no person of the name forged ever kept cash there.

To forge a note in imitation of a bank note, although there be no water-mark, and the word *pounds* be omitted, is a capital offence.

An entry of the receipt of money or notes made by a cashier of the bank of *England* in the bank book of a creditor, is an accountable receipt for the payment of money within 7 Geo. 2., and altering the principal sum by prefixing a figure to increase its numeration, is a capital forgery.

¶ A forgery, with intent to defraud "*the stewards of the feast of the Sons of the Clergy*" is within the above statutes, although it be to the injury of a private society, and those statutes apply expressly only to the defrauding of *individuals* and *corporate bodies*.

A promissory note in the following words, "On demand, we promise to pay Mesdames *Sarah Wallis* and *Sarah Doubtfire*, stewardesses for the time being of the Provident Daughters' Society, held at Mr. *Pope's*, the *Hope*, *Smithfield*, or their successors in office, sixty-four pounds, with 5 per cent. interest for the same; value received this 7th day of *February 1815*. For *Felix Calvert* and Co., *John Forster*," was holden to be a valid promissory note within the statute of 2 G. 2., and capable of being the subject of forgery. It is not necessary that such a note should be in itself negotiable; it is sufficient that it should be a note for the certain payment of a sum of money, whether negotiable or not. And though, as it was objected, these payees were not at the time legally stewardesses, yet it was a description by which they were then known; and though they could not legally have successors in office, yet, in case of their decease, their executors and administrators might sue, and they themselves, during their life, might recover on it.¶

A forged order for the delivery of goods, to be within 7 Geo. 2., must be positive and compulsory. It must likewise be directed

Leach's Cases,
78. R. v. Tuft,
Leicester Lent
Ass. 1776.
R. v. Cogan,
Leach, 356.

Mead v.
Young, 4 T.R.
28.

R. v. Parkes,
2 Leach's Ca.
775.

Locket's case,
Leach, 89.

Elliot's case,
id. 162.

Harrison's
case, id. 166.

R. v. Jones
and Palmer,
Leach's Ca.
366.

R. v. Box,
6 Taunt, 325.

Leach, 108.
266. Clinch's

case, *id.* 437.
Fost. 120.

rected to the person who holds the goods, and it must appear upon the indictment that the person whose name is charged to be forged, had an authority to make such order, as the forged order purports to be.

R. v. Jones,
Dougl. 300.

Where an indictment stated that the instrument forged "purported to be a bank note," but, in fact, it was very different and distinguishable from that security; the court held that the defect could not be supplied, so as to support the indictment, by any representations of the party at the time he uttered it.]

R. v. Reading,
1 East, 186.
note. R. v.
Gilchrist, *ib.*
S. P.

¶ An indictment charging that the defendant, having in his possession a bill of exchange, *purporting* to be directed to one *J. King*, by the name and description of *J. Ring*, forged the acceptance of the said *J. King*, is bad; because *purport* means what appears on the face of the instrument, and the bill did not purport to be drawn on *J. King*.

R. v. Esdall,
ib.

So, where the indictment charged that the bill *purported* to be directed to *Richard Down*, *Henry Thornton*, *John Freer*, and *John Cornwall*, jun., by the name and description of Messrs. *Down*, *Thornton*, and *Co.*

R. v. Mason,
ib. R. v. Lyon,
2 Leach's Ca.
597.

The indictment must set out the forged instrument in words and figures.

R. v. Testick,
ib.

But, upon an indictment for publishing a forged *receipt for money*, with the name *Stephen Withers*, &c., for the sum of 1*l.* 4*s.*, it was holden sufficient to set forth only the receipt itself, as follows: "18th March 1773. Received the contents above, "by me *Stephen Withers*," without setting forth the account itself to which such receipt referred, and at the foot of which it was subscribed; the account being only evidence to make out the charge.

R. v. Hunter,
2 Leach's Ca.
624.

The name of the holder of a navy bill, signed on a proper receipt-stamp, and affixed to the navy bill, does not itself purport to be a receipt for money within the above statutes of 2 G. 2. & 7 G. 2.; but, as the money is paid on such signature, and it has always been considered as a receipt at the Navy Office, it may, by proper averments, be brought within those statutes, as a receipt for money.

R. v. Thompson,
2 Leach's
Ca. 910.

So, upon the authority of the last case, an indictment for forging the word "settled," at the bottom of a bill of parcels, importing that the bill had been paid, was holden to be bad, because it did not shew, by proper averments, that the word "settled" purported to be a receipt; although the stamp-act 35 G. 3. c. 55. § 7. enacts, that every writing or memorandum denoting that a debt has been paid or *settled* shall be deemed a receipt.

See R. v. Taylor,
1 Leach's
Ca. 215.

But in the above case of R. v. Testick, the indictment was holden to be good, though it neither set out the account, nor made any averment.

R. v. Gade,
2 Leach's Ca.
732.

An indictment for forging a *transfer* of stock is good, although the stock had never been accepted by the person in whose name it

it stood, and although the transfer was not *witnessed* according to the rules and directions of the bank.

Upon a prosecution for this crime the forged instrument may be given in evidence although it be not stamped. ||

257. R. v. Morton, *id.* 258. R. v. Reculist, 2 Leach's Ca. 703.

R. v. Hawkes-
wood,
1 Leach's Ca.

FORMEDON.

FORMEDON is a real action which lies for the issue in tail after the death of his ancestor, or for him in remainder or reversion after the estate-tail determined, and is called *formedon*, because the writ comprehends the form of the gift. Co. Litt. 326. a. 327. Booth, 139.

The proceedings in this action, as in all other real actions, being dilatory and expensive, it is now seldom brought; but as it is a proper remedy in many cases, and still in use, we shall consider it under the following heads.

(A) Of the several Writs of Formedon: And herein,

1. *Of the Formedon in Descender.*
2. *Of the Formedon in Remainder.*
3. *Of the Formedon in Reverter.*

(B) Of what Things a Formedon will lie.

(C) How the Demandant must set forth his Title.

(D) Of the Tenant's Plea in Abatement or Bar.

(A) Of the several Writs of Formedon: And herein,

1. *Of the Formedon in Descender.*

FORMEDON in the descender is an action *ancestral droituel*, which lies for the issue in tail, upon a violation of that right which descends to him from his ancestor, according to the form of the gift, and is in nature of a writ of right, being the (a) highest writ that an issue in tail can have. 2 Inst. 291. Plowd. 235. F. N. B. 212. L. Litt. § 595. (a) And therefore tenant in tail

shall not have a writ *sur disclaimer*, nor a *quo jure*, nor a *ne injuste vexes*, nor *nuper obijt*, nor *rationabili parte*, nor a *mortdancestor*, nor a *sur cui in vita*; for these and the like

none but tenant in fee shall have. Co. Litt. 326. b. — But tenant in tail shall have a *quod permittat*, a writ of *customs and services in le debet & solet*, but not in the *debet* only; and in like manner he shall have a *secta ad molendinum in le debet & solet*, but not in the *debet* only; also he may have a writ of entry in *consimili casu*, and an admeasurement, and a *nativo habendo*, *cessavit*, *escheat*, *waste*, and the like. Co. Litt. 326. b.

Co. Litt. 21.

326. b.

F. N. B. 212.

L. And. 73.

Plowd. 239. b.

6 Co. 40.

Moore, 155.

Vent. 299.

& vide tit.

Estates-Tail.

(a) But though

the form of

the writ be

set down, yet the statute need not be recited, nor any other statute which giveth the form of the writ. 2 Inst. 336. (b) That where the heir could not have an assise of *mortdancestor*, he might, according to his special case, have a formedon in descender at common law, but then he was to recover a fee-simple. Plowd. 239. b. *per* Bendlow. Co. Litt. 60. b.

This writ lay not at common law, but was given by Westm. 2. c. 1. the (a) form of which is set forth in the statute; for at common law all estates-tail were fee-simple conditional, and the donee, by having issue, might have aliened the estate or forfeited it, in which cases the issue had no remedy; but, when by this statute, called the statute *de donis conditionalibus*, the donee was deprived of this power, it was also necessary that the issue should have a remedy against the alienation or discontinuance of his ancestor, and therefore the (b) formedon in descender was given.

F. N. B. 212.

L. (c) That

the demand-

ant may have

one formedon

upon several

gifts. Cro.

Ja. 330. *per*

Coke. — But, if *A.* makes a gift of the manor of *S.* to *B.* and the heirs of his body, and afterwards by another deed gives sixty acres of land to *B.* and the heirs of his body, upon the death of *B.* without issue, *A.* cannot have one formedon in reverter on these distinct gifts. 8 Co. 86. b. (d) But the writ against the pernor of the profits is given by the statute of 1 H. 7. c. 1.

And therefore since this statute upon (c) every gift in tail of lands or tenements, if the ancestor alien the lands or tenements, or be disseised or deforced thereof and die, he who is heir unto the lands, by force of the gift, shall have his formedon in descender against him who is tenant of the lands or tenements, or (d) pernor of the profits of the same.

F. N. B. 213. C.

So, if tenant in tail hath issue two daughters, and one of them hath issue a son, and dies, and the tenant in tail dieth, and a stranger abates, the surviving daughter and son shall have a formedon in descender.

F. N. B. 213. E.

So, if a man gives lands unto a woman, and unto the heirs which he himself shall beget on the body of the said woman, and they have issue between them two daughters, and one of them hath issue a daughter, and dies, and after the donor and donee die, the aunt and niece shall join in a formedon.

F. N. B. 213. D.

If tenant in tail hath issue two sons, and dies, and the eldest son enters and hath issue and dies, and the issue enters, and dies without issue, the youngest son of tenant in tail shall have his formedon in descender.

F. N. B. 214. D.

vide tit. Coparceners.

If tenant in tail hath several daughters, and after his death they enter and make partition, if one of the daughters after discontinues, and dies, leaving issue, such issue may have a formedon in descender.

F. N. B. 214. C.

So, if two coparceners are tenants in tail by descent from their father or mother, and afterwards they make partition, and one coparcener hath issue and dies, and the other coparcener dies without

without issue, the issue shall have a formedon in descender for the whole land.

So, if lands in *gavelkind* be entailed, and descend to many brethren as heirs to their father, and they make partition betwixt them of the lands, and afterwards one aliens his part and dies, his heirs shall have a formedon of that which they held in parts. F.N.B. 214. B.

If lands be given to two men, and to the heirs of the body of one of them, and he who hath the inheritance marries, and dies leaving issue, such issue may, after the death of him who hath the freehold, bring a formedon in descender against a stranger who abates, and allege the eplees in his father; for to such an intent the estate-tail was executed in the donee. But, in this case, it seems that the wife of the donee who had the inheritance in him shall not be endowed, because the estate-tail was not executed to all purposes in the husband. Perk. § 334.

If tenant in tail discontinue in fee, and die, and the discontinuee make a lease for life, and grant the reversion to the issue, he shall not have a formedon against the tenant for life; for by his formedon he must recover an estate of inheritance, which the tenant for life hath not in him, but the issue in tail himself hath it. Co. Litt. 297. b.

If in a formedon in descender the demandant is barred by verdict or on demurrer, yet his issue in tail shall have a new formedon on the construction of the statute Westm. 2. So, if he be barred of a writ of error by a release of errors by his ancestor, yet he shall have a new writ of error; for he does not claim altogether as heir, but *per formam doni*; and by the statute he shall not be barred by the feint or false pleading of his ancestor (a), so long as the right of entail remains. 6 Co. 7. b. (a) That a bar in a formedon in descender is a good bar in any other formedon in descender brought upon the same gift. Co. Litt. 393. b.

2. Of the Formedon in Remainder.

This writ lies where a gift is made in tail or for life, remainder in tail or in fee, and the tenant in tail or for life aliens, or is disseised, and dieth without issue, he in remainder, or his representative, may bring his formedon in remainder. Litt. § 597. F.N.B. 217. C.

This writ, as it lies for him in remainder after an estate-tail, is grounded upon the equity of the statute *de donis*; for a formedon in remainder did not lie upon an estate-tail at common law, because it was a fee-simple conditional, whereupon no remainder could be limited, because of the danger of a perpetuity, which was always against the policy of our law. 2 Inst. 336. Booth, 151.

But it seems by the better opinion, that a formedon in remainder lay after an estate for life; for this was an interest well known long before the statute *de donis*. Yet others doubt hereof, and think, that in this case it was given by the statute of Westm. 2. c. 24. made in the same year, by which it is provided, *Quod quotiescunque de cætero evenerit in cancell' quod in uno casu reperitur breve, in consimili casu cadente sub eodem jure & simili remedio indigente, concordent clerici de Canc. in brevi faciend.* on which words

(a) That at this day, if the tenant for life aliens, he in remainder seldom or never brings either his writ of entry *in consimili casu*, in the lifetime of the tenant for life, or his formedon after his death, or writ of entry *ad communem legem*, but enters for the forfeiture, and brings his ejectment. But, if the alienee of the tenant for life die seised before the entry of him in remainder or reversion, his entry in such case being taken away, this may be a proper remedy. Booth, 151-2.

F. N. B. 217.
C. Dyer, 125.

If lands be given to *A.* for life, and the reversion be afterwards granted to *B.* in tail, and after the death of *A.* a stranger abate, *B.* shall have a formedon in remainder, and not in the reverter.

Dyer, 143-5.

If lands be given to the father and son, and to the heirs of their two bodies begotten, remainder over in fee, and the father die leaving only one son, who afterwards dies without issue, and a stranger abate, or the estate has been discontinued, he in remainder may have one formedon, and need not bring several writs.

F. N. B. 219.
A. 8 Co. 89.
Booth, 152.

If a remainder be once executed, that is to say, if the remainder-man be once seised of the estate-tail in possession, and the right descend to his heirs, the heir shall not have a formedon in remainder, but in the descender. As, if *A.* give lands to *B.* in tail, remainder to *C.* in tail, *B.* die without issue, *C.* enter and alien in fee, and have issue *D.*, *D.* shall not have a formedon in remainder, because *C.* his father was seised, and the right descended to him, but he shall have the general writ of formedon in descender.

3. Of the Formedon in Reverter.

Lit. § 596.
F. N. B. 219.
E. Vide Dyer, 199. pl. 55.
where he in reversion must bring his formedon, and cannot have a *scire facias* to execute a fine.

This writ lies where the donee in tail or his issue die without issue, and a stranger abates, or they who were seised by force of the entail discontinue the same; in either of these cases, the donor or his heirs may have a formedon in reverter.

2 Inst. 336.
Plowd. 235.

This writ lay at common law; for though at common law the estate-tail was a fee-simple conditional, so that by having issue, the donee by alienation, &c. might have barred the possibility of the donor's right of reverter, yet the having of children was in the nature of a condition precedent; and therefore if the donee never had a child, the donor might bring his formedon in reverter, and recover against any alienation or disposition of the donee.

(B) Of what Things a Formedon will lie.

Co. Litt. 20.
vide tit. Estates-tail, letter (A).
(a) But it is said, that if

IT seems that all such inheritances, as may be entailed, may be recovered in a formedon, and that therefore it lies not only of lands, but also of rents, (a) commons, estovers, or other (b) profits arising from lands.

one grants common of pasture to a man and the heirs of his body, and the donee dies, and the heir is deformed of the common, he shall not have a formedon in descender of the common, but a *quod permittat*, in the nature of a formedon, and shall count upon the gift and special matter. F. N. B. 212. B. (b) As, if a man grants the moiety of the profits arising out of his mill unto another man, and the heirs of his body, and the donee dieth, and his heir is deformed of the profits, the heir shall have a formedon in the descender for those profits. F. N. B. 212. B. — So, if one grant to a man, and the heirs of his body, pasture for twenty oxen, or for an hundred sheep, &c., and the donee die, and his son, who is his heir, be deformed thereof, he shall have a formedon in the descender. F. N. B. 212. B.

But no formedon will lie for things merely personal, which only charge the person, and neither issue out of land nor relate to it, and therefore cannot be demanded as a tenement in a *præcipe*. As, if A. grants to B. and the heirs of his body, to be master of his hawks, or keeper of his hounds, with a fee or salary annexed to it, the issue of B. cannot have a formedon thereof. Ro. Abr. 837. Plowd. 2.

If there be a custom in a manor, that copyholds may be entailed, which co-operating with the statute *de donis* is allowed to be good, the issue in tail may have a formedon of such lands. Co. Litt. 60. vide tit. Copyhold.

(C) How the Demandant must set forth his Title.

THE demandant in a formedon in the descender must make himself heir to him who was last seised by force of the entail. But he (a) need not mention an ancestor who happened to be inheritable, but was never actually seised by force of the entail; as, if there be grandfather, father, and son, and the father die in the life-time of the grandfather, the son may bring his formedon without alleging any right in the father. So, if the donee in tail has two sons, and the eldest dies in his life-time, the second may, after the death of his father, bring his formedon without taking notice of the eldest son. Reg. 243. 8 Co. 87. Dyer, 216. pl. 56. F. N. B. 212. F. Booth, 143. Hetl. 78. (a) Where in formedon in descender, the demandant made himself heir unto every one that

had been inheritable to the entail, though by the register he should make himself heir only unto them that were seised by the force of the entail; yet the writ was holden good. Cited from the Year-book 11 H. 6. 20. Hob. 51, 52. But he must not fail to make himself heir to all that were seised. Hob. 52.

So, where in a formedon in descender, the demandant set forth, that the right descended unto him as brother and heir to the donee, without alleging that the donee died without issue, it was holden good; for he could not be heir to his brother unless the brother had died without issue. Barrow v. Haggett, 1 Mod. 219. 2 Mod. 94. S. C.

In formedon in reverter, the demandant need not in his writ or count allege, that all the issue inheritable are dead; but it is sufficient for him to say, that the donee is dead without issue; and that after his death it ought to revert to him, for he is (b) a stranger to the pedigree, and therefore not obliged to make it out. Dyer, 216. pl. 56. Booth, 155. Dyer, 14. pl. 75. 19. pl. 90. (b) But in this writ, none of the ancestors of the

donor, that were seised of the reversion descended, are to be omitted in the pedigree. Booth, 155.

So,

Booth, 155.
3 Lev. 218.
Leon. 286.
Brownl. 155.

So, in a formedon in remainder, the demandant need not allege that all the parties are dead, for he is equally a stranger, as in the precedent case; and it is sufficient for him to shew, that he who last inherited by force of the entail is dead without issue.

Hob. 51.

So, in a formedon in remainder upon an estate-tail limited to *P.* and *K.* the remainder to *F.* in fee, & *quæ post mortem P.* and *K.* to *T.* son and heir of *F.* ought to remain; the writ was adjudged good without laying expressly the death of *F.* though it was urged that the form of the register was so, because the laying of *T.* to be heir of *F.* doth import as much.

5 Mod. 17. *per*
Holt. C. J.

But in a formedon in remainder, it is not sufficient for the demandant to allege, that the issue in tail is dead without issue, without saying that the tenant in tail is also dead without issue, for he in remainder can have no title unless the estate-tail be spent; and it is not implied that because the issue is dead without issue, that therefore the tenant in tail is, for he may have other sons besides his eldest.

Hob. 333.

Also, if there be tenant in tail who hath three sons, and the second levy a fine in the life-time of his father, and the lands descend to the eldest, in whose life-time the second son dies, although the youngest son may, on the death of the eldest, bring his formedon in descender, and lay down the entail, and then bring it to his eldest brother that was last seised, and make himself immediate heir unto him without mention of the second brother; yet, if the second son survive the elder, the tenant in the formedon may plead the fine of the middle brother, and that he or his issue did survive, &c., and this will be a good bar.

Hob. 1.
Brownl. 154.
S. C.

In a formedon in descender by husband and wife, in right of the wife, the descent must be made in the writ to the wife alone, for the descent followeth the blood, and to that the husband is a stranger.

F. N. B. 219. C.
Booth, 153.

In a formedon in remainder, the demandant ought to shew the deed of gift, if *oyer* be required thereof, but he need not mention it in his count, but the tenant is to demand *oyer* thereof.

(D) Of the Tenant's Plea in Abatement or Bar.

Booth, 28.
(a) This plea is founded on that rule laid down by Bracton, l. 5. c. 27. *Amittere non potest quod non habet, & ita cadit breve.*

THERE are several pleas both in bar and abatement, which the tenant may plead to this action; such as (a) non-tenure, which is a plea in abatement, and by which the tenant shews that he is not tenant of the freehold, or of some part thereof, at the time of the writ brought, or at any time since; which is called pleading non-tenure generally.

Booth, 29.

Special non-tenure is where the tenant shews what interest and estate he hath in the land demanded, as that he is tenant for years, in ward, by statute merchant, elegit, or the like; and therefore

therefore the plea of special non-tenure must always shew who is tenant.

In a formedon in descender against three, who plead non-tenure, and issue thereupon joined, it was found specially that two of them were lessees for life, the remainder to the third person; and whether the three were tenants, as the writ supposed, was the question; and it seems by the book that they were, for they should have pleaded several tenancy, and then the demandant might maintain his writ.

Brownl. 153.
Pit v. Staple.

At common law, non-tenure of parcel of an entire thing, as a manor, &c., abated the whole writ; but now by the 25 E. 3. c. 16. it is enacted, "That by the exception of non-tenure of parcel, no writ shall be abated, but only for that parcel whereof the non-tenure was alleged."

Booth, 29.
Mod. 181.

If the tenant pleads non-tenure of the whole, he need not shew who is tenant; but in a plea of non-tenure of parcel he must shew who is tenant, and this even before the statute; for the common law would not suffer a writ good in part to be wholly destroyed, except the tenant shewed the demandant how he might have a better.

Mod. 181.

The tenant cannot, after a general imparlance, plead non-tenure of part, though he may plead non-tenure of the whole.

3 Lev. 55.
Barrow v.
Hagget.

In a formedon in reverter it hath been adjudged, that if the tenant pleads non-tenure generally, the demandant may maintain his writ that he is tenant, though he can recover no damages; and that *Littleton* and *Coke* were not to be intended of simple plea of non-tenure, but of non-tenure with a disclaimer, as the pleadings were usually in *Littleton's* time; for upon the simple plea of non-tenure, supposing the tenant hath no freehold, but a reversion in fee, the demandant shall not be restored to the fee, for nothing is disowned by the simple plea of non-tenure but only the freehold; which may be true, and yet he may have the reversion in fee. But, when the tenant disclaims, or pleads non-tenure and disclaims, the demandant shall be restored to the whole, because he hath disclaimed the whole.

Hunlock v.
Petre, 3 Lev.
330. 2 Lutw.
963. S. C.

A feoffment and lineal warranty, with assets, by descent, may be pleaded in bar to a formedon in the descender. So, a collateral warranty, without assets, before the statute 4 & 5 Ann. c. 16. s. 21. might be pleaded in bar to such a formedon.

2 Inst. 291.
Booth, 163.
vide tit. War-
ranty.

So, a common recovery may be pleaded in bar to a formedon in remainder or reverter, either with double or single voucher; with single, if the tenant to the writ were seised of the estate-tail at the time of the recovery; with double voucher, if he were not seised.

Booth, 164.
vide tit. Fines
and Recoveries.

In a formedon the tenant may plead in bar an exchange between the ancestor of the demandant and him under whom the tenant claims, and that the demandant entered into the lands given in exchange, and takes the profits; and an alienee may plead this plea, though he be a stranger, for he is privy in estate.

Booth, 165.

Co. Ent. 32. *Non dedit, i. e.* no such entail, is a good plea in bar of all for-
 b. Booth, 163. medons, and it may be pleaded by the vouchee.

Booth, 164. To a formedon in remainder may be pleaded in bar an estate-
 tail, made by another long before the donor in the count had any
 thing, and that the tenants are heirs to the first entail.

Booth, 164. A remitter may be pleaded in bar, as thus; that the donee
 was seised in fee, and being an infant made a feoffment to the
 donor, who gave the land to the infant in tail, by which he was
 remitted, whose estate the tenant hath.

Amcot v. If in a formedon in remainder the tenant pleads infancy, and
 Amcot, 1 Lev. that the remainder descended to him, and prays his age; and the
 163. Sid. 118. demandant pleads that the remainder did not descend to him,
 252. S. C. and thereupon issue is joined, and found for the demandant; a
 But for this final judgment shall be given notwithstanding the infancy of the
vide tit. In- tenant.
fancy and Age.

Winch. 23. The tenant may plead, that the demandant, at the day of the
 Dyer, 137. b. purchase of the writ, was (a) seised of the lands for which the
 pl. 26. (a) That formedon was brought; but in such plea he must shew of what
 if the demand- estate.
 ant enters into

any part of the land after the writ purchased, this falsifies his writ; and therefore the writ
 shall abate for the whole. — That if the tenant pleads entry into part pending the writ, he
 ought to say that he entered and expelled the other. Winch. 23.

3 Lev. 219. It is holden as a rule, that nothing can be pleaded in abatement
 to this action after a view, but what arises upon the view.

Vide tit. "LIMITATION OF ACTIONS (B)."

FRAUD.

Co. Litt. 3. b. **FRAUD** (a) covin, collusion, and deceit, are often used as
 (a) My Lord synonymous words, and in whatever shape or form they ap-
 Coke defines pear, are always deemed odious in the eye of the law.

covin to be a secret assent, determined in the hearts of two or more, to the defrauding and prejudice of
 another. Co. Litt. 357.

R. v. Atkinson, || In considering fraud criminally, it is often difficult to deter-
 2 Leach's Ca. mine whether the facts in evidence constitute a fraud or amount
 1066. 2 East, to a felony. It seems now to be agreed, that if the property
 P. C. 673. obtained, whether by means of a false token or a false pretence,
 be parted with absolutely by the owner, it is a fraud; but if the
 possession only be parted with, and that possession be obtained
 by fraud, it will be felony. ||

But

But for the better understanding hereof we shall consider,

(A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.

(B) What Acts are deemed fraudulent in the Courts of Equity.

(C) Of fraudulent Conveyances to defeat Creditors and Purchasers within the 13 & 27 Eliz.

(D) In what Court Fraud is cognisable.

(E) Where a Wrong-doer is farther punishable than by making void the fraudulent Act.

(A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.

HERE it may be laid down as a general rule, that without the express provision of any (a) act of parliament, all deceitful practices in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of common honesty, are condemned by the common law, and punishable according to the heinousness of the offence. Co. Litt. 3. b. Dyer, 295. Hawk. P. C. c. 71. (a) As to the most remarkable statutes against fraud and imposition, *vide* the statute of *Merton*, or 20 H. 3. c. 5. against the lord's enfeoffing his son and heir apparent to defeat the king of his wardship; and the statute 4 H. 7. c. 17. to the same purpose; the statute of *Gloucester*, or 6 E. 1. c. 11. for securing the interest of termors against recoveries by fraud; but more particularly the 21 H. 8. c. 15. which enables termors to falsify recoveries against their lessors. Westm. 2. or 13 E. 1. c. 4. for securing the wife's dower against a fraudulent recovery suffered by the husband. 9 R. 2. c. 3. 13 R. 2. c. 12. 32 H. 8. c. 38. for securing the interest of reversioners against recoveries suffered by fraud by particular tenants, such as tenant for life, dower, curtesy, and after possibility of issue extinct. 5 E. 3. c. 6. and 2 R. 2. c. 3. for securing creditors against such as take sanctuary. 1 R. 2. c. 9. against fraudulent feoffments to persons unknown. || The 1 H. 7. c. 1. which gives a formedon in remainder against the pernor of the profits. || 3 H. 7. c. 2. which makes deeds of gift of goods or chattels, in trust for the maker, void. || The 32 H. 8. c. 9. against the buying of pretended titles. || 33 H. 8. c. 1. & 30 Geo. 2. c. 24. against obtaining money or goods by false tokens. || The 5 & 6 Edw. 6. against the sale of offices. || The 13 Eliz. c. 5. 27 Eliz. c. 4. which are inserted under this head. 29 Car. 2. c. 3. emphatically called the "Statute of frauds." 3 & 4 W. 3. c. 14. against fraudulent devises. 4 & 5 W. 3. c. 16. against fraudulent mortgages; and 10 Ann. c. 23. against fraudulent conveyances to multiply votes at elections of knights of the shire; and the statutes against frauds by persons becoming bankrupts, for which *vide* tit. *Bankrupt*.

Such as (b) causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written. Sid. 312. [And this though it be read to him by a stranger to the party to whom the deed is made. 2 Co. 9.] (b) So, if one persuades a woman to execute writings to another as her trustee, upon an intended marriage, which in truth

truth contained no such thing, but only a warrant of attorney to confess a judgment, &c. Sid. 431. — So, if he suppresses a will. Noy, 103. — Or levies a fine in another's name. Noy, 99. Moore, 630. Cro. Eliz. 531. Mod. 46. 2 Jon. 64. — If he sues out execution upon a judgment obtained by another person. Noy, 99. — Or if he acknowledges an action in the name of another, without his privity and against his will. Noy, 99. — In which cases the record may be vacated, and also the wrong-doer punished by information or indictment, and obliged to answer in damages, to the party injured, by an action on the case. Hawk. P. C. 187-8. 6 Mod. 42. 61. 104. 301. 311. 2 Ld. Raym. 1179.

Co. Litt. 35. Also it is a rule, that a wrongful (a) manner of executing a
(a) Where a thing shall avoid a matter that might have been executed law-
person by add- fully.
ing a seal to a
note, which was sufficient without a seal, lost his security. 2 Vern. 162.

41 As. 28. As, if a man that has a right of action to certain lands, by
44 As. 29. covin causes another to oust the tenant of the land to the intent
Ro. Abr. 420. to recover it from him, and he recovers accordingly against him
549. Co. Litt. by action tried; yet he shall not be remitted to his ancient right,
357. Poph. 64. but is in of the estate of him who was the ouster.
100.

44 Ass. 29. So, if one man disseises another of land, to which a woman
Ro. Abr. 549. hath title of dower by covin, and with consent of the woman, to
(b) The same the intent to endow her, and he endows her in the (b) country
law, though accordingly, yet this is of no effect against the disseisee, but he
the endow- may oust him because of the covin.
ment was upon
a recovery
against him in a writ of dower, because of the covin. 44 Ass. 29. Ro. Abr. 549. — And
although the assignment was indifferently made by the sheriff of an equal third part, yet shall
the disseisee avoid it. Co. Litt. 357. b. 3 Co. 78. 5 Co. 31. a. 6 Co. 58. a. 8 Co. 132. b.

2 Inst. 713. If goods are sold in a market-overt, by covin, between two,
Cro. Eliz. 86. on purpose to bar him that has a right, this shall not bar him
thereof.

Ro. Abr. 90. As to frauds in contracts and dealings, the common law sub-
Cro. Ja. 474. jects the wrong-doer, in several instances, to an action on the
But for this case; as, if a person having the possession of goods sells them to
vide tit. Actions another, (c) affirming them to be his own, when in truth they
on the Case, are another's, an action on the case lies.
letter (E).
(c) That the
having the goods in his possession is a warranty in law that they belong to him. Salk. 210.
Ld. Raym. 593.

Ro. Abr. 91. But, if *A.*, possessed of a term for years, offers to sell it to *B.*,
101. Sid. 146. and says that a stranger would have given him twenty pounds for
Yelv. 20. S. P. this term, by which means *B.* buys it, though in truth *A.* was
And that in never offered twenty pounds, no action on the case lies, though
these cases it *B.* is hereby deceived in the value.
was the plain-
tiff's folly to
believe him.

Salk. 211. pl. 3. But, if on a treaty for the purchase of a house, the defendant
Risney and affirms the rent to be thirty pounds *per ann.* whereas in truth it
Selby, Lev. is but twenty pounds, and thereby the plaintiff is induced to
102. Sid. 146. give so much more than the house is worth, an action on the
Keb. 510. 518. case lies; for the value of the rent is matter that lies in the pri-
522. S. P. ad- vate knowledge of the landlord and tenant, and if they affirm the
judged. rent to be more than it is, the purchaser is cheated, and ought
to have a remedy for it.

If a vintner sells (a) wine, which he warrants to be sound and not corrupted; or if a person sells any (b) commodity which he warrants to be good; if it proves otherwise, an action on the case lies against him. 11 H. 6. 18. F. N. B. 96. Dyer, 75. in *margin*.
 (a) If the servant of a taverner sells wine to another which is corrupted, an action upon the case lies against the master though he did not command the servant to sell it to any particular person. 9 H. 6. 53. Ro. Abr. 95. But, if a servant sells an unsound horse, or other merchandize, in a fair, no action lies against the master, unless he commanded him to sell to a particular person. 9 H. 6. 53. Ro. Abr. 95. Poph. 143. Bridgm. 128. — But it seems, that in these cases no action lies against the servant. Ro. Abr. 95. — So, if an attorney, in an action of debt, knows of and was a witness to a release of the debt, made before the action brought for it, yet no action lies against the attorney, for he acted only as a servant, and in the way of his calling. Mod. 209. [See *Barker v. Braham*, 2 Bl. Rep. 869.] (b) So, an action on the case lies against a goldsmith for mingling dross with his plate. Cro. Ja. 471. 2 Ro. Rep. 28. — So against a jeweller for selling counterfeit jewels. 2 Ro. Rep. 5. 26, 27. Poph. 123. Cro. Ja. 469. S. C. — So, for selling silk of such a nature, whereas it was of a different kind, Salk. 289. — So, on a promise to deliver ten pots of good and merchandizable pot-ashes, and delivering pot-ashes mixed with dirt. Vent. 365.

If *A.* is employed by *B.* to sail from *England* to the *Indies*, and *A.* covenants that he or his servants will not thence import any *callicoes*, &c., and *A.* retains *C.* as his servant in this voyage, and acquaints him with the covenants; and notwithstanding *C.* falsely and fraudulently brings thence certain *callicoes*, &c. *A.* shall have an action against *C.*; for though no action lies by a master for a bare breach of his command, yet, if a servant does any thing falsely and fraudulently to the damage of his master, an action will lie. Hussy v. Pacy, Sid. 298. 2 Keb. 88. S. C. Lev. 188. S. C. adjudged, though objected, it was not laid to be done *ad intentione* to damnify the plaintiff; for let *C.* intend *quicquid velit*, *A.* was damnified thereby. Ro. Abr. 105. Like point.

If *A.* is excommunicated, and the letters of excommunication are brought to the parson of the parish to be read and published in the church against *A.*, and the parson, having malice to *B.*, inserts his name instead of the name of *A.* and pronounces him excommunicated, an action on the case lies. Harris's case, Ro. Abr. 100. Cro. Eliz. 838. S. C.

If a man chases the cattle of another into the lands of *J. S.*, whereby he is subject to the action of *J. S.*, an (c) action on the case lies against him. Ro. Abr. 100, 101. Cro. Car. 325. S. C.
 (c) So, if one person affirms that another's sheep are strays, by which they are seised upon by the bailiff of the manor, an action on the case lies. Allen, 3. Ro. Abr. 101.

If *A.* hath judgment against *B.*, and *J. S.*, with an intent to defeat him of the benefit of it, persuades *B.* to acknowledge a judgment to a stranger, to whom in truth he owed nothing, and thereupon his goods are taken in execution, &c., *A.* may bring an action on the case against *J. S.* on this fraud and combination. Carth. 3. Smith v. Tonstall, adjudged in B. R. and affirmed in the House of Lords.

If land be aliened pending a writ of debt, by covin, to avoid the extent thereof for the debt; yet, when the covin appears upon the return of the *elegit* by the sheriff, the land so aliened shall be extended. Ro. Abr. 549.

If a man makes a feoffment to the use of his son, an infant, and not in consideration of marriage, &c. and ten days after- 2 Ro. Abr. 34.

wards commits treason, of which he is attainted, this land shall be forfeited; for the feoffment was fraudulent against the king.

2 Ro. Abr. 34.

But, if the feoffment had been made in pursuance of an agreement entered into before, by which it was agreed, in consideration of his wife's settling her lands in such manner, that he would also settle his lands on his son; this, it seems, is not fraudulent, but good against the king.

Skin. 357.

Jones v.

Ashart.

(a) That if a man aliens his lands fraudulently, with an intent to prevent a forfeiture, and afterwards commits felony, the land shall be forfeited. Ro. Abr. 34.

A. being in *Newgate* for a robbery makes a bill of sale of all his goods, to the intent to make a provision for his son, and is afterwards convicted and executed; and in an action of trover brought by the son against the sheriff of *London*, it was holden by *Holt*, Ch. Just. that the bill of sale was fraudulent; for though a sale *bonâ fide*, and for valuable consideration, had been good, because the party had a property in the goods till conviction, and ought to be reasonably sustained out of them, yet this (a) conveyance is fraudulent at common law, for it cannot be intended to any other purpose than to prevent a forfeiture, and defraud the king.

2 Leon. 223.

A man takes a wife, and afterwards marries another, his first wife living, and by deed gives part of his goods to his pretended second wife; it seems this is a fraudulent gift within 13 Eliz. c. 5., and by the common law too, in respect of creditors, because made without any valuable consideration; for the second pretended marriage is so far from coming under the notion of a consideration, that it is a crime punishable by law.

7 Mod. 37.

Rice v. Ser-

jeant. See

also i Wils.

44. Ld.

Raym. 252.

5 Mod. 375.

A man has a judgment for a just debt against *A.* and takes out a *fieri facias*, and gets the sheriff to seize the goods, but would not let him proceed further, but suffered the goods to remain in the custody of *A.* the debtor: *B.* who has also a judgment against *A.* for a just debt, takes out a *fieri facias*; and the question was, whether he could seize upon the same goods. And it was holden *per Cur.* that he might, for the former was a fraudulent execution, and the sheriff might very well return *nulla bona* upon it.

Dyer. 243. b.
in margine.

(b) Where a prisoner in the *Fleet*, at the suit of divers creditors,

procured himself to be accused of felony, and to be removed to the *King's Bench*, with an intent to plead guilty, and after the allowance of clergy, to get quit; the king being informed of this practice, by his privy seal directed the justices not to proceed on his arraignment, without farther directions from him. Dyer, 247.

39 H. 6. 50. b.

Ro. Abr. 549.

Cro. Car. 128.

A man came by *habeas corpus* out of *London*, and had no cause to have the privilege of the Common Pleas, but by his covin: it was ordered, that he should be in execution till he had paid the debt recovered against him after the writ brought, and

and that after he should be remanded to answer the plaintiffs there.

Hence it appears, that the making use of the process of the law is not only a fraud, but an aggravation of the offence; as, if a person intending to steal a horse takes out a replevin, and thereby has the horse delivered to him by the sheriff; or if one intending to rifle goods, gets possession from the sheriff, by virtue of a judgment obtained, without any the least colour of title, upon false affidavits, &c.

2 Inst. 108.
H. P. C. 63.
Kelynge, 43.
Sid. 254.
Raym. 267.

If *A.* on a quarrel with *B.* tells him that he will not strike him, but that he will give *B.* a pot of ale to strike him, and thereupon *B.* strikes, and *A.* kills him, he is guilty of murder, for he shall not elude the justice of the law by such a pretence to cover his malice.

H. P. C. 48.
Hawk. P. C.
c. 31. § 24.

So, if *B.* challenge *A.*, and *A.* refuse to meet him; but, in order to evade the law, tell *B.* that he shall go the next day to such a town about his business, and accordingly *B.* meet him the next day on the road to the same town, and assault him, whereupon they fight, and *A.* kills *B.*, he seems guilty of murder, unless it appear by the whole circumstances, that he gave *B.* such information accidentally, and not with a design to give him an opportunity of fighting.

Hawk. P. C.
c. 31. § 25.

If a person takes a lodging in a house, under the colour thereof to have the opportunity of rifling it, and to elude the justice of the law, by endeavouring to keep out of the letter of it, by gaining a possession of the goods with the consent of the owner, he seems to be as guilty of felony as any other felon, in as much as his whole intention was to defraud the law.

Kelynge, 24.
81. Show. 50.
51. This at
common law
was not
clearly felony,
for 3 & 4 W.
& M. c. 9.

was passed to make it so.

(B) What Acts are deemed fraudulent in the Courts of Equity.

IT is clearly agreed, that all covins, frauds, and deceits, for which there is no remedy by the ordinary course of law, are properly cognizable in equity; and it is admitted, that matters of fraud were one of the chief branches to which the jurisdiction of Chancery was originally confined.

4 Inst. 84.
See of the
jurisdiction of
the court of
Chancery,
tit. Courts.
[Where a

court of equity absolutely sets aside a deed for fraud, and the estate in question passed by that deed only, it will not direct a reconveyance. *Secus*, where the estate has been conveyed to a third person as an instrument not privy to the fraud; or if the deed is set aside upon paying so much money; for there, till payment, the estate remains. *Bates v. Graves*, 2 Ves. jun. 294. In *Chesterfield v. Janssen*, 2 Ves. 155., Lord *Hardwicke* enumerates four species of fraud: 1st, Fraud arising from facts and circumstances of imposition, which is the plainest case: 2dly, Fraud may be apparent from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest or fair man would accept on the other; which are inequitable and unconscionable bargains, and of such even the common law has taken notice. A third is that which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that fraud must be proved, not presumed: but it is wisely established in a court of equity, to prevent taking any surreptitious advantage of the weakness or necessity of another, which knowingly to do, is equally against conscience.

as to take advantage of his ignorance. A fourth kind of fraud may be collected or enforced, in the consideration of a court of equity, from the nature and circumstances of the transaction, as being an imposition and deceit on other persons not parties to the fraudulent agreement.]

But, as every case on this head depends so much upon its own circumstances, it will be difficult to range them in any other order than by inserting the most remarkable cases where the parties have been relieved against fraud and imposition.

Raw v. Potts,
Pr. Ch. 35.
2 Vern. 239.
S. C., and
affirmed in
the House of
Lords.

As, where *A.* being tenant in tail, remainder to his brother *B.* in tail, *A.* not knowing of the entail, made a settlement on his wife for life for her jointure, without levying a fine, or suffering a recovery, which *B.* who knew of the entail engrossed, but did not mention any thing of the entail, because, as he confessed in his answer, if he had spoken any thing of it, his brother, by a recovery, might have cut off the remainder, and barred him; although after the death of *A.*, *B.* recovered an ejectment against the widow by force of the entail; yet she was relieved in Chancery, and a perpetual injunction granted for this fraud in *B.* in concealing the entail; for if it had been disclosed, the settlement might have been made good by a recovery.

2 Vern. 150.
Hundsden v.
Cheney.

So, where a mother being absolute owner of a term, the same being limited to her in tail, is present at a treaty for her son's marriage, and hears her son declare, that the term was to come to him at his mother's death, and is a witness to the deed, whereby the reversion of the term is settled on the issue of this marriage after the mother's death, she was compelled in equity to make good the settlement.

Abr. Eq. 357.
Hanning v.
Ferrers.

If *A.* by a marriage-settlement be tenant for life of certain mills, remainder to his first son in tail, and the son, who knows of the settlement, encourages a person to take a lease for thirty years of those mills, and to lay out considerable sums of money in new building and improving them, in order to reap the advantage thereof after his father's death; this is such a fraud and practice as ought to be discountenanced in equity, and therefore it was decreed in this case, that the lessee should enjoy for the residue of the term that remained unexpired after the father's death.

Vern. 136.
Hobbs v.
Norton.

So, where a younger brother, having an annuity of 100*l.* per annum charged on lands by his father's will, agrees with *J. S.* to sell it to him, which *J. S.* is encouraged to purchase by the elder brother, who told him, that though he had heard that there was a settlement which had entailed those lands out of which it issued, that yet he had constantly paid this annuity, as also 300*l.* charged by the same will to his sisters; and the elder brother afterwards got the settlement into his hands, and endeavoured thereby to avoid payment of this annuity; it was decreed in favour of the purchaser, that the annuity should still be paid purely on the encouragement given by the elder brother.

Pr. Ch. 131.
Barret v.
Wells.

So, where lands were in mortgage running through three descents, and the person entitled to redeem, not knowing how much was due for the interest, is informed by the heir of the mortgagee, that

that it was considerably less than really it was; whereupon he settles it upon his marriage, as subject only to so much; it was decreed, that those who derive under this settlement should redeem accordingly, without being obliged to pay the sum concealed, for the fraud.

[*Francis Broderick*, being seised of a considerable estate in fee, made his will, and devised it to *Thomas Broderick*, the defendant; *Francis* himself executed the will, but it was not attested in his presence by three witnesses. *Francis* died, and the defendant *Thomas*, finding that the will was void, for 100 guineas paid by him to the plaintiff *George Broderick*, who was *Francis's* heir at law, procured from the plaintiff a release, which recited that *Francis*, by his last will duly executed, had devised his estate to the defendant *Thomas*; and the defendant *Thomas* thinking himself not safe with the release only, for 50 guineas more prevailed with the plaintiff to convey the lands by lease and release to one *Day*, who was trustee to the defendant *Thomas*, to whom *Day* afterwards conveyed. Afterwards, the defendant *Thomas*, upon a valuable consideration, conveyed part to one *Parker*, who had not any other notice of the invalidity of the will, save that he heard it mentioned in common discourse. The plaintiff brought his bill against *Thomas Broderick*, *Day*, and *Parker*, to have the release, lease and release, delivered up as fraudulently obtained; and it not appearing that he knew at the time of his making the release, &c. that the will was bad, Lord *Harcourt* decreed that they should be delivered up; and it not appearing that *Parker* was privy to the fraud, though he had heard of the invalidity of the will as above, it was decreed that he, upon receiving his purchase-money with interest, should convey to the plaintiff, and should account for the rents and profits which he had received, and be allowed what he had laid out in repairs or otherwise.

payment of the purchase money with interest at 5*l.* per cent., because he had notice of the invalidity of the devise by common report, though not actual notice from the plaintiff or defendant; and though he was not a fraudulent purchaser, yet he was a rash one, and ought to have inquired into the validity of the will, or gotten the heir at law to join in the conveyance to him. *Ex relatione alterius*. Vin. Abr. ubi *supr.*

The father had, on his marriage, articulated to settle his whole estate upon that marriage; but neglecting so to do, when the eldest son attained his full age, he, without giving the son notice of the articles, and by threats and promises, prevailed with him to join in making a settlement on the younger children, and thereby to give the father a power of making a jointure upon another wife: the father afterwards gave a bond to make such jointure, and married. This bond was set aside as against the heirs, and the first articles were established, and the wife was put to seek satisfaction of her bond out of the personal estate.

Where on a treaty for a lease, it appeared that the agents of the lessor had in his presence represented the quantity of land proposed to be demised to be much more than it actually was; and that the lessor, knowing that this was a misrepresentation,

Broderick v. Broderick, Vin. Abr. tit. Circumvention, p. 3. 1 P. Wms.

239. In this case it was decreed, that the defendant do account for the rents and profits of the freehold leases to the plaintiff, the plaintiff to have all just allowances for debts and legacies paid by him, and to account for 150 guineas to the defendant, with interest, &c. As to the purchaser *bonâ fide* of part of the freehold lands, he shall reconvey to the plaintiff, upon

Jevers v. Jevers, 4 Br. P. C. 199. 2 Eq. Cas. Abr. 54. pl. 13. See too *Scrope v. Offley*, 4 Br. P. C. 237. S. P.

Mead v. Webb, 4 Br. P. C. 497.

had assented to it, because he did not think it prudent to disclose the truth; the contract was set aside as fraudulent.

Ramsden v. Hylton, 2 Ves. 304. An estate was settled after marriage upon trust, *inter al.* to raise portions for the daughters of the marriage upon failure of issue male, to whom the estate was limited in tail: one of the daughters gives a general release to her brother, but neither party at the time of such release being given had any knowledge of the settlement. The release, therefore, though general, was holden not to extend to the settlement, and the trusts of it were decreed to be performed.]

2 Vern. 151. If *A.* has a prior incumbrance on an estate, and is a witness to a subsequent mortgage, but does not disclose his own incumbrance; this is such a fraud in him, for which his incumbrance shall be postponed. (*a*)
 Clare and the Earl of Bedford, cited to have been decreed. (*a*) [In the case of *Mocatta v. Murgatroyd*, 1 P. Wms. 394., Lord *Couper* is reported to have decreed that the first mortgagee shall in such case be postponed, though there be no actual proof of his knowing the contents of the deed he attested. But Mr. *Cox*, the editor of that book, has not been able to find this decree in the registrar's book. And Lord *Thurlow* said, in the case of *Becket v. Cordley*, that he thought this case of *Mocatta v. Murgatroyd* went too far in imputing notice to the first mortgagee from the mere circumstance of his being a witness to the second mortgage, since it is in common practice for persons to attest the execution of deeds without being made acquainted with their contents.]

2 Vern. 370. So, where a counsel having a statute from *A.* advises *B.* to lend *A.* 1000*l.* on a mortgage, and draws the mortgage, with a covenant against all incumbrances, and conceals his own statute; it was holden, that the statute should be postponed to the mortgage.
 Draper v. Borlace.

2 Vern. 554. So, if *A.* being about to lend money to *B.* on a mortgage, sends *C.* to inquire of *D.* who had a prior mortgage, whether he had any incumbrance on *B.*'s estate, if it be proved that *C.* went to him accordingly, and that *D.* denied that he had any, *D.*'s mortgage shall be postponed.
 Ibbotson v. Rhodes.

Peterv. Russel, 2 Vern. 726. So, if *A.* having a mortgage on a leasehold estate, lends the mortgage-deed to the mortgagor, for the purpose of borrowing more money; this is such a fraud in the mortgagee, for which his mortgage shall be postponed to the subsequent incumbrance.
 Abr. Eq. 321. S. C.

Abr. Eq. 357. The plaintiff's wife, before her intermarriage with the plaintiff, being possessed of a house for a term of years, as executrix to her first husband, which was liable, as assets, to the payment of his debts, in order thereto, and to raise money for that purpose, the plaintiffs after their marriage entered into an agreement with the defendant for sale of the house for the residue of the term for 450*l.*, whereof 210*l.* was to be applied in discharge of a mortgage thereon to one *J. S.*, and the remaining 240*l.* was to be paid to the plaintiffs. Accordingly the plaintiffs executed an assignment of the house to the defendant, with a receipt indorsed thereon for the whole purchase-money, but the defendant did not then pay the purchase-money, but gave a note for the payment of 210*l.*, part thereof, to *J. S.* the mortgagee, and of the remaining 240*l.* to the plaintiffs; and for the non-payment thereof the plaintiffs brought their bill to have a specific performance and pay-
 ment

ment of the money accordingly. The defendant, by his answer, admitted the whole case to be as above set forth; but insisted, that he ought not to be bound thereby, for that the plaintiffs could not make him a good title, they having by articles before marriage agreed to settle this house for the benefit of themselves and their issue, of which he had no notice at the time of his purchase; and for a discovery of these articles, and to have up his note on a reassignment of the house, the defendant brought his cross-bill. The plaintiffs by their answer admitted there were such articles, but insisted, that the house lying in *Middlesex*, those articles were never registered in the *Middlesex* office, and therefore void as against the plaintiff. But on a hearing at the Rolls, the Master of the Rolls decreed the original bill to stand dismissed with costs; and on the cross-bill decreed the note given for the purchase-money to be delivered up on a re-assignment of the house, and the plaintiff in that cause likewise to have his costs, by reason of the plaintiff's fraud in concealing the articles; which decree was affirmed by my Lord Chancellor.

So, in a case between two purchasers of lands in *Yorkshire*, where the second purchaser having notice of the first purchase but that it was not registered, went on and purchased the same estate, and got his purchase registered; it was decreed, that having notice of the first purchase, though it was not registered, bound him, and that his getting his own purchase first registered was a fraud, the design of those acts being only to give the parties notice, who might otherwise without such registry be in danger of being imposed upon by a prior purchase or mortgage, which they are in no danger of when they have notice thereof in any manner, though not by the registry.

Abr. Eq. 358.
Blades v.
Blades.

If a copyholder, by his will, intending to give the greatest part of his estate to his godson, and the other part to his wife, is persuaded by the wife to nominate her to the whole, on a promise that she would give the godson the part designed for him; it will be decreed against the wife on the point of fraud, though there was no *memorandum* thereof in writing pursuant to the statute of frauds and perjuries.

Pr. Ch. 3.
Devenish v.
Baines.

So, where the defendant, on a treaty of marriage for his daughter with the plaintiff, signed a writing comprising the terms of the agreement, and afterwards designing to elude the force thereof, and get loose from his agreement, ordered his daughter to put on a good humour, and get the plaintiff to deliver up that writing, and then marry him, which she accordingly did, and the defendant stood by, at a corner of a street, to see them go by to be married; the plaintiff was relieved on the point of fraud.

Halfpenny v.
Mallet, Eq.
Ca. Abr. 28.
2 Vern. 373.
S. C.

[A father purchased lands to him and his heirs, and when he was on his death-bed sent for his eldest son, and told him that these lands were bought with his second son's money, whereupon the eldest son promised that his brother should enjoy them accordingly. The father dies. The Lord Keeper *Wright* and the

Sellack v.
Harris, 5 Vin.
Abr. tit. Con-
tract, &c. (H),
p. 31.

Master of the Rolls held, that the eldest son was entitled to these lands, because, by the statute of frauds, there ought to have been a declaration of the use or trust in writing. But Lord *Cowper* was of another opinion, because of the fraud here manifest, in that the eldest son promised the father on his death-bed, that the other should enjoy the lands, so that he took this to be a case out of the statute.

Leister v.
Foxcroft,
cited in Gillb.
Eq. Rep. 11.

So, where a parol building-lease was made of ground, and when the lessor was dying, he declared, he thought he ought to make a lease in writing; but the heir told him, he should not discompose himself, for that he would supply it; whereby, and by other fraudulent means, the lessee was hindered from seeing the lessor, and having the lease executed accordingly; the Lords held this to be out of the statute, and made it good to the lessee.

Gillb. Eq.
Rep. *ibid*.

So, if a man has made his will, and his son executor, and when he is dying, says, that he has a mind to have his wife executrix, and the son says, "Don't trouble yourself to alter it, for I will let her have the surplus, and act as executor;" a court of equity will decree accordingly.]

Barrow v.
Greenough,
3 Ves. 152.

|| So, a provision in a will was increased by the court upon evidence of the testator's having declined making a new will for adding to the provision, as it was his intention to have done, upon being promised by his executor and residuary legatee, that his intention should be carried into effect without it.

Small v.
Allen, 8 T. R.
147.

Where a testator having already made a will, nevertheless, at the request of some interested persons, consented to make a fresh will, and one being prepared and presented to him for execution, he desired to be informed, whether it was the same with the former, and being told it was, he subscribed it; but it being materially different from the first, it was set aside upon evidence of these circumstances of imposition upon the testator. ||

Abr. Eq. 19.
& vide tit.
Agreements,
letter (C).

There are likewise several other instances, where a parol agreement intended to be reduced into writing, but prevented by fraud, has been decreed in equity, notwithstanding the statute of frauds and perjuries; as, where upon a marriage-treaty instructions were given by the husband to draw a settlement, which he privately countermanded, and afterwards drew in the woman by persuasions and assurances of such settlement to marry him; it was decreed that he should make good the settlement.

Abr. Eq. 20.

So, where a parol agreement was concerning the lending of money on a mortgage, and the conveyance proposed was an absolute deed from the mortgagor, and a deed of defeasance from the mortgagee, and after the mortgagee had gotten the deed of conveyance, he refused to execute the defeasance; it was decreed against him on the point of fraud.

Young v.
Peachy,
2 Atk. 254.
See further as
to parental in-
fluence, Cory

[So, where a father prevailed with his daughter and her husband to join with him in suffering a recovery for a particular purpose, and afterwards made use of it for another purpose, Lord *Hardwicke* relieved against it upon the ground of fraud.

In

In this case the deed to lead the uses was general to the father and his heirs.]

v. Cory, 1 Ves.
19. Kinchant
v. Kinchant,

1 Br. Ch. Rep. 369. 374. Heron v. Heron, 2 Atk. 160.

If a son and heir apparent persuades his father not to make a will which he intended to make, and which was to contain provisions for his younger children, promising to do for them himself; this is such a fraud, for which equity will decree the heir to give them such provisions himself.

Pr. Ch. 4.
Chamberlain's
case, cited
to have been
decreed.

So, where tenant in tail is prevented by the issue in tail from suffering a recovery in order to provide for younger children, by his promising to do for them himself, equity will compel him to do it after his father's death.

Pr. Ch. 5.
Luttrell v.
Olmus,
11 Ves. 638.
supra.

2 Vern. 133.

If a mother having a right to dower, to encourage a marriage of her son to *A. B.* releases her dower, and the release is shewn to the wife and her relations, it shall bind the mother, though the release was obtained by (a) a fraudulent suggestion.

(a) That a
release shall

be avoided in equity whenever there is *suppressio veri* or *suggestio falsi*. Vern. 19, 20. 31, 32.

¶ Where in order to induce the father of a young lady to consent to her marriage, a creditor suppressed the fact of his debt and the marriage was had, he was not permitted to set up the debt even against the husband, in whose favour, and at whose instance, he had made the suppression.¶

Neville v. Wil-
kinson, 1 Br.
Ch. Rep. 543.
See also Dal-
biac v. Dalbiac,
16 Ves. 116.

If a man charges lands in *D.* with a portion for a daughter by a first venter, and then marries, and settles part of those lands for the jointure of a second wife, who has no notice of the charge, and *A.* believing that the portion would take place of the jointure, by will gives other lands in lieu thereof, and the wife combines with her son, who is heir to *A.*, to defeat his settlement and provision on the daughter, by adhering to her jointure, and insisting that the provision on the daughter was voluntary and fraudulent as to her; and that therefore she was not bound to accept of the devise; the daughter will be relieved in equity.

Vern. 219.
Reeve v.
Reeve.

A widow makes a (b) deed of settlement of her estate, and marries a second husband, who was not privy to such settlement; and it appearing to the court, that it was in confidence of her having such estate, that the husband married her, the court set aside the deed as fraudulent.

2 Ch. Rep. 81.
Howard v.
Hooker.

(b) So, where
the intended
wife, the

marriage, entered privately into a recognizance to her brother; it was decreed to be delivered up. 2 Ch. Rep. 79. — But, where a conveyance or settlement shall be said to be fraudulent, and in derogation of the rights of marriage, *vide* 2 Vern. 17. and tit. *Marriage and Divorce*, D. 3. and Gale v. Lindo, 1 Vern. 475.

day before her

to be delivered

be fraudulent,

Marriage and Divorce,

1 Vern. 475.

But, where a widow, before her marriage with a second husband, assigned over the greatest part of her estate to trustees, in trust for children by her former husband; though it was insisted, that this was without the privity of the husband, and done with a design to cheat him, yet the court thought that a widow may thus provide for her children before she puts herself under the power of a husband; and it being proved that 8000*l.* was thus settled,

Vern. 408.
Hunt v.
Mathews.

2 Vern. 71.
Child v. Dan-
bridge.

settled, and that the husband had suppressed the deed, he was decreed to pay the whole money, without directing any account.

A. failing in his trade compounded with his creditors at so much in the pound, to be paid at the time therein mentioned; and he having failed in payment at the precise time, some of the creditors refused to stand to the agreement, of which, being under hand and seal, he brought his bill to compel a performance. But it appearing in the cause that *A.*, to draw in the rest of the creditors, had made an under-hand agreement with some of them, who were seemingly to accept of the composition, to pay them their whole debts, which was a fraud and deceit upon the rest of the creditors, the court would not decree the agreement, nor relieve the plaintiff, but dismissed the bill.

2 Vern. 602.
Small v.
Brackley.

So, where *A.* being entrusted by *B.* to receive interest on tallies, receives the principal and fails, and afterwards compounds with his creditors, but *B.* would not come in, without having a greater composition, which *A.* agrees to give, and *A.* brought his bill to be relieved against this under-hand agreement; the court refused to give him any relief, he having been guilty of a breach of trust, and also a party to the fraud.

Middleton v.
Lord Onslow,
1 P. Wms.
768. See too
Spurrett v.
Spiller,
1 Atk. 105.
S. P.

[Where, with the consent of the wife and her trustees, and in order to a composition with the husband's creditors, the court of Chancery ordered part of the wife's fortune to be paid to the creditors consenting to accept such composition, and to discharge the husband of the debts; and some of the creditors, upon executing the deed of composition, took private securities, post-dated, for part of their debts, besides their share with the other creditors; such securities were set aside, as a fraud on the wife, the trustees, and the court.

Cockshott v.
Bennett,
2 T. R. 763.

So, too, at law; where all the creditors of an insolvent consented to accept a composition upon an assignment of his effects by a deed of trust to which they were all parties, and one of them, before he executed, obtained from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note was made; the note was adjudged void, as a fraud on the rest of the creditors, and therefore incapable of being ratified or revived by a subsequent promise.

Jackson v.
Duchaire,
3 T. R. 551.

Upon the same principle where *A.* agreed to give *B.* a certain sum for goods in advancement of *C.*, it was holden that a secret agreement between *B.* and *C.* that the latter should pay a further sum, was void as a fraud upon *A.*, and that *B.* could not recover such further sum against *A.*]

2 Vern. 123.
where a bill
of exchange
was obtained

If a security be obtained from a person by fraud and practice, upon a pretence of a demand that is fictitious, it will be relieved against in equity.

by a gross fraud, and it was relieved against with costs to be ascertained by the party's own oath. — Where a policy of insurance for insuring a life was gained by fraud, and set aside with costs both at law and in equity. 2 Vern. 206. — Where a weak man was prevailed upon by two of his relations to give a bond to one of them, to settle his estate to the use of himself in tail male, remainder to his two brothers successively in tail male, and he afterwards marrying, was relieved against the bond. 2 Vern. 189. [Where advantage has been taken of the weakness of parties, and conveyances therefore set aside, see *White v. Small*, 2 Ch. Ca. 103. *Clarkson v. Hanway*, 2 P. Wms. 203. *Bennet v. Wade*, 2 Atk. 324. *Evans v. Blood*, 4 Br. P. C. 557. *Bridgeman v. Green*, 2 Ves. 627. *Filmer v. Gott*, 7 Br. P. C. 70.]

As,

As, where *A.* having, by the means of an attorney, prevailed on *E.*, a woman, to levy a fine of some houses, and to execute a deed leading the uses thereof to *A.* and his heirs; it was proved that she, at the time of levying the fine, declared she must make use of some friend's name in trust; and afterwards by will declared she had levied such fine only in trust, and the better to enable her to dispose of the estate, and thereby devised it to *J. S.* and his heirs, subject to the payment of her debts; although *A.* proved a great familiarity and friendship between them, and that she had declared he should have her estate; yet it was decreed, not only that the estate should be liable to the creditor's debts, but that *A.* should convey the estate to the devisee and his heirs. 2 Vern. 307.

So, where *A.* being to procure 100*l.* for *B.*, borrows it, and pays *B.* only 300*l.* and takes other 300*l.* himself, and the remaining 400*l.* in goods, which prove worth little or nothing; and for securing the whole, both gave a recognizance; yet that being sued against *B.* he brought his bill, and had a perpetual injunction against the recognizance on payment of 300*l.* only and interest, by reason of some circumstances of fraud; it appearing to be a contrivance between *A.* and the lender to charge *B.* with the whole.

Where a purchase was obtained from a man almost in his dotage, at a great under-value, who was persuaded by the persons that treated with him that they could help him to a great match, and told him, that to qualify himself for the lady, it was necessary he should convert all his lands into money, and they treated for the purchase in a person's name who knew nothing of the matter; for these circumstances of fraud the purchase was set aside.

vert into execution. — Where a purchase at a great under-value, obtained who some time after became a lunatick, was set aside for a fraud. 2 Vern. 678.

Where an agreement for a purchase was obtained from a woman of ninety years of age, and several suspicious circumstances appeared, the court would neither decree it to be carried into execution against the heir at law, nor to be delivered up on a cross-bill for that purpose, but left the parties to their remedy at law.

court followed the same middle line of conduct.]

[The Duke and Duchess of *Cleveland*, being about to send Lord *Southampton*, their eldest son, to travel, employed one *Osmond* as a servant to attend upon the young lord, then an infant of about seventeen, and (as by the answer of *Osmond* it was admitted) to prevent his being imposed upon. Afterwards on the Lord *Southampton*'s returning from abroad, *Osmond* was continued in his service, and, when his lordship was about twenty-seven years of age, prevailed on him to enter into a bond for the payment of 1000*l.* to him the said *Osmond*. The bond was prepared by *Osmond*, and kept secret from the duke and duchess. There were also some proofs of the weak capacity of the young lord, and that at that time he was unable to raise money to pay off

Smith v.
Loder, Pr. Ch.
80. 2 Vern. 346.
S. C.

Vern. 206. vide
Pr. Ch. 76.,
where, on the
circumstances
of a fraud, the
Court of
Chancery re-
fused to carry
the agreement
of a feme co-
from a person

2 Vern. 632.
Green v.
Wood. [See
the case of
Savage v.
Taylor, Cas.
temp. Talb.
234. where the

Osmond v.
Fitzroy, and
e contra.
3 P. Wms.
129. In giving
judgment in
this case, Sir
J. Jekyll said,
"Where a
man gives a
bond, if there
be no fraud or
breach of trust
in the obtain-
ing of it, equity

will not set off the bond. Under all these circumstances the court thought aside the bond the bond fraudulently obtained, and relieved against it. only for the weakness of the obligor, if he be *compos mentis*; neither will this court measure the size of people's understandings or incapacities, there being no such thing as an equitable incapacity, where there is a legal capacity." But in *Griffin v. Devenille*, Lord *Thurlow* observed, that in almost every case upon this subject, a principal ingredient was a degree of weakness short of *legal incapacity*; and that in this very case of *Osmond v. Fitzroy*, no relief probably would have been given, if the court had not considered Lord Southampton as more liable to imposition than the generality of mankind. Cox's note, 3 P. Wms. 130.

Bosanquet v. Dashwood, Ca. temp. Talb. 38. Proof v. Hines, *id.* 111. A court of equity will relieve against an unequal contract entered into by a person in embarrassed circumstances; for to avail oneself of the distresses of another carries somewhat of fraud in it.

Heathcote v. Paignon, 2 Br. Ch. Rep. 167. See 3 Wooddes. 457.

Duke Hamilton v. Mohun, 1 P. Wms. 118. *Hylton v. Hylton*, 2 Ves. 547. *Griffin v. De Veuille*, 3 Wooddes. App. 16. (a) *Glissen v. Okeden*, 2 Atk. 258. and 3 Br. P. C. 560. *Cocking v. Pratt*, 1 Ves. 400. *Hawes v. Wyatt*, 3 Br. Ch. Rep. 156. (b) Proof v. Hines, Ca. temp. Talb. 111. *Walmsley v. Booth*, 2 Atk. 25. *Oldham v. Hand*, 2 Ves. 259. *Welles v. Middleton*, printed cases in the House of Lords, 1785. *Newman v. Payne*, 2 Ves. jun. 199. and 4 Br. Ch. Rep. 350. (c) *Cray v. Mansfield*, 1 Ves. 381. *Gurt-side v. Isherwood*, 1 Br. Ch. Rep. 558. *Fox v. Mackreth*, 2 Br. Ch. Rep. 400. *Crow v. Ballard*, 4 Br. Ch. Rep. 117. *Lord Hardwicke v. Vernon*, 4 Ves. 411. 14 Ves. 504.

Berney v. Pitt, 2 Vern. 14. *Knott v. Hill*, *id.* 27. *Wiseman v. Beake*, *id.* 121. *Cole v. Gibbons*, 3 P. Wms. 290. *Earl of Chesterfield v. Jansen*, 1 Atk. 342. 351. and 2 Ves. 144. 155. *Barnardiston v. Lingood*, 2 Atk. 133. *Gwynne v. Heaton*, 1 Br. Ch. Rep. 1. (d) *Baldwin v. Rochford*, 1 Wils. 229. *Taylor v. Rochford*, 2 Ves. 281. *Howe v. Weldon*, *id.* 516.

Law v. Law, Ca. temp. Talb. 140. and 3 P. Wms. 391. *Hannington v. Du Chastel*, 1 Br. Ch. Rep. 124. *Morris v. McCulloch*, Ambl. 432. *Garforth v. Fearon*, 1 H. Bl. 327. *Parsons v. Freeman*, *Id.* 322.

Upon principles of public policy, a court of equity treats as fraudulent all agreements for the purchase of public offices, even though such offices should not be within the statute of 5 & 6 Edw. 6. Agreements of this kind are indeed considered in the same light in a court of law.]

(C) Of fraudulent Conveyances to defeat Creditors and Purchasers within the 13 Eliz. c. 5. & 27 Eliz. c. 4.

IT seems by the common law, if a man had right and title to a thing, or a just debt owing to him, he might avoid any fraudulent conveyance made to deceive him of that right or debt; as, if a man had a right to goods, and he that had them, sold them by covin in a market-overt, to alter the property of them; or if one passed away goods to deceive a creditor; these acts might have been set aside. But, if the gift were precedent to the right or debt, there was no way in such case to set aside the conveyance.

3 Co. 83.
Moore, 638.
Dyer, 295.
Co. Litt. 76. a.
290. a. b.
Lane, 105.
Cr. El. 444.
[The principles and rules of the common law, as now universally

known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13 El. c. 5. and 27 El. c. 4. *Per Lord Mansfield*, Cowp. 434.] || And it has been said, that a deed cannot be fraudulent, unless it is fraudulent both at law and in equity, that the question of fraud is the same in the one court and in the other. But to this doctrine Lord *Eldon* does not agree; for the clear doctrine of Lord *Hardwicke* and all his predecessors was, that there are many instances of fraud, that will affect instruments in equity, of which the law cannot take notice. 1 V. & B. 98. ||

But now by the 13 Eliz. c. 5. “for the avoiding and abolishing of feigned, covenous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore; which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, and executions, have been and are devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

|| Made perpetual by 29 El. c. 5. ||

“It is therefore declared, ordained, and enacted, that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels, or of any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, and chattels, or any of them, by writing or otherwise, and all and every bond, suit, judgment, and execution at any time had or made sithence the beginning of the queen’s majesty’s reign that now is, or at any time hereafter to be had or made to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, by such guile-

“ful,

ful, covinous, or fraudulent devices and practices, as is aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded,) to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, fained consideration, expressing of use, or any other matter or thing to the contrary notwithstanding."

§ 5. "Provided that this act, or any thing therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, had, made, conveyed, or assured, or hereafter to be had, made, conveyed, or assured, which estate or interest is or shall be upon good consideration and *bonâ fide* lawfully conveyed or assured to any person or persons, or bodies po^rick or corporate, not having at the time of such conveyance, or assurance to them made, any manner of notice or knowledge of such covin, fraud, or collusion, as is aforesaid."

Made perpetual by
39 El. c. 18.

And by the 27 Eliz. c. 4. "Forasmuch as not only the queen's most excellent majesty, but also divers of her highness' good and loving subjects, and bodies politick and corporate, after conveyances obtained or to be obtained, and purchases made or to be made of lands, tenements, leases, estates, and hereditaments for money or other good considerations, may have, incur, and receive great loss and prejudice by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses heretofore made, or hereafter to be made, of, in, or out of lands, tenements, or hereditaments so purchased or to be purchased, which said gifts, grants, charges, estates, uses, and conveyances were or hereafter shall be meant or intended by the parties that so make the same to be fraudulent and covinous, of purpose and intent to deceive such as have purchased or shall purchase the same; or else by the secret intent of the parties the same be to their own proper use, and at their free disposition, coloured nevertheless by a fained countenance and shew of words and sentences, as though the same were made *bonâ fide*, for good causes, and upon just and lawful considerations:

§ 2. "For remedy of which inconveniencies and for the avoiding of such fraudulent, fained, and covinous conveyances, gifts, grants, charges, uses, and estates, and for the maintenance of upright and just dealing in the purchasing of lands, tenements, and hereditaments, it is ordained and enacted, That all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, of, in, or out of any lands, tenements, or other hereditaments whatsoever, had or made any time heretofore sithence the beginning of the queen's majesty's reign that now is, or at any time hereafter to be had or made, for the intent and of purpose to defraud and deceive such person or persons, bodies politick or corporate, as have purchased, or shall afterwards purchase in fee-simple, fee-tail, for life, lives, or years, the same lands, tenements and hereditaments, or any part or parcel thereof so formerly conveyed, granted, leased, charged, incumbered, or

“ limited in use, or to defraud and deceive such as have, or shall
 “ purchase any rent, profit, or commodity, in or out of the
 “ same, or any part thereof, shall be deemed and taken only as
 “ against that person and persons, bodies politick and corporate,
 “ his and their heirs, successors, executors, administrators, and
 “ assigns, and against all and every other person and persons
 “ lawfully having or claiming, by, from, or under them, or any
 “ of them, which have purchased, or shall hereafter so purchase
 “ for money, or other good consideration, the same lands, tene-
 “ ments, or hereditaments, or other part or parcel thereof, or
 “ any rent, profit, or commodity, in or out of the same, to be
 “ utterly void, frustrate, and of none effect; any pretence,
 “ colour, fained consideration, or expressing of any use or uses
 “ to the contrary notwithstanding.

§ 3. “ Provided that this act, or any thing therein contained,
 “ shall not extend or be construed to impeach, defeat, make
 “ void, or frustrate any conveyance, assignment of lease, as-
 “ surance, grant, charge, lease, estate, interest, or limitation
 “ of use or uses of, in, to, or out of any lands, tenements, or
 “ hereditaments heretofore at any time had or made, or here-
 “ after to be had or made upon or for good consideration, and
 “ *bonâ fide*, to any person or persons, bodies politick or corpo-
 “ rate; any thing before mentioned to the contrary hereof
 “ notwithstanding.”

And by § 4. it is further enacted, “ That if any person or
 “ persons have heretofore sithence the beginning of the queen’s
 “ majesty’s reign, that now is, made or hereafter shall make
 “ any conveyance, gift, grant, demise, charge, limitation of
 “ use or uses, or assurance of, in, or out of any lands, te-
 “ nements, or hereditaments, with any clause, provision, ar-
 “ ticle, or condition of revocation, determination, or alteration,
 “ at his or their will or pleasure, of such conveyances, assur-
 “ ance, grants, limitations of uses, or estates of, in, or out of
 “ the said lands, tenements, or hereditaments, or of, in, or out of
 “ any part or parcel of them contained or mentioned in any
 “ writing, deed, or indenture of such assurance, conveyance,
 “ grant, or gift, and after such conveyance, grant, gift, de-
 “ mise, charge, limitation of uses, or assurance so made or
 “ had, shall or do bargain, sell, demise, grant, convey, or
 “ charge the same lands, tenements, or hereditaments, or any
 “ part or parcel thereof, to any person or persons, bodies po-
 “ litick or corporate, for money or other good consideration paid
 “ or given, (the said first conveyance, assurance, gift, grant,
 “ demise, charge, or limitation, not by him or them revoked,
 “ made void, or altered, according to the power and authority
 “ reserved or expressed unto him or them, in and by the said
 “ secret conveyance, assurance, gift, or grant,) that then the
 “ said former conveyance, assurance, gift, demise, and grant,
 “ as touching the said lands, tenements, and hereditaments
 “ so after bargained, sold, conveyed, demised, or charged
 “ against the said bargainees; vendees, lessees, grantees, and
 “ every

“ every of them, their heirs, successors, executors, and assigns, and against all and every person and persons which have, shall, or may lawfully claim any thing by, from, or under them, or any of them, shall be deemed, taken, and adjudged to be void, frustrate, and of none effect, by virtue and force of this present act. Provided nevertheless, That no lawful mortgage made, or to be made, *bonâ fide*, and without fraud or covin, upon good consideration, shall be impeached or impaired by force of this act, but shall stand in the like force and effect as the same should have done if this act had never been had nor made.”

Cowp. 434.

[Although the statute of 13 Eliz. c. 5. subjects the parties to the frauds, which it provides against, to certain penalties, and therefore, it should seem, ought to be construed strictly; yet Lord *Mansfield* observed, that the statutes of 13 & 27 El. cannot receive too liberal a construction, or be too much extended in suppression of fraud.]

In the construction of these statutes the following opinions have been holden:

Cro. Eliz. 243.
Leonard v.
Bacon.

That where in a *formedon* the tenant pleaded non-tenure upon which they were at issue; and it was found, that before the writ purchased, the tenant enfeoffed divers persons, with an intent to defraud him who had cause of action to the lands, and that notwithstanding the feoffor took the profits; on this verdict it was adjudged for the demandant, *viz.* “ that by the 13 Eliz. c. 5. the feoffment was void against him.”

3 Co. 80.
Twine's case,
Moore, 638.
2 Bulst. 226.
S. C. [See
too Worsley
v. De Mattos,
1 Burr. 467.]

A. being indebted to *B.* in 400*l.* and to *C.* in 200*l.*, *C.* brings debt against him, and pending the writ, *A.* being possessed of goods and chattels to the value of 300*l.* makes a secret conveyance of them all, without exception to *B.* in satisfaction of his debt, but notwithstanding keeps in possession of them, and sells some of them; and others of them, being sheep, he sets his mark on. It was resolved to be a fraudulent gift and sale within the 13 Eliz. c. 5.; for though such a sale hath one of the qualifications required by the statute, being made to a creditor for his just debt, and, consequently, on a valuable consideration; yet it wants the other; for the owner's continuing in possession is a fixed and undoubted character of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, and therefore this sale is not made *bonâ fide*. And as this is a leading resolution, being agreeable to the rule of commerce settled by the statute, so it is highly conformable to the most exact reason and equity; for if such collusion and practice were allowed between a debtor and his creditor, as it would prove injurious to other creditors of the same debtor, in depriving them of all means of satisfying themselves by the stated methods of justice; so it must in its consequence have a very ill influence on commerce, by preventing loans of money, and other confidences of that nature, which are so necessary for the support of it, since no man would lend or trust another with money or goods upon such an apparent hazard of losing them.

So,

So, where *A.* being indebted to five several persons in the sums of 20*l.* each, and having goods to the value of 20*l.*, makes a gift of them to one of the five, in satisfaction of his debt; but upon this secret trust between them, that the grantee, in compassion to his circumstances, should deal favourably with him in permitting him, or some other for him, to use and possess the said goods, paying this creditor as he was able and could afford it, the said debt of 20*l.*, it was resolved to be a fraudulent conveyance and deed of sale.

3 Co. 81.
Moore, 639.

So, if *A.* makes a bill of sale of all his goods in consideration of blood and natural affection to his son, or one of his relations, it is a void conveyance in respect to creditors, for the considerations of blood, &c. which are made the motives of this gift, are esteemed in their nature inferior to valuable considerations, which are necessarily required in such sales by 13 Eliz. c. 5. And this seems to be a construction suitable to the strictest rules of equity; for if considerations of blood or natural affection were allowed to be of equal dignity with, or to come under the notion of, valuable considerations required by this statute, it would be in the power of any debtor, by such conveyances of his personal estate to his kindred, to build a family upon a conduct to his creditors, which carries in it all the stains of injustice and collusive dealing. Moreover, there is a strong presumption, that such sales to relations are constantly attended with a secret trust and personal confidence of reconveying part of the goods to the vendor for his subsistence; so that they are entirely inconsistent with the scheme laid down by the statute, and therefore illegal and void.

2 Ro. Abr.
779. Palm.
214. 3 Co. 81.

¶ A testator by his will gave 6000*l.* to trustees upon trust to pay the interest to *S. C.* for her life for her separate use, and afterwards to pay the same among her children. *S. C.* filed her bill against the testator's widow and *J. S.* the executors, praying to have the 6000*l.* secured. In 1736 an account was directed to be taken of the personal estate. In 1745 *J. S.* the executor was, by an order of the court, committed to the *Fleet* prison, for non-payment into the bank of the sum of 3000*l.*, part of the estate of the testator in his hands, where he remained till his death in 1750; and the cause was revived against *Gopp* and *Edwards*, whom *J. S.* had made his executors. On the 4th April 1753 the Master reported a considerable balance due from the estate of *J. S.* to that of the testator; and it having been discovered that *J. S.* had advanced to his children divers sums of money, and the testator's estate proving insufficient to pay the legacies, and *J. S.* having died insolvent, a supplemental bill was filed against *Gopp*, who had married one of the daughters of *J. S.* since deceased; *Elizabeth Edwards*, widow, another of the daughters since deceased; and against *Sarah* and *Catharine*, unmarried daughters of *J. S.*, for a discovery of the money so advanced, and to have it refunded. *Gopp* by his answer admitted, that *J. S.* had given him, in 1744, on the day of his marriage, 500*l.*, as a portion with his wife, which he said was in pursuance

Partridge v.
Gopp, Ambl.
596. 1 Eden,
163. S. C.

of an agreement before marriage. The other married daughter of *J. S.* made the same defence. *Sarah* and *Catharine* confessed, that in 1743 *J. S.* had made each of them a free gift of 500*l.* for their maintenance and subsistence in the world. And they all denied knowledge of the bad circumstances of *J. S.* at the time he advanced the money. It was insisted for the plaintiffs, that these were fraudulent gifts within the 13 Eliz. c. 5. For the defendants it was argued, that they were not fraudulent, because there was no secret trust, and they might be considered as payment of debts of nature. As to the married daughters, Lord *Northington* held, there was a good consideration, and dismissed the bill as to them. With respect to the other children, he observed, it had struck him at first as a hardship to make them refund; especially, as such a gift could not be considered as a trust for the giver. But on consideration he thought that no man has such a power over his own property, as that he can dispose of it so as to defeat his creditors, unless for good consideration and *bonâ fide*: that it is the motive of the giver, not the knowledge of the acceptor, that is to weigh: that the statute extends to all cases, except where there is good consideration and *bona fides*; and that blood had been held not to be a good consideration: that an alienation cannot be made *bonâ fide* and voluntarily, where a man, as in this case, is largely indebted at the time; for every man ought to be just before he is generous: that he had no doubt but that the voluntary gift proceeded from affection getting the better of justice; and lastly, that it was done secretly and *pendente lite*.

Stiles v. Attorney-General, 2 Atk. 152.

In *Jamieson v. Skipwith*, 2 Br. Ch. Rep. 34. it was taken for granted, that an engagement by a pupil to his teacher, as a remuneration of gratitude, was not valid as against creditors.

Hill v. Bp. of Exeter, 2 Taunt. 69.

The Duke of *Wharton* having, upon the ground that the publick good was advanced by the encouragement of learning and the polite arts, and from being pleased with the attempts of *Dr. Young*, granted him an annuity of 100*l.*, and afterwards by indenture reciting that there was an arrear of the annuity, and that *Dr. Young* had, at the Duke's request, quitted a service in the family of the Earl of *Exeter*, and thereby lost an annuity, granted him a farther annuity of 100*l.*, and charged his estate with both the annuities; Lord *Hardwicke* held (as against creditors) that the advancement of learning, though a good inducement, was not a valuable consideration, but that the quitting of Lord *Exeter's* service was a valuable consideration, and that the forbearance to sue for the arrears of the first annuity was also a valuable consideration, in respect whereof it ceased to be a voluntary grant.

A. seised in fee of an advowson, except the next presentation, which *B.* had under the same title, in consideration of natural love and affection conveyed the advowson in fee to his son. Upon a vacancy, *C.* claiming title to the advowson, contested the next presentation against *B.* in a *quare impedit*. *A. B.* and *C.* entered into a compromise upon the terms that *C.* should release his claims to *A.* and *B.* according to their respective interests, and that *A.* should convey to *C.* the then next following presentation,

ation, which he did. It was holden, that the grant of that presentation was a conveyance for a valuable consideration, and was paramount to the grant made to the son of A.]

But, if a person, before he contracts any debts, makes a voluntary settlement on his son *bonâ fide*, it seems that this is not within the statute (a), for it never could be the intent of the act to set aside all voluntary settlements. But, if the gift be made on any trust either expressed or implied, between donor and donee, it is within the statute; for all acts for the suppressing of fraud are to be liberally expounded.

of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void." *Townsend v. Windham*, 2 Ves. 11. *Russel v. Hammond*, 1 Atk. 15. *Stileman v. Ashdown*, 2 Atk. 493. However, in the case of *Jones v. Marsh*, Ca. temp. Talb. 64., Lord Talbot declined giving any opinion how far a family settlement, without any consideration, would be fraudulent against subsequent creditors though the party was not indebted at the time; and in *Hungerford v. Earle*, 2 Vern. 261. *Hutchins*, Lord Commissioner, held such settlement to be void. It is observed, however, that Lord Talbot was not, by the circumstances of the case before him, called upon to give his opinion; and that the opinion of *Hutchins* was evidently influenced by the provisions of the settlement not having been pursued. *Fonbl. Eq. Tr.* 263. note. ¶ And it is now clearly settled, that a voluntary settlement in favour even of strangers by one not indebted at the time, that is, not in *insolvent circumstances*, (for a single debt, and, as it would seem, the running debts of a man for the common bills for his house, will not do,) and meaning no fraud, is good against subsequent creditors. *Stephens v. Olive*, 2 Br. Ch. Rep. 90. *Lush v. Wilkinson*, 5 Ves. 384. *Kidney v. Coussmaker*, 12 Ves. 155., and *Montague v. Sandwich*, there cited. *Holloway v. Millard*, 1 Madd. 414. *Battersbee v. Farrington*, 1 Swanst. 106. *Walker v. Burroughs*, 1 Atk. 93. *East India Company v. Clavell*, *Gilb. Eq. Rep.* 37-||

And therefore if the jury find that the owner continued in possession of his goods after his bill of sale of them, this is an undoubted badge of a fraudulent conveyance, because the possession is the only *indicium* of the property of a chattel, which is a thing unfixed and transitory. So, there are other marks and characters of fraud, as a general conveyance of them all without any exception; for it is hardly to be presumed that a man will strip himself entirely of all his personal property, not excepting his bedding and wearing apparel, unless there were some secret correspondence and good understanding settled between him and the vendee for a private occupancy of all or some part of the goods for his support. Also, a secret manner of transacting such bill of sale, and unusual clauses in it, as that it is made honestly, truly, and *bonâ fide*, are marks of fraud and collusion; for such an artful and forced dress and appearance give a suspicion and jealousy of some defect varnished over with it.

[A. being indebted, by settlement before marriage, in consideration of the marriage, and of 10,000*l.* the wife's fortune, (which was supposed to be more than the amount of his debts at that time,) conveys all his real estate and household goods (his real estate alone not being thought an adequate settlement) in trust for himself for life, remainder to his wife for life, remainder to his first and other sons in strict settlement: the wife being a ward of Chancery, the settlement was approved of by a

Mod. 119.

[1 *Ventr.* 194.

1 *Sid.* 349.

2 *Ro. Rep.* 306.]

(a) "If there be," saith Lord *Hardwicke*, "a voluntary conveyance

3 *Co.* 81.

Moore, 638.

Cadogan v.

Kennet,

Cowp. 432.

Master, and the goods enumerated in a schedule. *A.*, after the marriage, continued in possession of the goods; after which a creditor, *at the time of the settlement*, having obtained judgment, took them in execution, whereupon the trustees commenced an action against him. It was holden, that the settlement was good against creditors; that possession was no circumstance of fraud in this case, for that it was part of the trust that the goods should continue in the house. But, if the settlor had let the house and furniture, reserving one rent for the house, and another for the furniture; or, if the rent could be apportioned, the creditors would be entitled to the share of such rent reserved, or to such apportionment of it in respect of the goods. And there having been a sale of part in this case, it was agreed, that the value should be vested in the funds on the trusts of the settlement, and the interest during *A.*'s life paid to the defendant. The rest of the goods were ordered to be delivered to the plaintiffs.]

Dewey v.
Bayntun,
6 East, 257.

¶ Where pictures and other property at *Wendover Castle*, belonging to Lord *Arundel*, were, in consideration of Lady *Arundel*'s relinquishing some interests under a settlement in favour of Lord *Arundel*, assigned to trustees for the separate use of Lady *Arundel*, and they continued in the possession of Lord *Arundel* without any inventory; in an action against the sheriff for a false return, it was left to the jury whether the trust deeds were a contrivance to defraud Lord *Arundel*'s creditors; or, whether they were a *bonâ fide* transaction; and a verdict being found in favour of the transaction, a new trial was granted, in order to bring that point more distinctly before the jury; the opinion of the court, however, evidently being, that the possession of the husband being consistent with the object of the deeds, was not of itself sufficient to annul the transaction, so as to render the goods liable to an execution at the suit of Lord *Arundel*'s creditors. The jury, upon the second trial, found a verdict for the creditor, upon which application was made for an injunction, and the Lord Chancellour expressed his opinion very fully in favour of the general nature of the transaction, and directed a trial in the Court of Common Pleas for the purpose of settling the question. But of the ultimate event of the case there is no report.

Lady Arundel
v. Phipps,
10 Ves. 139.

Leonard v.
Baker,
1 M. & S. 251.
See also Meg-
gitt v. Mills,
1 Ld. Raym.
286. Reed v.
Blades,
5 Taunt. 112.

Where a person assigned his effects to trustees, and the son, in order to accommodate his mother, became the purchaser of the household goods at a fair appraisement, and suffered the greater part of them to remain in the house with his mother, who continued to reside there, and take lodgers as before; it being found by the jury, that the change of property was notorious, and that the assignment was not executed with an intent to defeat either the general body of creditors, or any particular creditor; the title of the son was sustained against a subsequent execution by a creditor of the father.

Kidd v. Raw-
linson, 2 Bos.
& Pull. 59.

A *fieri facias* having issued against *A.*, his furniture was taken and put up to sale by the sheriff, and *B.* his brother-in-law became the purchaser, and a bill of sale was made out to *B.* dated
the

the 13th of Nov. 1798; nevertheless *A.* was permitted by *B.* to continue in possession of the goods, in order that he might be able to carry on his business; but, being soon after arrested and committed to prison, he executed a bill of sale of the same goods, dated the 11th of March 1799, to the defendant, to whom he was indebted in the sum of 15*l.* 5*s.* The defendant, having taken possession according to the last bill of sale, received a notice from *B.* not to dispose of the goods, stating his prior title. On the 14th of March the landlord of the premises authorized the defendant to distrain for 12*l.* 10*s.* for rent due from *A.* for two quarters, which the defendant paid, and on the 26th of the same month sold the goods for 26*l.* 14*s.* 6*d.* The expences of the bill of sale to the defendant, of keeping possession, and of the auction, added to the rent advanced by the defendant, amounted to 26*l.* 4*s.* 8*d.*, leaving a balance in the hands of the defendant of 9*s.* 8*d.*; and to recover the produce of this sale, after deducting the amount of the rent paid to the landlord, *B.* brought his action; and the jury being directed by Lord *Eldon* C. J. to consider, whether the plaintiff had purchased the goods for the purpose of defeating any execution by the rest of the creditors of *A.*, were of opinion that the purchase was not made with that view, and gave a verdict for the plaintiff. A motion was made to set aside the verdict, on the ground, that the first bill of sale, not being followed by the possession, was, according to the doctrine of *Bamford v. Baron*, 2 T. R. 594., and *Edwards v. Harben*, 2 T. R. 587., fraudulent; but the court were unanimous in supporting the verdict. And Lord *Eldon* said, that the plaintiff was not a creditor of *A.*, and did not buy the goods as a means of satisfying any debt of his own; nor indeed could he so do, for the sheriff was to receive the money produced by the sale; nor was the purchase made with a view to defeat creditors, but out of mere kindness to *A.* to whom the plaintiff was related: that it seemed to him that this did not fall within the principle of *Twyne's* case, and the other cases, where the parties stood in the relation of debtor and creditor, and where it was their intention to defeat the other creditors: that it appeared to him to be a new case; for that the goods were purchased at a publick sale by a person who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honest purpose: that if the plaintiff had lent the money to *A.* to purchase these goods, and had then taken a conveyance of them as a security for his debt arising out of the mere act of lending the money, leaving *A.* in possession of the goods, that would not have been a fraudulent act, as in *Bull. N. P.* 258. where Mr. *J. Buller*, after stating the case of a conveyance, which was holden to be fraudulent, because the donor continued in possession, adds, that “the donor’s continuing in possession is not
“ in all cases a mark of fraud, as, where a donor lends his
“ donee money to buy goods, and at the same time takes a bill
“ of sale from him for securing the money:” that it would be difficult to distinguish the transaction in question from that case,

except indeed in the circumstance of the publick sale by the sheriff, which certainly was a distinction in the plaintiff's favour; and that it had appeared to him at the trial, that the plaintiff might be considered as the donor of these goods, or as lending money to *A.* to purchase them through the medium of the sheriff, and taking a bill of sale as a security for the money, which way of considering it would make it the very case put in *Mr. J. Buller's Nisi Prius.*||

Cowp. 434.

[Where there had been a decree in the Court of Chancery and a sequestration; and a person, with knowledge of the decree, bought the house and goods belonging to the defendant, and gave a full price for them; yet the court said, that the purchase being with a manifest view to defeat the creditor, was fraudulent; and therefore, notwithstanding a valuable consideration, void. So, if a man knows of a judgment and execution, and with a view to defeat it purchases the debtor's goods, it is void; because the purpose is iniquitous. For if a transaction be not *bonâ fide*, the circumstance of its being done for a valuable consideration will not alone take it out of the statute.]

5 Co. 60.
Moore, 615.

If a gift be made to deceive one creditor, it is void against all creditors; but wherever a conveyance is construed fraudulent, it must be with respect to real creditors and purchasers for valuable consideration.

And. 233.
Moore, 602.
[See *acc.* 3 Co.
83. a. Cro. El.
444. Doe v.
Routledge,
Cowp. 785.]

Therefore, if a man makes a fraudulent lease, and then another *bonâ fide*, without rent or fine, the second lessee shall not avoid the first lease; for no purchaser shall avoid a former fraudulent conveyance, but a purchaser for valuable consideration.

Gooche's case,
5 Co. 60.
Moore, 615.

But, though a purchaser for valuable consideration within the 27 Eliz. c. 4. hath notice of a fraudulent conveyance before he purchases, yet after the purchase he shall avoid it; for the statute expressly avoids such conveyances, so that whether the purchaser hath notice of them, or not, is not material.

Chapman v.
Emery, Cowp.
278.

[So, where one, *after marriage*, made a settlement of an estate upon himself for life, remainder to his wife for life, remainder to their issue in tail; and three years afterwards mortgaged the estate to *B.* who was apprized of the settlement; it was holden, that the settlement was void as against the mortgagee within the statute of 27 Eliz. c. 4.; and the settlement being made void by the statute, notice could make no difference.]

Doe v. Man-
ning, 9 East, 5.
Evelyn v.
Templar,
2 Br. Ch. Rep.
148. In Doe
v. Martyr,
1 N. R. 335.
Mansfield
C. J. expressed
his regret, that
it had ever

|| So, a voluntary settlement of lands made in consideration of natural love and affection was adjudged to be void as against a purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase money was paid or the deeds were executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction; for the law infers fraud in this case upon the construction of the st. 27 Eliz.

been decided, that even notice of the prior settlement would not defeat such a purchase.

And

And a pure voluntary settlement in favour of relations, and without fraud, being void by the statute against a purchaser, whether with or without notice, the contract for sale, no actual conveyance being executed, will be enforced against the parties having the legal interest under that settlement. For if, as it has been holden, even before any third person has acquired an interest in the property so voluntarily settled, and when the matter rests entirely between the grantor and grantee, the latter has no equity to prevent the former from defeating the grant by a sale of the estate; it would be too much to say, that he has an equity after the sale is contracted for, and after a third person has acquired an interest in it, to prevent that third person from obtaining the benefit of the contract, which the court would not restrain the settlor himself from entering into.||

Buckle v.
Mitchell,
18 Ves. 100.

Pulvertoft
v. Pulvertoft,
Id. 84.

If *A.* brings an action against *B.* for lying with his wife, after which *B.* assigns his estate to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should mention within ten days, and *A.* recovers 5000*l.* damage, and brings his bill to set aside this deed as fraudulent, and made to defeat him of his recovery; in this case *A.* can have no other relief but to come in upon the surplus, after the debts mentioned in the schedule, or appointed within ten days pursuant to it, are satisfied; the deed being fraudulent neither in law nor equity, *A.* being no creditor at the time of executing it; and it was conscientious in him to prefer his real creditors to one, whose debt, when recovered, was founded only in *maleficio*.

Lewkner v.
Freeman, Pr.
Ch. 105. 1 Eq.
Ca. Abr. 149.
pl. 5. S. C.

A. by bill of sale made over his goods to a trustee for *B.*, who lived with him as his wife, and was so reputed, and he also purchased a lease of the house wherein he dwelt, in the name of a trustee, and declared the trust thereof to himself for life, then in trust for *B.* during the residue of the term; this bill of sale was holden fraudulent as to creditors; but as to the declaration of the trust of the term, the court held it good, and not liable to *A.*'s debts, the term being never in him, and being so settled at the time it was purchased; and *A.* might have given the money to *B.*, who might have purchased it for herself, and in her own name.

2 Vern. 490.
Fletcher v.
Lady Lidley.

Fraudulent conveyances and gifts are only void against purchasers and creditors, and shall bind the parties themselves, and their representatives.

Cro. Ja. 270.
vide 2 And.
172. [Franklin
v. Thornebury,

1 Vern. 132. Villers v. Beaumont, *id.* 100. Bale v. Newton, *id.* 464. Clavering v. Clavering, 2 Vern. 473. Boughton v. Boughton, 1 Atk. 325. *acc.* and if there be two or more voluntary conveyances, the first shall prevail unless the latter be for payment of debts. 1 Ch. Rep. 99.]

And therefore where *A.* made a fraudulent sale of his goods to *B.* and delivered possession of some of them in his lifetime, and the rest came to the hands of his administrator, it was holden in an action brought by *B.* for those goods, that the administrator could not plead the statute of 13 Eliz. c. 5., nor maintain the possession of the goods even to satisfy creditors.

Hawes and
Loader, Yelv.
196. Cro. Ja.
270. S. C.

13 H. 4. 4. b.
Ro. Abr. 549.
(a) As an executor of his own wrong. Yelv. 197. Cro. Jā. 271. [See too *Edwards v. Harben*, 2 T. R. 587. and *supra*, 444.]

But, if a man makes a deed of gift of his goods in his lifetime by covin, to oust his creditors of their debts; yet after his death the vendee shall be (a) charged for them.

Bethel v. Stanhope, Cr. El. 810. 2 And. 172. S. C.

Where by special verdict it was found, that *A.* being possessed of divers goods to the value of 250*l.*, by covin to defraud his creditors made a gift of his goods to his daughter, upon condition, that upon payment of 20*s.* it should be void, and died; and that *J. S.* intermeddled with the goods; after which the daughter took possession of them by force of the gift, and then administration was granted to *J. S.* of all the goods, &c. of *A.*; in an action against him as executor, it was holden, that the gift was apparently fraudulent within the 13 Eliz. c. 5., and that by his intermeddling, before administration granted to him, he became an executor *de son tort*, and liable as such; and that the law continued the possession in him from the time of intermeddling to the time of granting administration.

Mathews v. Fraser, 1 Cox, 278.

|| So, where a man assigned over his personal property to his son for a consideration *clearly inadequate*, and died, it was holden to be void as against creditors. But copyholds not being naturally subject to debts, a conveyance of them cannot be fraudulent against creditors. ||

Trin. 1706.
Baker and Lloyd, per Holt, C. J.

If *A.* makes a bill of sale to *B.* a creditor, and afterwards to *C.* another creditor, and delivers possession at the time of the sale to neither, and after *C.* gets possession of the effects, and *B.* takes them out of his possession, *C.* cannot maintain trespass, because the first bill of sale is fraudulent against creditors, and so is the second; yet they both bind *A.*, and *B.*'s is the elder title, and the naked possession of *C.* ought not to prevail against the title of *B.* that is prior, where both are equally creditors, and possession at the time of the bill of sale is delivered over to neither.

Moore, 615.
(a) Where a feoffment

If a gift be made to deceive one creditor, it is void against (a) all the creditors of the party, within the statute.

was made to deceive creditors, though by the event the king was cheated of his ward, yet being only to the intent and purpose to deceive creditors, it ought not to be extended farther. 10 Co. 57. — So, where there was a redemise to *A.*, to the intent the wife of the tenant should not be endowed during the life of *A.*, it was holden that it could not be extended to any other intent or purpose. Dyer, 351. — Where one held of divers lords by heriot custom, and to the intent to deceive one, made a gift of all his beasts heriotable. 2 Leon. 8, 9. Dyer, 351.

Estwick v. Caillaud, 5 T. R. 420.

|| If a person, having several creditors, convey by deed the legal interest in part of his real and personal property to a trustee in trust, (after deducting the expences of the trust,) out of the rents and profits to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, there being no intent fraudulently to delay the creditors not named in the schedule in the obtaining of their demands, the deed is good in law.

Nunn v. Wilmore, 8 T. R. 521.

Where a deed conveyed the lease of a farm, and all the grantor's effects and all debts due to him, to trustees in consideration

sideration of a certain sum to be paid to him by one of the trustees, in trust to dispose of all the property, and out of the produce to re-imburse that trustee the sum advanced by him to the grantor, and all other the trustees' demands upon him, and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper, the surplus to be holden for the benefit of the grantor's wife (whose property the bulk of it originally was) as a separate maintenance for her, in consequence of a separation between them on account of the husband's ill usage; it was holden, that the deed was not fraudulent or void, as against creditors, it appearing to have been made *bonâ fide* at the time, and that all the grantor's creditors then known had, upon application to the trustees, received payment of their debts.

If *A.* indebted to *B.* and *C.* being sued to judgment and execution by *B.* voluntarily give *C.* a warrant of attorney to confess judgment, on which judgment is immediately entered, and execution levied on the same day on which *B.* would have been entitled to execution, and had threatened to sue it out; the preference so given by *A.* to *C.* is not unlawful, nor fraudulent within the statute of 13 Eliz.

Holbird v.
Anderson,
5 T. R. 235.

After a creditor had distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his goods, for the purpose of discharging the rent, and also certain book debts due to such creditor and his agent, the debtor confessed judgment to the defendant, another creditor, for a large nominal sum, with a defeasance that execution should issue only for such an amount as would cover the defendant's debt, and of all the other creditors among whom a rateable distribution was to be made, it was holden, that the judgment confessed, being in fact *bonâ fide*, and upon good consideration; was not covinous or fraudulent within the 13 Eliz. although it might have the effect of delaying or hindering the first-mentioned creditor in the recovery of the whole amount of his demands.

Meux q. t. v.
Howell,
4 East, 1.

Where *A.* a debtor to the plaintiff, being sued by the plaintiff, pending the suit and before execution being insolvent, executed an assignment of all his effects to trustees for the benefit of all his creditors, under which possession was immediately taken; the assignment was holden not to be fraudulent within 13 Eliz. although made to the intent to delay the plaintiff of his execution.||

Pickstock v.
Lyster, 3 M.
& S. 371.

A man binds himself in a bond to pay money, and then in a statute to make such a conveyance, &c. a fraudulent conveyance is made contrary to the defeasance of the statute; though the conveyance be void against the first debtor, yet it is a breach of the condition of the statute, and the conusee shall be satisfied before the creditor by bond.

Cro. Ja. 131,
132.

It is not necessary that he who contracted the debt should make the fraudulent conveyance; for if a man binds himself and his heirs in a bond, and lands descend to his heir, who makes a fraudulent conveyance of those lands, the creditor shall avoid it.

5 Co. 60.

If

2 Co. 54.
11 Co. 74.

If a person, intending to deceive a purchaser, conveys by deed enrolled his lands to the king, and afterwards, for valuable consideration, conveys to *J. S.*, the purchaser shall avoid this conveyance to the king by the 27 Eliz. c. 4.; for although the statute does not by express words extend to the king, yet being a general law, and made for suppressing fraud, it shall include him.

11 Co. 74. a. b.

So, if *A.* being tenant in tail, remainder to *B.* in tail or fee, and *B.* under an apprehension that *A.* designs to suffer a recovery, and destroy his remainder, by deed enrolled conveys his remainder to the king; yet, if *A.* for valuable consideration afterwards by recovery conveys the estate to *J. S.* and dies without issue, the purchaser shall avoid the conveyance to the king as fraudulent within the 27 Eliz. c. 4.

Latch. 222.
Sir Ambrose
Turvil v.
Tipper.

In trespass against a bailiff of a manor for distraining goods, he justified by virtue of his authority, and that by his precept he was commanded to distrain the goods of *J. S.* which goods came to the plaintiff's hands by colour of a fraudulent gift of them to the plaintiff; and on issue, whether the sale was made *bonâ fide*, it was found for the defendant, and adjudged for him, although it was objected, that he being no creditor could not take advantage of the statute, which being a penal law ought to be construed strictly.

6 Co. 72. b.
& vide 1 Vern.
45, 46.

If a father makes a fraudulent lease of his lands, with an intent to deceive a purchaser, and dies before he makes any conveyance of the lands, and afterwards his son and heir, knowing or not knowing of this lease, conveys to *J. S.* for valuable consideration, *J. S.* shall avoid this lease within the 27 Eliz. c. 4.

Co. Litt. 3. b.
Sir Richard
Grobham's
case.

A. has a lease of certain lands for sixty years, if he live so long, and forges a lease for ninety years absolutely, and by indenture reciting this forged lease bargains and sells it for valuable consideration, together with all his interest in the land, to *B.*; in this case *B.* is not a purchaser within 27 Eliz. c. 4.; for though there were general words in the sale to pass the true interest, yet it is plain that it was never contracted for, nor originally included in the bargain; so that the bargain being made of an imaginary interest, the bargainee can never come under the character of a real purchaser, to defeat the purchaser of the true lease of sixty years, which *A.* was really possessed of.

Sid. 134.

A deed, though it be fraudulent in its creation, yet by matter *ex post facto* may become good; as, if one makes a fraudulent feoffment, and the feoffee makes a feoffment to another for valuable consideration, and afterwards the first feoffor also, for valuable consideration, makes a second feoffment, the feoffee of the feoffee shall hold against the second feoffment of the first feoffor.

Pr. Ch. 377.
East India
Company v.
Clavel, Gilb.
Eq. Rep. 37.
2 Eq. Ca. Abr.
52. pl. 6.

A. agreed with the *East India Company* to go as president to *Bengal*, and entered into a bond of 2000*l.* penalty for performance of articles; but before he set out he made a settlement of his estate, and among other things he declared the trust of a term of 1000 years to be for the raising of 5000*l.* as a portion for his daughter, who afterwards married *J. S.* a gentleman of 700*l.*

per ann. who before the marriage was advised by counsel, that the portion was sufficiently secured; and who afterwards on her death had, on her request, expended 400*l.* on her funeral, but never made any settlement on her; and *A.* having embezzled the goods and stock of the Company to a considerable value, the question was, whether this settlement was voluntary and fraudulent as to them; and it was holden to be a prudent and honest provision, without any colour of fraud; and though in its creation it was voluntary, yet being the motive and inducement to the marriage, it made it valuable.

See Pr. Ch.
305. 2 Eq.
Ca. Abr. 481.
pl. 13.

On the clause of the 27 Eliz. c. 4. that if a man settles land to uses, with a power of revocation, and afterwards sells the lands for valuable consideration, that the former uses shall be revoked; it hath been holden, that if a man having a future power of revocation bargains and sells the land before his power commences, yet it is within the act. So, if the power of revocation be reserved with the (a) consent of *A.* and he convey his land, not having revoked, the conveyance shall be good. So, if one having a power of revocation, extinguish it by feoffment, and then sell, the sale shall be good.

Moore, 605.
3 Co. 82. b.

(a) A man and his wife seised in fee of lands, in right of the wife, in consideration

of the marriage of their son, and 500*l.* paid for a portion, levy a fine to the use of the father and his wife for their lives, then to their son and his heirs, proviso, that it should be lawful for the father to revoke, with consent of four persons, the relations of the son's wife; the father dies, the mother, without consent, sells the lands for valuable consideration to other persons; and it was holden, that the vendee should not avoid the settlement, the power of revocation being out of the power of them to effect, the consent of such being necessary, over whom the father and mother could not be presumed to have any power; otherwise if the consent were lodged with those persons, that may be supposed to be at the disposal of the persons to whom the power is reserved. 2 Jon. 94, 95.

This branch of the statute does not extend to creditors, and therefore if the conveyance was not made to deceive them, it seems they cannot avoid it.

If goods continue in the possession of the vendor, after a bill of sale of them, though there is a clause in the bill, that the vendor shall account annually with the vendee for them, yet it is a fraud; since if such colouring were admitted, it would be the easiest thing in the world to avoid the provisions and caution of the act.

Moore, 638.

Where there is an absolute conveyance or gift of a lease for years, and the person who makes it continues in possession after such sale, the gift is fraudulent, because attended with that distinguishing character of a fraud. But, if the conveyance or sale be conditional, as that upon payment of so much money, the lease shall go to the vendee, then, continuance in possession after the gift does not make it fraudulent, because the vendee is not to have the lease in possession till he performs the condition.

2 Buls. 226.
Stone v.
Grubham.

If one makes a lease for years with a proviso to be void upon payment of 10*s.* this lease will be void against purchasers; but, if it be a mortgage for a considerable sum of money, though it be in the power of the mortgagor, yet it is not void.

Cro. Ja. 455.

[Where

Russell v.
Hammond,
1 Atk. 13.

[Where a father settled an estate upon his son, but took back an annuity to the value of it, Lord *Hardwicke* held that this was tantamount to a continuance in possession, and that the settlement was void as against creditors.

Shaw v.
Standish,
2 Vern. 326.

A. entered into articles of partnership in fifths with three others for 21 years in digging for mines in *A.*'s lands, *A.* to have two-fifths, and in consideration of his ownership of the land, to have a tenth out of the share of the other partners. In pursuance of these articles, they searched for mines, and in about two years, and after having expended about 120*l.* they discovered a valuable mine, which they worked for three months, when *A.* died: upon *A.*'s death, his widow set up a voluntary settlement made after marriage. But the court inclined to think that the partners were as purchasers, and that the voluntary settlement was void as to them.

Goodright
v. Moses,
2 Bl. Rep.
1019. S. P.

In the above case it was said to have been adjudged at law, that a lessee at a rack-rent and who paid no fine, was a purchaser within the statute, and should avoid a voluntary conveyance.]

2 Vern. 510.

If a man makes a voluntary settlement, reserving to himself a power to mortgage and charge the estate with what sums he pleases, this amounts in effect to a power of revocation, and is therefore fraudulent as to creditors by judgment.

6 Co. 73.
Cro. Ja.
158. 455.
Hardr. 395.

It seems to be clearly agreed, that if a person makes a settlement on his wife, or child, after marriage, in consideration of love and affection, and not pursuant to any articles, or any agreement in consideration of the marriage, or marriage-portion, that such settlement being voluntary is fraudulent against purchasers within the 27 Eliz. c. 4.

Cro. Ja.
158. 455.
Lev. 150.
Hard. 395.
(a) *Vide*
1 Chan. Ca.
99. Vern.
440. 479.
2 Vern. 701.

But, though the settlement be made after marriage, yet, if it were in pursuance of marriage articles, to make a provision on the wife and the issue of the marriage, it is not fraudulent; and in this case the wife and children become purchasers themselves, and shall avoid a prior voluntary conveyance, and shall in (a) equity have the same favour in not being obliged to discover papers, writings, &c.

Cro. Ja. 454.
Dame Griffin
v. Stanhope,
adjudged;
and that the
wife's concealing the
conveyance

As, where a (b) person promised a woman, before marriage, to make her a jointure of 1000*l.* a year; and after marriage, for securing the payment thereof, made a lease to commence after his death for 100 years, with a proviso, that on making the settlement the lease should be void: this lease was holden good against a purchaser.

in this case did not make it fraudulent, when, upon revealing of it, it appeared to be good. (b) That before the statute of frauds and perjuries, a verbal agreement before marriage was sufficient to prevent its being said to be fraudulent. Vent. 194. || And so it seems it would be now. Dundas v. Dutens, 2 Cox, 235. 1 Ves. jun. 196. S. C. ||

Prodgers
v. Langham,
Sid. 133.
Keb. 486. S. C.

Where *A.* made a lease for years, to the use of such person as should marry his daughter, provided he was then living and approved of the match; it was holden, that if *A.* had sold the lands before the marriage, that the lease would be fraudulent

against a purchaser; but, if before the sale the daughter marries, the father cannot defeat it, because it was the cause of the marriage, and drew on the stranger to engage in it, and is of the same effect as if it had been a special agreement with this particular person; and it was holden not to be necessary that the father approved of the match at the time, but that, if he approved of it seven years afterwards, it was sufficient.

So, where *A.* surrendered the reversion in fee of copyhold lands to his son, to lessen the fine he must have paid in case it had come to him by descent; and after, on the son's treaty of marriage, the father tells the wife's friends, that this copyhold was so settled on the son, in consideration of which, and of some leasehold lands settled by the father, a marriage was had, and 2000*l.* portion paid; though in the settlement no mention was made of the copyhold, yet it was holden that the surrender thereof, in the manner aforesaid, was not voluntary or fraudulent against a purchaser, because it was the principal inducement that prevailed on the friends of the son's wife to consent to the marriage, and to give her such a fortune, and that it ought to be considered as if it had been surrendered at the time of the marriage.

[So, where on an ejectment brought by the assignee of a mortgagee, it was objected, that it did not appear, that any money was paid upon the original mortgage, and therefore it was fraudulent; and being fraudulent in the creation, though the present assignee paid a valuable consideration, yet this would not purge the fraud, and make it good against the defendant, who was a purchaser *bonâ fide*, and for a valuable consideration; *Holt*, C. J. answered, that the first mortgage was good between the parties; and being so, when the first mortgagee assigned for a valuable consideration, this was all one, as if the first mortgage had been upon a valuable consideration: for the assignee stands in his place, and therefore is within the second proviso of the statute of 27 Eliz. c. 4.]

It seems to be holden, that if a bond be given before marriage to settle a jointure, and after the marriage a settlement be made, which goes farther, and entails the land upon the children of the marriage, that the settlement may be good as to the jointure, and fraudulent (a) as to the remainders in respect to a purchaser.

himself for life, remainder to the daughter, and afterwards sold the land to another, whether the former conveyance shall be avoided during his life, within the 27 Eliz. c. 4. 2 Ro. Rep. 306. Q. — Where a settlement, in consideration of a marriage portion, was made on the husband and wife, and the issue of that marriage, remainder to the heirs of the body of the husband; it was holden, that the consideration should extend to the issue of the husband of the second venter. Lev. 150. 237. Hardr. 395. Chan. Ca. 104. || As to the extent of the consideration of marriage in settlements, see *Pulvertoft v. Pulvertoft*, 18 Ves. 92. *Sutton v. Chetwynd*, 3 Mer. 249. ||

But, where the intended husband was under age, and so incapable of making a settlement, and the wife's father gave a bond for the payment of 1500*l.* on his making a suitable jointure-settlement on her, without taking any notice whatsoever of the issue,

Pr. Ch. 275.
Kirk v. Clerk.

Andrew New-
port's case,
Skin. 423.,
and 3 Lev.
387. S. C. by
the name of
Smartle v.
Williams.

Vern. 285.
(a) Where a
father made
a settlement
on the mar-
riage of his
daughter, to

Pr. Ch. 520.
Brunsdon v.
Stratton.

issue, and the marriage took effect; and the husband some years after, on the payment of the 1500*l.* made a settlement of 147*l. per ann.* on himself for life, remainder to his wife for life, for her jointure, with remainder to their first and other sons, in the usual form; it was holden, that this settlement was neither voluntary nor fraudulent, being but adequate to the wife's fortune; and that the words of the bond were capable of such a construction, for that a jointure-settlement must be intended a settlement in the common form to the issue, and a jointure for the wife.

Wheeler v.
Caryll,
Ambl. 121.

[So, where a woman, entitled to 6000*l.* secured by her mother's marriage-settlement, subject to the contingency of being lessened by the birth of another daughter, married clandestinely without any settlement; and after the marriage her father secured the 6000*l.* upon his estate, upon which her husband made a settlement upon her; such settlement was adjudged to be good against the husband's creditors.

Jones v.
Marsh, Ca.
temp. Talb.
64.

So, where the husband, some time after marriage, in consideration of an additional portion of 100*l.* paid by the wife's mother, settled an estate of 100*l. per ann.* upon himself for life, remainder to his first and other sons, &c., and his mother, having an interest in the estate, joined with him in the conveyance; and thirteen years after, he mortgaged his estate with the usual covenants; and upon his death the mortgagee brought his bill against the son to foreclose; Lord *Talbot* said, that it would be very hard to call this a fraudulent settlement; since it was in consideration of a marriage had, and of an additional provision of 100*l.* paid by the wife's relations, which cannot be said to be voluntary against a creditor who lent his money thirteen years after.

Ambl. 121.
The like law
if the parti-
cular assignee
of the husband
for a valuable
consideration,
apply to
equity. Jew-
son v. Moul-
son, 2 Atk.
417.

If a woman is entitled to a trust term, which the husband cannot lay hold of and possess, nor get at without the assistance of a court of equity; if the trustees will not raise the portion, and the husband goes into equity for aid; the court will decree an adequate settlement to be made on the wife, and will support it as a good settlement for a valuable consideration. So, if after marriage, the wife being entitled to such a portion, which the husband cannot touch without the aid of the court, and which the trustees will not pay without the husband's making a settlement; if the husband does agree to it, and do that which the court would decree, it is a good settlement against creditors.]

Hobbs v. Hall,
1 Cox, 445.

|| Where a husband had lived in a state of adultery, in consequence of which a separation had taken place between him and his wife, and upon that occasion he settled real estates to the amount of 300*l. per annum* on her for her separate maintenance, and on the children of the marriage; such settlement was holden not to be fraudulent under the statute of 13th Eliz. as against creditors.||

Roe v. Mitton,
2 Wils. 356.

[*John Hamerton* being seised in fee of an estate, and having a mother who had an annuity of 50*l. per ann.* issuing out of the whole, and also two brothers, *Thomas* and *Vavasor*; and being about to be married; his mother, previously to the marriage, consented

consented to part with her security upon the *whole* estate for her annuity, and to take, instead thereof, a security for the same upon *part* of the estate; and accordingly she and *John* (the intended husband) join in a fine to deliver the whole estate from the annuity, and in consideration of the marriage, and of a portion of 1300*l.*, and of the grant and release of the annuity, *John* conveys to trustees that they should pay 50*l.* *per ann.* to the mother out of *part* of the estate for her life, then as to the whole, to the use of *John* for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son in tail-male, remainders to *Thomas Hamerton* and *Vavasor Hamerton*, severally, one after the other in tail-male in strict settlement, remainder to the daughter and daughters of the marriage of *John Hamerton* and his intended wife, remainder to *John Hamerton* in fee. There was no issue of the marriage; afterwards *John Hamerton* mortgaged the estate to *Monckton*, and acknowledged a fine to him *sur concessit*, then *Monckton* purchased of *John Hamerton* in fee for a valuable consideration, and took a fine from him *sur conusance de droit come ceo, &c.*; *John Hamerton* died without issue, but *Thomas Hamerton* left a son, who brought an ejectment to recover the estate. It was holden, that this was a good settlement against purchasers, the consideration given by the mother making her a purchaser for her younger sons.]

¶ *A.* having an estate in fee of 6000*l.* a-year in value, and being also tenant for life without impeachment of waste of another estate of the annual value of 5000*l.* with the reversion in fee, after an estate-tail in *B.* his only son by a former marriage, became greatly indebted by mortgage, annuities, and otherwise, to the amount of 100,000*l.* *A.* and *B.* joined in conveying both estates to trustees, upon trust by sale or mortgage, or by sale of timber, or out of the rents and profits, to pay debts, and to apply so much of the rents and profits of what should remain unsold, as they should think proper, as a sinking fund, and to pay the residue to *A.* and to settle the remaining trust estates (subject to an annuity of 1000*l.* a-year to *B.* for the joint lives of him and *A.*) upon *A.* for life without impeachment of waste, with power to lease for twenty-one years only; remainder to trustees to preserve, &c.; remainder (subject to a jointure to the wife of *A.* and to portions for children) to the joint appointment of *A.* and *B.*, and in default thereof to the appointment of *B.* surviving, and in default thereof to *B.* in tail-male; remainder to the other sons of *A.* in tail-male; remainder to *B.* in tail-general; remainder to the daughters of *A.* in tail, with cross remainders; remainder to *B.* in fee; with powers of leasing, and full powers to the trustees to manage. On a bill filed by *A.* to be relieved against this settlement, one of the grounds insisted upon was the want of consideration; for that *A.* had been deceived into a notion of the expediency of his son's co-operation, whereas, in truth, he was perfectly competent out of the unsettled estate to effect all the purposes of the arrangement with-

Middleton v.
Lord Kenyon,
2 Ves. jun. 391.

out

out his son: and that, although the son's joining was no effective accommodation, he had been a most disproportionate gainer by the transaction, without any sacrifice or concession on his part. But Lord *Loughborough* decided, with great clearness, that as to the alleged want of value to support the settlement, there was no colour for that objection; that there was consideration enough to support the deed at law against creditors or purchasers; and there was consideration enough not only to support the beneficial limitations of the estates to the son, but all the other limitations in which the father was concerned; and that, alluding to the case of *Roe v. Mitton* (*supra*), much slighter considerations had been holden sufficient in courts of law to support such a settlement, even against the most favourable case, that of a fair and honourable purchaser. The consideration, his Lordship added, was a consideration of value; the thing parted with, the interest conveyed, the charge undertaken, were all of great and essential value, and would support, to the full extent, all the effects of the settlement, if any attempt were made to impeach it as void at law.||

Doe v. Routledge, Cowp.
705.

[*William Watson*, in 1763, surrendered a copyhold estate, to which he was entitled in fee, to the use of himself for life, remainder to the defendant *Routledge*, (who was his nephew by a sister,) his heirs and assigns, and was admitted thereupon. This surrender was voluntary, and without any consideration, other than natural love and affection. In the year 1767, *Routledge* paid his addresses to a woman, whom he afterwards married, and shewed a copy of the surrender to her father, but whether this had any influence in procuring the marriage did not appear. Afterwards, in 1773, *William Watson* surrendered the same estate to the use of *Hugh Watson*, a nephew by a younger brother, his heirs and assigns; and by a deed of the same date, executed by *William Watson*, reciting that *Hugh Watson*, upon the proposal and at the request of *William Watson*, had agreed with *William Watson* for the absolute purchase of the said estate for the sum of 200*l.*, and also the surrender in pursuance thereof, *William Watson* acknowledges the receipt of the 200*l.* from *Hugh Watson*, and enters into the usual covenants: there was receipt indorsed on the deed for the 200*l.*, and it was in proof that it was paid. *Hugh Watson* was accordingly admitted upon the surrender, and entered into possession. It was in evidence that before, and at the time of the surrender to him, he knew of the surrender to *Routledge*: that the estate at the time of the surrender to *Hugh Watson* was worth between 50*l.* and 60*l. per ann.* and the inheritance worth between 1800*l.* and 2000*l.* It did not appear that *William Watson* was indebted at the time of making the first surrender, or at the time of his death. It was holden, that the first settlement, though voluntary, was good within the 27 Eliz., for that there is no part of the act which affects voluntary settlements *eo nomine*, unless they are fraudulent; and that the deed of 1773 was not such a deed as ought to set the first settlement aside, supposing the first to be affected by the

the

the act, inasmuch as the consideration money was by no means adequate to the value of the estate, and the whole transaction was merely colourable.]

¶ On a treaty of marriage between *A.* and *B.*, the father and mother of *B.*, in consideration of the settlement to be made by *A.*, joined in conveying a small estate (out of which the mother was dowerable) to *A.* in fee (but no fine was levied); and they also joined in settling another estate of which the father was seised in fee, on the father for life, *remainder to the mother for life*, remainder to the uses of the marriage. At the time of the settlement the father was indebted by specialty. This being a fair and reasonable family settlement, and not made with any view to defeat creditors, the limitation to the mother for life was holden not to be fraudulent as against creditors within the statute of 13 Eliz., more especially as she had joined in conveying the small estate in fee to the husband.¶

Jones v. Boulter,
1 Cox, 288.

It has been holden, that *fraud may be given in evidence* to defeat a fraudulent and covinous conveyance, and that the party who offers it need not plead it, for the acts to prevent fraud are to be construed liberally in suppression of the mischief. Besides, it were an hardship to force the party to plead a thing that is managed with so much subtlety that he cannot attain a competent knowledge of it to plead it in due time.

5 Co. 60.
Hob. 72. S. C.
and S. P. cited
and agreed.
But, if the
issue be taken
directly, en-
feoffed, or not
enfeoffed, the

feoffment must be avoided by pleading the fraud specially — & vide 10 Co. 56, 57. Cro. Car. 550., that covin is not to be presumed; and that if in a special verdict the jury find such circumstances in the case, as might very well have induced them to find fraud, yet if they do not expressly find it, it shall never be presumed. See 2 Ves. 155. *supra*.

(D) In what Court Fraud is cognizable.

IT is clearly agreed, that the court of Chancery had always an original jurisdiction in relieving against frauds, and that at this day it is the only (a) court where matters of fraud are properly cognizable.

2 Vern. 261.
Vide of the ju-
risdiction of
the court of
Chancery, tit.

Courts. (a) [But every kind of fraud is equally cognizable, and equally adverted to in a court of law; and some frauds are only cognizable there; as fraud in obtaining a devise of lands, which is always sent out of the equity courts to be there determined. 3 Bl. Comm. 431. And Lord Mansfield in the case of *Bright v. Eynon*, 1 Burr. 396. says, that courts of equity and courts of law have a concurrent jurisdiction to suppress and relieve against fraud. But the interposition of the former is often necessary for the better investigating of truth, and to give more complete redress. And Lord *Loughborough C.* in the case of *Bates v. Graves*, 2 Ves. jun. 295., "When the court of Chancery has declared a deed to be set aside for fraud and imposition, I must suppose that it would be equally set aside at law upon pleading to it." For courts of law relieve by making void the instrument obtained by fraud. Wood's Inst. 296.]

It hath however been doubted, whether a court of equity could give relief on the statutes which make conveyances and dispositions fraudulent against purchasers and creditors, being introductive of new laws. But it is now settled, that such relief may be proper in equity, and that directing an issue to be tried at law is only discretionary in the court.

Pr. Ch. 14.
2 Vern. 261.
436. 1 Cox,
445.

A. recovers a judgment against the defendant's father, and the plaintiff (the sheriff's bailiff) levied 24*l.* of goods in possession of the

Pr. Ch. 233.
Kent v. Bridge-
man.

the defendant's father; the defendant brought trover against the plaintiff, pretending the goods to be his, because the landlord had seized them for rent, and sold them to him; but on evidence the sale was proved fraudulent, and that the father was in possession all along, and paid taxes for the farm and goods, &c. and therefore the judge gave directions to the jury to find for the defendant at law; but because he had not proved a copy of the judgment, as it was holden he ought, for that only reason the jury found against him; and he brought his bill for relief; and a demurrer to it on the arguing was over-ruled; then by answer he insisted upon his property under the bill of sale and recovery at law, where the matter is properly triable, and relied on that without examining any witnesses; but the plaintiff fully proved his case as before, and that the judge altered his directions only for want of proof of the judgment, and disproved the defendant's answer in some particulars; and a perpetual injunction was granted against the judgment, and the defendant to pay costs; for though it were examinable at law, so it was in equity too; and the plaintiff having set out the whole matter, and proved it to be true, if it were untrue the defendant might have disproved it.

Archer v.
Mosse,
2 Vern. 8.
Stephenton v.
Gardiner,
2 P.Wms.286.
(a) But though
a will gained by fraud, and proved in the spiritual court, cannot be controverted in equity; yet if the party, claiming under such will, comes for any aid in equity, he shall not have it.
2 Vern. 76.

But it hath been holden, that a will relating to the personal estate cannot be set (a) aside in a court of equity for fraud and imposition, let the fraud be ever so great or so strongly proved; and that this is a matter properly cognizable in the spiritual court.

2 Vern. 700.
Pr. Ch. 123.

It was once holden, that a will relating to the real estate, as well as a deed, may be set aside in equity, for fraud and circumvention; as, if a man agrees to give the testator 2000*l.* in bank bills, upon condition he devise his estate to him, and on the delivery of such bills he makes his will, and devises his estate to him, and the bills prove to be forged and counterfeit.

Eq. Ca. Abr.
406. [Kerrick
v. Bransby,
3 Br. P.C.
358., and
Webb v. Claverden, 2 Atk. 424.

But it hath been lately resolved in the House of Lords, that a will of a real estate could not be set aside in a court of equity for fraud or imposition, but must first be tried at law on *devisavit vel non*, being matter proper for a jury to inquire into.

Bennet v. Vade, *id.* 324. Anon. 3 Atk. 17. Bates v. Graves, 2 Ves. jun. 287.]

(E) Where a Wrong-doer is further punishable than by making void the fraudulent Act.

Cro. Ja. 497.
2 Ro. Abr. 78.
2 Ro. Rep. 107.
Keb. 849.
6 Mod. 42.
Sid. 312. 431.

IT is clear from many instances, that gross frauds are punishable by way of indictment or information; such as playing with false dice, causing an illiterate person to execute a deed to his prejudice, levying a fine in another's name, &c.; and that for these and such like offences the party may be punished not only with

with fine and imprisonment, but also with such further infamous punishment as the judges in their discretion shall think proper. Noy, 99. 103. Moore, 630. Cro. Eliz. 531. Mod. 46. 2 Jon. 64. Ld. Raym. 865. Hawk. P. C. c. 71.

But it hath been holden, that the deceitful receiving of money from one man for another's use, upon a false pretence of having a message and order to that purpose, is not punishable by any criminal prosecution, because it is accompanied with no manner of artful contrivance, but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be sufficient security. 6 Mod. 105. Salk. 379. 5 Mod. 18. R. v. Bazeley, 2 Leach's Ca. 835.

But by the 33 H. 8. c. 1. it is ordained and enacted, "That if any person or persons, of what estate or degree soever he or they be, falsely and deceitfully obtain, or get into his or their hands or possession any money, goods, chattels, jewels, or other things of any other person or persons, by colour or means of any such false token, or counterfeit letter, made in any other man's name, as is aforesaid, that then every such person and persons so offending, and being thereof lawfully convicted by witnesses taken before the lord chancellor of England for the time being, or by examination of witnesses or confession taken in the Star-chamber at Westminster before the King's most honourable council, or before the justices of assise in their circuit for the time being, or before the justices of peace in any part of the King's dominion in their general sessions, or by action in any of the King's courts of record; shall have and suffer such correction and punishment by imprisonment of body, setting upon the pillory, or otherwise, by any (a) corporal pain, except pains of death, as shall be to him or them limited, adjudged, or appointed by the person and persons before whom he shall be so convict of the said offences or any of them."

(a) It is said, that the offender cannot be fined in a prosecution upon this

statute, because it is expressly ordained that some corporal punishment shall be inflicted, and no other is mentioned. 3 Inst. 123. But in Cro. Car. 564. there is a precedent, by which it appears, that one convicted on such a prosecution hath been adjudged not only to stand in the pillory, but also to pay a fine of 500l. and to be bound with sureties to his good behaviour.

And it is further enacted by the said statute, "That as well the justices of assise for the time being, as also two justices of peace in every county, whereof one to be of the *quorum*, shall have full power and authority to call and convene by process or otherwise, to the said assises or general sessions, any person or persons being suspected of any of the offences aforesaid, and to commit him or them to ward, or let him or them to bail, till the next assises or general sessions, there to be examined and further to be ordered by their discretion as is above said."

And by the 27 Eliz. c. 4. § 3., the same *mutatis mutandis* is enacted as to fraudulent conveyances to deceive purchasers.

[It is also enacted by 30 Geo. 2. c. 24. "That all persons who knowingly and designedly by false pretences shall obtain from any person money, goods, wares, or merchandizes, with

|| Upon this statute no *certiorari* lies. R. v. Smith, Cowp. 24.||

"intent to cheat and defraud any person or persons of the same, shall on conviction be put in the pillory, or publicly whipped, or fined and imprisoned, or transported, for the term of seven years, as the court shall in discretion think fit."]

|| By 52 G. 3. c. 64. the 30 G. 2. c. 24. is extended to any bond, bill of exchange, bank note, promissory note, or other security for payment of money, or delivery or transfer of goods, or other valuable thing.||

R. v. Mason,
2 T. R. 581.
R. v. Munoz,
2 Str. 1127.

[In an indictment upon the statutes both of 33 H. 8. & 30 G. 2., the false pretences and false tokens made use of by the defendant must be set forth: if they are not, it is error, for which a judgment against the defendant will be reversed.]

R. v. Airey,
2 East, 30.

|| But, if the pretences be stated, and the truth of them be negatived, it is sufficient, though it be not in terms alleged, that the defendant *falsely* pretended.

2 East, P. C.
686. Leach's
Ca. 499.

The statute of 30 G. 2. applies to all cases where goods are obtained by false pretences of any kind; but both that statute and the statute of 33 H. 8. are confined to cases where credit is obtained in the name of a third person, and do not extend to a case, where a man on his own account gets goods with an intention to steal them; where an original intent to steal appears, the statutes do not apply; where no such intent appears, if the means mentioned in the statutes are made use of, the legislature has made the offender answerable criminally, who before, by the common law of the land, was answerable only civilly. Such was the opinion given by the judges in considering the case of the *King v. Pares*.

R. v. Young,
2 T. R. 505.
1 Leach's Ca.
505. S. C.

Although to constitute an offence within the statute of 30 G. 2., the money or goods must be obtained by a false pretence with an intent to defraud; yet the pretence may relate to a future transaction; and if made by one in the presence of and in concert with others, they may be all included jointly in the same indictment.||

By the 13 Eliz. c. 5. § 2. it is enacted, "That all and every the parties to such fained, covinous, or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, and other things before expressed in the statute, and being privy and knowing of the same, or any of them, which shall wittingly and willingly put in ure, avow, maintain, justify, or defend the same, or any of them, as true, simple, and done, had, or made *bonâ fide* and upon good consideration; or shall alien or assign any the lands, tenements, goods, leases, or other things, before mentioned, to him or them conveyed, or any part thereof, shall incur the penalty and forfeiture of one year's value of the said lands, tenements, and hereditaments, leases, rents, commons, or other profits of or out of the same, and the whole value of the said goods and chattels, and also so much money, as are or shall be contained in any such covinous and fained bond; the one moiety whereof to be to the queen's majesty, her heirs

“ heirs and successors, and the other moiety to the party or
 “ parties grieved by such fained and fraudulent feoffment, gift,
 “ grant, alienation, bargain, conveyance, bonds, suits, judg-
 “ ments, executions, leases, rents, commons, profits, charges,
 “ and other things aforesaid, to be recovered in any of the
 “ queen’s courts of record, by action of debt, bill, plaint, or
 “ information, wherein none essoign, protection, or wager of
 “ law shall be admitted for the defendant or defendants; and
 “ also being thereof lawfully convicted, shall suffer imprison-
 “ ment for one half year without bail or mainprize.”

To an information brought in *London* on the aforesaid act for justifying *apud L.* of a fraudulent gift of goods made by *A.* to the defendant to defraud the plaintiff of his debt, the defendant saith, that *A.* gave these goods to him at *C. bond fide*, and that he justified the gift there, and traverses the justifying it at *L.* and ruled to be no plea; for 31 Eliz. c. 5. restrains common informers to bring their actions only in the proper county where the offence was done; yet that does not extend to a party grieved, but that he may inform in what county he pleases, for he is not a common informer.

Dyer, 351.
 pl. 23.
 2 Leon. 8.
 Cro. Eliz. 645.

¶ By 50 G. 3. c. 59., “ If any person or persons to whom
 “ any money or securities for money shall be issued for publick
 “ services, shall from and after the passing of this act embezzle
 “ such money, or in any manner fraudulently apply the same
 “ to his own use or benefit, or for any purpose whatever except
 “ for publick services, every such person so offending, and being
 “ thereof duly convicted according to law, in any part of the
 “ United Kingdom, shall be adjudged guilty of a misdemeanor,
 “ and shall be sentenced to be transported beyond the sea, or to
 “ receive such other punishment as may by law be inflicted on
 “ persons guilty of misdemeanors, and as the court before
 “ which such offenders may be tried and convicted shall
 “ adjudge.”

By § 2., “ If any such officer, collector or receiver so en-
 “ trusted with the receipt, custody or management of any part
 “ of the publick revenues, shall knowingly furnish false state-
 “ ments or returns of the sums of money collected by him or
 “ entrusted to his care, or of the balances of money in his
 “ hands or under his controul, such officer, collector or
 “ receiver so offending, and being thereof convicted, shall be
 “ adjudged guilty of a misdemeanor, and shall be adjudged to
 “ suffer the punishment of fine and imprisonment, at the
 “ discretion of the court, and be rendered for ever incapable of
 “ holding or enjoying any office under the crown.”

By 52 G. 3. c. 63., “ If any person or persons with whom
 “ (as banker or bankers, merchant or merchants, broker or
 “ brokers, attorney or attornies, or agent or agents of any de-
 “ scription whatsoever) any ordnance debenture, exchequer bill,
 “ navy, victualling, or transport bill, or other bill, warrant, or
 “ order for the payment of money, state lottery ticket or certi-
 “ ficate, seaman’s ticket, bank receipt for payment of any loan,
 “ India

“ India bond, or other bond, or any deed, note, or other security for money, or for any share or interest in any national stock or fund of this or any other country, or in the stock or fund of any corporation, company, or society established by act of parliament or royal charter, or any power of attorney for the sale or transfer of any such stock or fund, or any share or interest therein, or any plate, jewels, or other personal effects, shall have been deposited, or shall be or remain for safe custody, or upon or for any special purpose, without any authority, either general, special, conditional, or discretionary, to sell or pledge such debenture, bill, warrant, order, state lottery ticket or certificate, seaman’s ticket, bank receipt, bond, deed, note, or other security, plate, jewels, or other personal effects, or to sell, transfer, or pledge the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, shall sell, negotiate, transfer, assign, pledge, embezzle, secrete, or in any manner apply to his or their own use or benefit, any such debenture, bill, warrant, order, state lottery ticket, or certificate, seaman’s ticket, bank receipt, bond, deed, note, or other security, as hereinbefore mentioned, plate, jewels, or other personal effects, or the stock or fund, or share or interest in the stock or fund to which such security or power of attorney shall relate, in violation of good faith, and contrary to the special purpose, for which the things hereinbefore mentioned, or any or either of them, shall have been deposited, or shall have been or remained with or in the hands of such person or persons, with intent to defraud the owner or owners of any such instrument or security, or the person or persons depositing the same, or the owner or owners of the stock or fund, share or interest, to which such security or power of attorney shall relate, every person so offending in any part of the United Kingdom of *Great Britain* and *Ireland*, shall be deemed and taken to be guilty of a misdemeanor, and being thereof convicted according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on a person or persons guilty of a misdemeanor, and as the court before which such offender or offenders may be tried and convicted shall adjudge.”

By § 2. reciting “ That it is usual for persons having dealings with bankers, merchants, brokers, attornies, and other agents, to deposit or place in the hands of such bankers, merchants, brokers, attornies, and other agents, sums of money, bills, notes, drafts, cheques, or orders for the payment of money, with directions or orders to invest the monies so paid, or to which such bills, notes, drafts, cheques, or orders relate, or part thereof, in the purchase of stocks or funds, or in or upon government or other securities for money, or to apply and dispose thereof in other ways, or for other purposes; and it is expedient to prevent embezzlement and malversation in such cases also; it is enacted, that if any such

“ banker, merchant, broker, attorney, or other agent, in
“ whose hands any sum or sums of money, bill, note, draft,
“ cheque, or order for the payment of any sum or sums of mo-
“ ney shall be placed, with any order or orders in writing, and
“ signed by the party or parties who shall so deposit or place
“ the same, to invest such sum or sums of money or the money
“ to which such bill, note, draft, cheque, or order as afore-
“ said, shall relate, in the purchase of any stock or fund, or in
“ or upon government or other securities, or in any other way
“ or for any other purpose specified in such order or orders,
“ shall in any manner apply to his or their own use and benefit,
“ any such sum or sums of money, or any such bill, note, draft,
“ cheque, or order for the payment of any sum or sums of
“ money as hereinbefore mentioned, in violation of good faith
“ and contrary to the special purpose specified in the direction
“ or order in writing hereinbefore mentioned, with intent to
“ defraud the owner or owners of any such sum or sums of mo-
“ ney, or order for the payment of any sum or sums of money ;
“ every person so offending in any part of the United Kingdom,
“ shall in like manner be deemed and taken to be guilty of a
“ misdemeanor, and being convicted thereof according to law,
“ shall incur and suffer such punishment as is hereinbefore
“ mentioned.”

§ 3. “ Provided always, That nothing herein contained shall
“ extend or be construed to extend, to prevent any of the per-
“ sons hereinbefore mentioned from receiving any money
“ which shall be or become actually due and payable upon or
“ by virtue of any of the instruments or securities hereinbe-
“ fore mentioned, according to the tenor and effect thereof, in
“ such manner as he or they might have done, if this act had
“ not been made.”

§ 4. “ Provided also, That the penalty by this act an-
“ nexed to the commission of any offence intended to be
“ guarded against by this act, shall not extend or be construed
“ to extend to any partner or partners, or other person or per-
“ sons of or belonging to any partnership, society, or firm, ex-
“ cept only such partner or partners, person or persons, as
“ shall actually commit or be accessory or privy to the commis-
“ sion of such offence ; any thing herein contained to the con-
“ trary in anywise notwithstanding.”

§ 5. “ Provided also, That nothing in this act contained,
“ nor any proceeding, conviction, or judgment to be had or
“ taken thereupon, shall hinder, prevent, lessen, or impeach
“ any remedy at law or in equity, which any party or parties
“ aggrieved by any offence against this act might or would have
“ had, or have been entitled to if this act had not been made,
“ nor any proceeding, conviction, or judgment had been had
“ or taken thereupon ; but nevertheless the conviction of any
“ offender against this act shall not be received in evidence in
“ any action at law, or suit in equity, against such offender ;
“ and further, that no person shall be liable to be convicted by
“ any

“ any evidence whatever, as an offender against this act, in
 “ respect of any act, matter, or thing done by him, if he shall
 “ at any time previously to his being indicted for such offence,
 “ have disclosed such act, matter, or thing, on oath, under or
 “ in consequence of any compulsory process of any court of
 “ law or equity, in any action, suit, or proceeding, in or to
 “ which he shall have been a party, and which shall have been
 “ *bonâ fide* instituted by the party aggrieved by the act, matter,
 “ or thing, which shall have been committed by such offender
 “ aforesaid.”

§ 6. “ Provided always, That nothing in this act contained
 “ shall extend to or affect any person or persons being a trustee
 “ or trustees in or under any marriage settlement, will, or other
 “ deed or instrument, or being a mortgagee or mortgagees of
 “ any property whatsoever, whether real or personal, in respect
 “ of any act or acts done by any such person or persons in re-
 “ lation to the property comprized in or affected by any such
 “ trust or mortgage as aforesaid.”

§ 7. “ Provided always, That every person who shall commit,
 “ in *Scotland*, any offence against this act, which by the pro-
 “ visions thereof is constituted a misdemeanor, shall be liable
 “ to be punished by fine and imprisonment, or by either of
 “ them, or by transportation for any term not exceeding
 “ fourteen years, as the judge or judges before whom such of-
 “ fender shall be tried and convicted may direct.”

§ 8. “ Provided always, That nothing herein contained shall
 “ extend to restrain any banker, merchant, broker, attorney, or
 “ other agent, from selling, negotiating, transferring, or other-
 “ wise disposing of any securities, property, or other effects as
 “ aforesaid, in their custody or possession, upon which they shall
 “ have any lien, claim, or demand, which by law entitles them
 “ to sell or dispose thereof, unless such sale, transfer, or other
 “ disposal shall extend to a greater number or to a greater
 “ part of such securities, property, or other effects as afore-
 “ said than shall be requisite or necessary for the purpose
 “ of paying or satisfying such lien, claim, or demand; any
 “ thing hereinbefore contained to the contrary thereof in any-
 “ wise notwithstanding.”

END OF THE THIRD VOLUME.

such tenant, or any one claiming under him, shall refuse to deliver up possession after demand in writing made and signed by the landlord or his agent, and served upon or left at the dwelling-house of a tenant, and the landlord shall proceed by ejectment, it shall be lawful for him, at foot of the declaration, to address a notice to the tenant, requiring him to appear on the first day of the next term, to be made defendant and find bail, if ordered by the court; and on the appearance of the party it shall be lawful for the landlord producing the lease or agreement, or some counterpart, and proving the execution, and that the premises have been actually enjoyed under it, and that the tenant's interest has expired or been determined by notice to quit and possession demanded, to move that the tenant should undertake to give plaintiff a judgment of the term preceding trial, and enter into recognizances to pay the costs and damages to be recovered by plaintiff, and the court shall, if they see fit, make such rule absolute.

Doe dem.
Bradford v.

Roe, 5 Barn. & A. 770. Doe dem. Phillips v. Roe, 5 Barn. & A. 766.; and see 6 Moo. R. 54.

See 1 M'Clel.
492.

A tenancy, by virtue of an agreement in writing, for three months certain, is a tenancy "for a term" within the statute.

It is not necessary to express in the rule *nisi* the amount of security required.

Doe dem. Pen-
nington v.

Roe, 7 Barn. & C. 2.

1 Wm. 4. c. 70.
§ 36.

A tenancy for years determinable on lives is not a holding for any "number of years certain" within this act.

By stat. 1 Will. 4. c. 70. § 36., after reciting the delays suffered by landlords in recovering possession of their lands, it is enacted, "that in all actions of ejectment to be brought in any of his majesty's courts at *Westminster*, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord, in or after *Hilary* or *Trinity* terms respectively, it shall be lawful for the lessor of the plaintiff in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a declaration in ejectment, entitled of the day next after the day of the demise in such declaration, whether the same shall be in term or in vacation, with a notice thereunto subscribed, requiring the tenants in possession to appear and plead thereto, within ten days, in the court in which such action may be brought; and proceedings shall be had on such declaration, and rules to plead entered and given, in such and the same manner, as nearly as may be, as if such declaration had been duly served before the preceding term: provided always, that no judgment shall be signed against the casual ejector until default of appearance and plea within such ten days, and that at least six clear days' notice of trial shall

"be

" be given to the defendant before the commission day of the
 " assizes at which such ejectment is intended to be tried ; provided
 " also, that any defendant in such action may, at any time be-
 " fore the trial thereof, apply to a judge of either of his majesty's
 " superior courts at *Westminster*, by summons in the usual man-
 " ner, for time to plead, or for staying or setting aside the pro-
 " ceedings, or for postponing the trial until the next assizes ;
 " and that it shall be lawful for the judge, in his discretion, to
 " make such order in the said cause as to him shall seem ex-
 " pedient."

By § 37. it is enacted, " that in making up the record of the
 " proceedings on any such declaration in ejectment, it shall be
 " lawful to entitle such declaration specially of the day next
 " after the day of the demise therein, whether such day shall
 " be in term or in vacation, and no judgment thereon shall be
 " avoided or reversed by reason only of such special title."

§ 37.

And by § 38. it is enacted, " that in all cases of trials of
 " ejectments at *nisi prius*, where a verdict shall be given for the
 " plaintiff, or the plaintiff shall be nonsuited for want of the
 " defendant's appearance to confess lease, entry, or ouster, it
 " shall be lawful for the judge before whom the cause shall be
 " tried, to certify his opinion upon the back of the record, that
 " a writ of possession ought to issue immediately, and upon
 " such certificate a writ of possession may be issued forthwith ;
 " and the costs may be taxed, and judgment signed and executed
 " afterwards at the usual time, as if no such writ had issued :
 " provided always, that such writ, instead of reciting a recovery
 " by judgment in the form now in use, shall recite shortly that
 " the cause came on for trial at *nisi prius* at such a time and
 " place, and before such a judge, (naming the time, place, and
 " judge,) and that thereupon the said judge certified his opinion
 " that a writ of possession ought to issue immediately."

§ 38.

N.B. The 3^d does not apply to London & Middlesex before a Justice of the Peace.
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(D) Of the Declaration in the Ejectment.

2. *What shall be a sufficient Description of the Premises.*

Page 15.

IT is no error if the declaration in one count is for a
 message and *tenement*, for the damages may be referred to the
 message ; *aliter* if they were in separate counts.

*Doe v. Dye-
ball, 8 Barn. &
C. 70.*

It is not necessary to state the premises to be in a parish, for
 if described as in the parish of *A.* and *B.* and there is no such
 parish, the word parish is surplusage.

*Goodtitle v.
Walter,
4 Taunt. 671.*

3. *Of the Demise and Right of Entry in the Lessor of the Plaintiff, and of the Ouster.*

Page 20.

WHERE a copyholder has been admitted tenant, and done
 fealty to the lord, he is estopped in an action by the lord for a

*Doe v. Bud-
den, 5 Barn.
& A. 626.*

forfeiture from shewing that the legal estate was in a trustee, and not in the lord, at the time of the admittance.

Doe v. Gartham, 1 Bing. 357.

The visitors and feoffees of a school who dismiss the schoolmaster for misconduct, cannot maintain ejectment to recover the house till they have summoned the master before them, and determined his freehold interest.

Doe dem. Banks v. Booth, 2 Bos. & Pull. 219.

The trustees under a turnpike act having demised to one of several mortgagees such proportion of the tolls arising from the road, and of the toll-houses and toll-gates, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to recover the interest due to him; it was held, that he might well maintain the action, notwithstanding a clause in the act that all the mortgagees should be creditors on the tolls in equal degree.

Doe dem. Pitcher v. Mitchell, 1 Bro. & Bing. 11. 3 Moo. 229.; and see 8 Taunt. 241.

A. and *B.*, tenants in common, having agreed to divide their property, and that *Blackacre* should belong to *A.*; the occupier of *Blackacre*, who, after this agreement, had paid his whole rent to *A.*, was held to have admitted *A.*'s title, and on ejectment brought by *A.* could not object that the partition deed was not executed.

Barwick v. Thompson, 7 Term R. 488.

If *B.*, claiming under *A.*, let lands for years to *C.* and die, and *A.* afterwards bring an ejectment against *C.*; *C.* cannot dispute the title of *A.*

Doe dem. Barber v. Lawrence, 4 Taunt. 23.

A right of entry cannot be reserved to a stranger to the estate; or to a *cestui que trust*, where the legal estate is in the trustee.

Doe v. Wheeler, 4 Bing. 276.

But where lessee made an under-lease, containing a proviso that the lessor *and* lessee might re-enter for breach of covenant, it was held that the lessee might *alone* maintain ejectment without joining the lessor.

Doe v. Brewer, 4 Maule. & S. 500.

The lessor of the plaintiff cannot release the action.

Doe dem. Grundy v. Clarke, 14 East, 488.

Where a pauper had been put in possession of a cottage forty years ago by the then existing overseers, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers, till two years ago, when the pauper disposed of it to the defendant, and went away; held, that the existing overseers could not maintain ejectment, having no derivative title from their predecessors (being no corporation), and the pauper having done nothing to recognize his holding under them.

Doe dem. Newby v. Jackson, 1 Barn. & C. 448.

Where an agreement was made between *A.* and *B.* that *A.* should sell premises to *B.* if he had a good title to them, and that *B.* should have the possession from the date of the agreement, it was held that *A.* could not maintain ejectment against *B.* without a notice to quit, although the object of the action was to try the title.

Doe dem. Lockwood v. Clarke, 8 East R. 185.

Where a lease was for twenty-one years, if the tenant, his executors, &c. should so long continue to inhabit the farmhouse and occupy the land, and should not assign or part with the same; it was held, that the tenant having become bankrupt, and the assignees having sold the lease, and the bankrupt being

out of the farm, the landlord might bring ejectment with an actual re-entry.

Where there was a proviso for re-entry, on the tenant's assigning without licence, it was held that a trust deed executed by the tenant, conveying all his real and personal property to trustees for his creditors, on which a commission of bankruptcy was sued out, was not a valid assignment creating a forfeiture, since the deed was void and an act of bankruptcy.

Doe v. Powel,
5 Barn. & C.
308.

One put into possession upon an agreement for purchase, cannot be ousted by an ejectment before his lawful possession is determined by demand of possession, or otherwise.

Right v. Beard,
13 East R. 210.

Where a defendant enclosed a piece of waste, and occupied it thirty years without paying rent, and then on demand by the occupier of the adjacent land paid 6*d.* per acre for three years, this was held conclusive to shew that the occupation began by permission, and to support an ejectment.

Doe v. Wil-
kinson,
3 Barn. & C.
412.

After trial the court will not relieve the tenant by staying proceedings in the ejectment, on payment of arrears of rent and costs.

Doe v. Mas-
ters, 2 Barn. &
C. 490.; and
see 7 East R.
363.

The court will not stay proceedings in an ejectment brought by the mortgagee against the mortgagor, on the latter paying principal, interest, and costs, if he has agreed to convey the equity of redemption to the mortgagee.

Goodtitle v.
Pope, 7 Term
R. 185.

The court will not set aside a verdict and judgment in order to let a party in to defend, though he set forth a clear title and offer to pay costs.

Doe dem.
Ledger v. Roe,
3 Taunt. R.
506.

After verdict in ejectment against a tenant for not quitting pursuant to notice, a subsequent distress for rent due after the verdict, does not waive the notice.

Doe v. Darley,
8 Taunt. 538.

The lessor of plaintiff is bound, at the trial, to prove the defendant in possession of the premises which he seeks, although defendant has entered into the general consent-rule to confess lease, entry, and ouster.

Goodtitle v.
Rich, 7 Term
R. 527.; and
what is evi-
dence of being

tenant in possession, see 2 Barn. & A. 371.

Defendant, who held under a tenant for life, received on her death a letter from the lessor of the plaintiff, claiming as heir, and demanding rent. Defendant answered, that he held the premises as tenant to S., — that he had never considered the lessor of the plaintiff as his landlord, — that he should be ready to pay the rent to any one who should be proved entitled to it; but that, without disputing the lessor's pedigree, he must decline deciding on his claim without more satisfactory proof in a legal manner: held, that this was a disclaimer of lessor of plaintiff's title, and that notice to quit was unnecessary.

Doe v. Frowd,
4 Bing. R.
557.

Where a lease contained a general covenant to repair, and also a covenant to repair within three months after notice, and a proviso for re-entry for nonperformance of the covenants, and the landlord served the tenant with a notice to repair *forthwith*; it was held, that he might bring ejectment on the proviso, before the three months had expired.

Doe v. Paine,
2 Camp. 520.

Doe v. Meux,
4 Barn. & C.
606.

But where the landlord gave a notice to *repair within three months*, according to the covenant, it was held, he was precluded from insisting on the forfeiture till the three months expired.

Doe v. Bond,
5 Barn. & C.
855.

Where a lease contained a proviso for re-entry if the lessee committed waste to the value of 10*l.*, and the tenant pulled down some old buildings of more than 10*l.* value, and substituted others of a different description; it was held, that the waste contemplated in the proviso, was *waste producing an injury to the reversion*, and that it was a question for the jury, whether such waste had been committed.

Doe v. Breach,
6 Esp. 106.

Ejectment may be maintained on a power of re-entry in an *agreement* as well as in a deed.

Doe v. Watt, 8 Barn. & C. 508.

(a) Fox v.
Swann, Sty.
482. Good-
right dem.
Walter v. Da-
vids, Cowp.
803. The au-
thority of the
case Doe dem.
Scott v. Miller,
2 C. & P. seems

The forfeiture of a lease by breach of a covenant or condition may be waived, in like manner as a forfeiture for nonpayment of rent, or a notice to quit; that is to say, if the landlord do any act, with knowledge of the breach, which can be considered as an acknowledgment of a tenancy still subsisting; as, for example, if he receive rent accruing subsequently to the forfeiture (a), unaccompanied by circumstances which shew a contrary intention. (b)

very doubtful. See Adams on Eject. 192.

(c) Doe dem.
Boscawen v.
Bliss, 4 Taunt.
735.

But a waiver of one forfeiture incurred by breach of covenant will not be a waiver of a second forfeiture incurred by another breach of the same covenant; nor, where the breach is a continuing breach, will the landlord be precluded from taking advantage of it, by having received rent, &c. after the breach was originally committed. Thus where a right of re-entry was reserved on a breach of covenant not to under-let, it was held that the lessor was entitled to re-enter upon a second under-letting, although he had waived his right so to do upon the first. (c) So also where the forfeiture incurred was by using rooms in a house in a manner prohibited by the lease, it was held that such user was a continuing breach, and that the landlord might recover after receiving rent, provided the user continued after such receipt. (d) So also where a lease of coal mines reserved a certain rent, and contained a proviso that the lease should be void if the tenant should cease working at any time two years, and the tenant did cease working two years and then paid rent, but did not resume the working; it was held, that this was a continuing breach, and that ejectment might be maintained for the ceasing to work after the payment of the rent. (e)

(d) Doe dem.
Ambler v.
Woodbridge,
9 Barn. & C.
376.

(e) Doe dem.
Bryan v.
Banks, 4 Barn.
& A. 401.

But in a case where a lease contained a covenant to repair, with a right of re-entry in case the lessee should not repair within three months after notice, and the landlord gave notice, and after the three months had expired received rent accruing after such expiration, and then brought an ejectment, the premises continuing out of repair, and the jury found a verdict for the defendant, the Court of King's Bench refused to set the verdict aside, notwithstanding the opinion of Lord *Kenyon*, as expressed on

on the trial, that the forfeiture had not been waived. And it seems the jury were right, for the power of re-entry was not given for breach of the general covenant to repair, but "in case the lessee should not repair within three months after notice;" the receipt of rent therefore, after the expiration of the notice to repair, was a waiver of that notice, and consequently a fresh notice was necessary to bring the party within the penalty of the proviso. (a)

(a) Fryett dem.
Harris v. Jeffreys, 1 Esp.
593.

Where the defendant, being the mortgagee of a term, purchased the mortgagor's whole interest in the premises in consequence of the lessor's advice, "to take to the premises, and finish the buildings," given after a right of re-entry had accrued for the non-completion of the buildings; it was held, that the lessor's right of re-entry was not thereby waived, but suspended only for such reasonable time after the purchase as might be required to complete the buildings, and that ejectment might be maintained for the forfeiture after that time had elapsed, against the purchaser, who had proceeded in part to finish, but had never wholly completed the buildings, or put them in a habitable state.

Doe dem.
Soré v. Ekins,
1 Ry. & Moo.
29.

A lease contained a covenant on the part of the lessee to insure the premises in the joint names of himself and the lessor, and in two-thirds of the value of the premises demised. Both parts of the lease continued in the possession of the lessor, and an abstract only was delivered to the lessee, in which it was stated, that the tenant was to insure the premises in two thirds of the value, but it was not stated in whose name or names the policy was to be effected. The lessee insured in his own name only, and, as was contended, to a less amount than two thirds of the value of the premises, but to the same amount as the lessor had himself insured the premises during two years of the lease, when the lessee had been in embarrassed circumstances. Lord *Tenterden* C. J. ruled, that although there was no dispensation or release from the covenant, yet if the conduct of the lessor of the premises had been such as to induce a reasonable and cautious man to believe, that he would do all that was necessary or required of him, by insuring in his own name, and to the amount proved, he could not proceed against his lessee for a forfeiture; and he left to the consideration of the jury, the question whether such had been the conduct of the lessor; the jury found a verdict for the defendant.

Doe dem.
Knight v.
Rowe, 1 Ry. &
Moo. 343.

A landlord will not lose his right to re-enter by merely lying by (however long the period), and witnessing the act of forfeiture; but it seems that if, with full knowledge thereof, he permits the tenant to expend money in improvements, it is a circumstance from which the jury may presume a waiver, as well as ground for application to a court of equity for relief.

Doe dem.
Sheppard v.
Allen, 3 Taunt.
78.

(G) Of the Writ of Execution.

Page 32.

Doe dem. Emmett v. Thorn, 1 Maule & S. 425.

IF the sheriff sell a term under a *fi. fa.* which is afterwards set aside, and an order made to pay the produce of the sale over to the debtor, such debtor cannot maintain ejectment against the purchaser to recover the term.

Doe v. Witherwick, 5 Bing. 11.

Several crops having been taken under an *hab. fac. poss.* issued on an ejectment against a tenant for holding over, the Common Pleas refused a rule ordering the lessors of plaintiff to pay over the value after deducting rent: the tenant if he had a claim to the crops might take his legal remedy.

Doe dem. Lucy v. Bennett, 4 Barn. & C. 897.

Where in ejectment, a landlord appears and defends, after verdict and judgment against the landlord, execution may issue without any further order of the court.

Doe v. Grubb, 5 Barn. & C. 457.

Where *A.* was admitted to defend as landlord, and died before the termination of the suit, having devised all his real estate to *B.*, and the statute of limitations prevented the lessor from bringing a fresh action, the court gave him leave to sign judgment against the casual ejector in the old suit, and issue execution unless the devisee would defend, it appearing that the lessor had not improperly delayed proceedings.

ELECTION.

(E) Where a Party shall be put to his Election or not.

Page 50.

Pieters v. Thompson, Coop. 294.; and see 1 Ves. & B. 551. 3 Ves. & B. 9. 19 Ves. 277.

A PLAINTIFF suing in equity and in a foreign court of law shall be put to his election, and so also of proceeding at law and in equity.

Rendlesham v. Woodford, 1 Dow. P. C. 249. 18 Ves. 209.

Where a testator by his will gave various legacies to his heir at law, and afterwards contracted for the purchase of several freehold estates which, by a clause in his will, it appeared he clearly intended should go to his executors for the purposes of his will, and not to his heir; it was held, that the heir should elect, and not be permitted to take the estates and the benefits under the will also.

Green v. Green, 2 Meriv. R. 86.; and see Gretton v. Hayward, 1 Swanst. 409.

Where by settlement on the marriage of *G.* with the plaintiff, certain estates to which *G.* was entitled as tenant in tail in remainder were settled, as to part, to the use of *G.* for life, remainder to the plaintiff for life, remainder to the first and other sons of the marriage; and as to part to *G.* for life, remainder to the first and other sons in tail; and other estates to which plaintiff, the wife, was entitled in fee simple were by the same settlement conveyed to similar uses, and upon the death of *G.*, the defendant, (his only son and heir) entered on the estates to which he was entitled as tenant in tail under the settlement, and brought ejectment to recover those to which his father was entitled as tenant in tail at the time of the settlement, and into which

which the plaintiff had entered on his death as tenant for life under the settlement, as not having been conveyed by fine and recovery to the uses of the settlement; it was held, that the defendant was bound to make his election, and could not take the estate limited to him under the settlement, and at the same time proceed to eject the plaintiff claiming a life interest under the same instrument. *Qu.* Whether a party electing between two beneficial interests is bound to give up one absolutely, or only to make compensation for what he deprives another party of?

The question has arisen and has given rise to much doubt and discussion whether a party electing to retain his property against a will forfeits all the benefit of a devise in his favour under the will, or whether he only gives up so much as to compensate devisees disappointed by his election; and it has been stated as the result of the cases, 1. That in the event of election to take against the instrument, courts of equity assume a jurisdiction to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his election disappoints. 2. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the court controlled his legal right. It seems, however, that the more correct rule to be drawn from the authorities is, that the party electing against a will or instrument in all cases forfeits *in toto* the whole benefit which is given to him by that will or instrument, as infringing the implied condition of the devise or disposition in his favour, and that, instead of the property thus forfeited going as undisposed of to the heir at law, equity sequesters it for the compensation of the parties disappointed by the election. If (as of course commonly happens) the property forfeited is less than the property taken against the will, the whole forfeited by the one party goes partially to compensate the other; but if (as can seldom if ever happen) the property given up exceeds the other, then it would seem on principle the surplus would go to the heir at law, and could not be taken by the party electing as a partial benefit under the will, to which he has refused to give full effect.

Where, however, the party making the election is also the heir at law to whom the excess, if any, of the property given up would devolve, it seems that he takes the surplus as heir at law after compensation to the disappointed devisee has been made; and this instance does not break in upon the principle of absolute forfeiture ensuing from an election against the will, since the party here takes the forfeited estate in another character — that of heir.

Vane v. Dungannon, 2 Scho. & Lef. 118. *Welby v. Welby*, 2 Ves. & B. 190, 191. *Green v. Green*, 2 Meriv. 86. *Gretton v. Haward*, 1 Swanst. R. 409. *Rich v. Cockell*, 9 Ves. 369.; and see Mr. Swanston's learned note, 1 Swanst. 442., and Mr. Jacob's luminous annotation, 1 Roper, Hus. and Wife, 566.

A will unduly executed to pass real estate will not put the heir to his election.

W. 22.; and see *Stalman on Elect.* 229.

Where a widow took a specific legacy under her husband's will, *Reynolds v.*

1 Swanst. R. 442. note. See *Cowper v. Scott*, 3 P. Will. 119. *Cooke v. Hellier*, 1 Ves. 235. *Morris v. Burroughs*, 1 Atk. 404. *Pugh v. Smith*, 2 Atk. 43. *Wilson v. Mount*, 3 Ves. 194. *Wilson v. Townsend*, 2 Ves. 697. *Broome v. Monck*, 10 Ves. 609. *Webster v. Mitford*, 2 Eq. Ca. Ab. 563. *Streatfield v. Streatfield*, Ca. temp. Talbot, 176. *Bor v. Bor*, 3 Bro. P. C. 167. *Ardesoife v. Bennett*, 2 Dick. 463. *Lewis v. King*, 2 Bro. C. C. 600. *Pulteney v. Darlington*, 2 Ves. jun. 566. *Gardner v. Fell*, 1 Jac. &

Torin, 1 Russ. R. 129.; and see Chalmers v. Storil, 2 Ves. & B. 222. Dickson v. Robinson, Jac. R. 503.

Back v. Kett, Jacob's R. 534.

Dillon v. Parker, Jac. R. 505. 1 Swanst. R. 359.

Roadley v. Dixon, 3 Russ. 192. See Coleman v. Jones, *Id.* 512.

Attorney-General v. Ld. Lonsdale, 1 Sim. R. 105.

Blommart v. Player, 2 Sim. & Stu. 597.

will, in which will he intended to include a *Scotch* heritable bond, which, however, did not pass by the will according to the *Scotch* law, and which was real property liable to the widow's terce; it was held, that the widow could not take the legacies under the will without bringing in her terce in the heritable bond to increase the general residue.

A testator having directed his executor to sell whatever real estates he might die possessed of, and having given benefits to his heir at law afterwards acquires other lands, the heir held not bound to elect.

Where parties having a right to elect between two titles, under one of which they were tenants for life, and under the other tenants in fee-simple, had continued in possession forty-three years, and executed deeds, acknowledging that they held under the former title, their heir at law was precluded from claiming the fee under the latter.

A testator after bequeathing to his wife an annuity charged on his estate at *S.*, with power of entry and distress if it should be in arrear for thirty days, and giving other legacies and annuities which he charged on his lands at *S.* in aid of his personal estate, gave and devised all his real and personal property to trustees upon certain trusts; and he directed them to occupy and manage, during the minority of his son, a farm constituting the greater part of his estate at *S.*, and to let and manage the residue of his real estates, and to receive the rents of the whole of his real estates: it was held that the widow must be put to elect between her dower and the benefits given her by the will.

To raise a case of election, there must be a form of a gift as to the property which the donor had no power to dispose of.

Where it was not apparent on the face of the will, that a general devise in trust to sell was intended to include a particular estate, of which the testatrix had been wrongfully in possession up to the time of her death, the rightful owner of the estate was held not put to his election in respect of an interest bequeathed to him in the money to be produced by the sale of the estate.

ERROR.

(A) In what Cases a Writ of Error will lie.

Page 56.

Cave v. Masey, 3 Barn. & C. 735.

Evans v. Sweete, 2 Bing. R. 326.

Samuel v. Judin, 6 East R. 335.

Bird v. Pegg,

IF a defendant under terms to give judgment of the term bring a writ of error, the court will quash it.

Where a plaintiff brought a writ of error on a nonsuit, the court refused to stay execution, at least, unless some real error was pointed out.

Error does not lie on an interlocutory judgment.

Where judgment is given in an action *against* an infant, it may

may be reversed on error if the infant appeared by attorney, but *aliter* where the judgement is given in favour of the infant. 5 Barn. & A. 418.

On error assigned of a misnomer of the christian name of one of the plaintiffs below, in the warrants of attorney, it was held immaterial. De Tastet v. Rucker, 3 Bro. & B. 65. 6 Moo. 135.

It is no error to entitle the declaration generally of *Michaelmas* term, though the cause of action is stated to have accrued on the 18th *November*. Ruston v. Owston, 2 Bing. R. 469.; and see Lee v. Clarke, 2 East R. 553.

(H) How far the Writ of Error is a *Supersedeas*.

Page 87.

A WRIT of error may be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same term. Hill v. Tebb, 1 New R. 298.

It is not necessary that there should be fifteen days between the teste and return of a writ of error. Laidler v. Forster, 4 Barn. & C. 116.

A writ of error may operate as a stay of proceedings, though sued out before interlocutory judgment. Emanuel v. Martin, 2 Maule & S. 334.

If a defendant puts in sham bail in error, the plaintiff may treat them as a nullity, and sue out execution. Ward v. Levi, 1 Barn. & C. 268.

The writ is a *supersedeas* from the allowance, though not served till after execution. Meagher v. Vandyck, 2 Bos. & Pull. 570.

And though not returned. Sampson v. Brown, 2 East R. 459.

And though the plaintiff be at a distance and in ignorance of the allowance. Hawkins v. Jones, 5 Taunt. 204.

If the plaintiff in ejectment after verdict, sue out an *hab. fac. poss.* without waiting to tax his costs, the defendant's writ of error is no *supersedeas*. Doe v. Dyneley, 4 Taunt. 289.

Where the plaintiff several years after judgment brought an action on the judgment, and after judgment signed in this action, the defendant sued out a writ of error on the first judgment, this was held no *supersedeas*. Bishop v. Best, 5 Barn. & A. 275.

Where the defendant has admitted that the writ of error is for delay, it will not operate as a *supersedeas*. Hawkins v. Snuggs, 2 Maule & S. 476.

But the declaration of the defendant as to his motive in bringing a writ of error, must be made after action commenced, in order to prevent the writ being a *supersedeas*. Hamilton v. Scholefield, 6 Moo. 45.

Barnard, 4 Maule & S. 351.; and see Redford v. Garrod, 7 Taunt. 537. Eicke v. Sowerby, 1 Barn. & C. 287. Spooner v. Garland, 2 Maule & S. 474. Baskett v.

And if one of several defendants who have severed in defence sues out a writ of error, the plaintiff cannot proceed to execution because one of the other defendants makes an admission that the writ was brought for delay. Aarons v. Williams, 2 Bing. 504.

(For the 6 G. 4. c. 96. requiring bail to be given in all cases of writs of error, see tit. *Bail* (B), Vol. I. p. 461.)

(I) To

(I) To what Court a Writ of Error lies.

Page 90.

1 Will. 4. c. 70.
§ 8.

BY the late Act for the more effectual administration of justice, " writs of error upon any judgment given by any of the " Courts of King's Bench, Common Pleas, and Exchequer, " shall thereafter be made returnable only before the judges, or " judges and barons, as the case may be, of the other two " courts, in the Exchequer Chamber, any law or statute to the " contrary notwithstanding; a *transcript* of the record only " shall be annexed to the return of the writ; and the court of " error after errors are duly assigned and issue in error joined, " shall, at such time as the judges shall appoint, either in " term or vacation, review the proceedings, and give judgment, " as they shall be advised thereon; and such proceedings and " judgment, as altered or affirmed, shall be entered on the " original record, and such further proceedings as may be " necessary thereon shall be awarded by the court in which the " original record remains; from which judgment in error no " writ of error shall lie or be had, except the same be made " returnable in the High Court of Parliament." By this act, the several statutes relating to the bringing of writs of error, upon judgments in the Exchequer (*a*), seem to be virtually repealed: and though the statute 27 Eliz. c. 28. for redress of erroneous judgments in the King's Bench, upon which a writ of error lies in the Exchequer Chamber, before the justices of the Common Pleas and barons of the Exchequer, would probably be considered still in force, yet that statute is confined to the particular actions enumerated therein, and does not extend to actions commenced by original writ, nor where the king is a party. The king however not being mentioned in the late act, may still bring a writ of error in parliament, in the first instance: And writs of error *coram nobis* in the King's Bench, or *coram vobis* in the Common Pleas, and the proceedings thereon, to reverse judgments in the *same* court, for error in fact, or in the process, &c. do not seem to be affected by the provisions of the late act.

(*a*) 31 Edw. 3.
stat. 1. c. 12.
31 Eliz. c. 1.
16 Car. 2. c. 2.
20 Car. 2. c. 4.
See Tidd's
Prac. Sup. 182.

(K) Of assigning Errors.

Page 100.

Hoggett v.
Higinson,
7 Moo. 311.

WHERE a judge's order for time to plead has been obtained, the defendant cannot assign for error the want of an original writ.

French v.
Cook, 1 Taunt.
125.; and see
2 H. Black.
608.

A bill may be filed to warrant a judgment after the want of a bill has been assigned for error; for if there is a bill on the file of the proper term, the court will not enquire how it came there.

(M) Of

(M) Of the Judgment to be given on a Writ of Error.

Page 115.

THE omission of the name *James* (*William Norton* instead of *Will. James Norton*), in entering the *postea* on the finding of the jury, was held to be no ground of error.

May v. Pigé,
1 Bing. R. 514.;
and see De
Tastet v.

Rucker, 3 Bro. & B. 65. 6 Moo. 135.

Where error was assigned for entering verdict for a sum exceeding the damages in the declaration, the court allowed the plaintiff to amend the judgment and transcript in a term subsequent to that in which judgment was signed, by entering a *remittitur* for the excess.

Usher v. Dansey, 4 Maule & S. 94.

On a writ of error on a judgment, on conviction of felony at the sessions, the court will only look to the record of conviction, though the justices return also the record of a former acquittal.

Rex v. Wildey,
1 Maule & S.
183.

Judgment having been given in the C. P. for the plaintiffs, upon a special verdict in *assumpsit*, which was reversed upon writ of error in K. B., the defendant is entitled, in the latter court, not only to judgment of acquittal, but also for the costs of his defence in C. P., being the same judgment which the court below ought to have given, the defendant in such case being entitled to his costs by statute 23 H. 8. c. 15.

Gildart v.
Gladstone,
12 East R. 668.

(As to amendments after error brought, see tit. *Amendment*, Vol. I.)

ESCAPE.

(B) What Degree of Liberty, or going at large, shall be deemed an Escape.

Page 129.

IF the sheriff take the real debtor, but by a writ directing him to arrest a party of a different christian name, he is not bound to detain him in custody, and therefore is not liable to an action of escape for letting him go, though the sheriff would be justified in detaining him.

Morgans v.
Bridges, 1 Barn.
& A. 647.

A sheriff who takes a bail-bond, and on enquiry denies that he has taken one, cannot therefore be sued for an escape.

Mendez v.
Bridges,
5 Taunt. 325.

The marshal of the K. B. prison is not liable for an escape for obeying the warrant of commissioners of bankrupt, in bringing before them a bankrupt, charged in execution in his custody, in order to be examined on the second day of the meeting of the commissioners.

Spence v.
Jones, 5 Barn.
& A. 705.

If the sheriff on a *ca. sa.* receive the money from the prisoner before the return day of the writ, and liberate him before he has paid the money to the plaintiffs in the action, he is liable for an escape.

Slackford v.
Austin, 14 East
R. 468. See
6 Moo. 111.
and 6 Taunt.
490. 2 Marsh. 186.

Bail put in after the term in which the writ is returnable, is

Moses v. Nor-

ris, 4 Maule & S. 597.

Pigott v. Wilkes, 5 Barn. & A. 502.

White v. Jones, 5 East, 292.

Houlditch v. Birch, 4 Taunt. 608.

Ryland v. La-vender, 2 Bing. 65.

not an answer to an action against the sheriff for an escape brought before it was put in.

Where the sheriff arrested a party on a *ca. sa.* in a particular liberty, and without any *non omittas* clause in the writ, he was held still liable for an escape; for the arrest, though wrongful as against the bailiff of the liberty, was not void.

If the marshal discharge *B.* out of custody, on a rule for discharge entitled *A.* against *B.*, when the action in which he is in custody is *A.* against *B.* and *C.*, he is liable for an escape, for the rule is nugatory.

A sheriff who carries a prisoner taken in execution to a lock-up house within his own bailiwick, and keeps him there fourteen days before the return, is not thereby guilty of an escape; taking to a lock-up house is now warranted by usage.

If a gaoler covenant with the sheriff not to let prisoners escape, and the sheriff direct a warrant to the gaoler and *W. W.* (his turnkey), "by me (the sheriff) for this time only specially appointed," and a prisoner escape from *W. W.* acting under this warrant, the gaoler is not liable on this covenant.

(C) Of the Difference between voluntary and negligent Escapes.

Page 132.

WHEN it is said (p. 133.) that if a sheriff voluntarily permit a prisoner to go at large he cannot re-take him, this must be understood of custody in execution; for if the prisoner be in custody on *mesne process*, the sheriff may re-take him after having permitted him to go at large.

(D) Of the Difference between an Escape on Mesne Process and Execution.

Page 133.

AN attachment for nonpayment of money is in the nature of *mesne process*; and the sheriff is not liable for an escape for permitting the defendant to go at large, provided he have him at the return of the writ.

A bankrupt, having escaped out of the custody of the marshal, and being at large, surrendered to a commission subsequently issued, and received the protection of the 5 G. 2. c. 30. § 5., it was held, that he might, notwithstanding, be re-taken and detained in custody by the marshal.

(F) Of the proper Remedy and Nature of the Action to be brought for an Escape.

Page 143.

A BILL could not, at common law, be filed against the Warden

Atkinson v. Matteson, 2 T. R. 172.
Lewis v. Morland, 2 Barn. & A. 56.

Lewis v. Morland, 2 Barn. & A. § 56. *Sed vide cont.*

4 Price, 23.
Anderson v. Hampton, 1 Barn. & A. 508.

Crook v. Eyles, 2 Marsh. 49.

Warden of the Fleet for an escape in vacation; but by the 59 G. 3. c. 64. this is altered.

6 Taunt. 347.;
and see 2 Bro.
& B. 51.

(G) Of the Manner of laying the Action.

Page 145.

IN an action against the marshal for an escape, the declaration alleged that the plaintiff and *W. B.* had divers disputes, and by mutual bonds of submission referred them to the arbitration of *C.* and *D.*; that an award was made ordering *W. B.* to pay the plaintiff a certain sum on, &c., and because the award was not performed, plaintiff sued out of the C. P. a writ, commanding defendant to attach *W. B.* (then being in his custody), so that he might have his body before the justices of C. P. on, &c., to answer, &c.; and *W. B.* being and remaining in the custody of the defendant, as such marshal, by virtue of the attachment, &c. &c., was brought before Sir *S. G.*, a judge of C. P., at his chambers, by *habeas corpus*, and by him committed to the custody of the Warden of the Fleet, and afterwards was brought before Sir *J. L.*, a judge of K. B., at chambers, and by him committed to the custody of the defendant, charged with the attachment, and defendant afterwards suffered him to escape; it was held, that the plaintiff was bound to prove the execution of the bond of submission by himself, as well as by *W. B.*; but it seems he need not have done so had he alleged and proved a rule of C. B., ordering the issuing of the attachment, although proof of such rule without a statement of it in the declaration, would not be sufficient.

Brazier v.
Jones, 8 Barn.
& C. 124.

(H) Of the Party's Defence who suffered the Escape :
And herein of pleading fresh Suits.

Page 148.

A PLEA to an action of escape, after stating the return of the prisoner into custody before action brought, ought to shew a detention of him by the marshal down to the commencement of the suit, or his legal discharge from detention; and therefore, though if the plea only state that, after the return into custody, the marshal did detain and keep the prisoner in execution, under and by virtue of the commitment, and the replication traverse that the defendant did keep and detain him, &c. in manner and form as stated in the plea on this issue, the defendant is bound to shew a detention down to the commencement of the action, or till legal discharge, and the plea is negatived by showing that the prisoner escaped a second time; the plaintiff is not bound to new-assign the second escape.

Chambers v.
Jones, 11 East,
406.; and see
Griffiths v.
Eyles, 1 Bos.
& Pull. 413.

ESTATE IN TAIL.

(B) What Words are requisite to create an Estate-tail in a Deed or Gift.

Page 163.

Doe dem. Lit-
tledale v.
Smeddle,
2 Barn. & A.
126.

WHERE a settlement conveyed an estate to trustees for the use of the settlor for life, and then for the use of his wife for life, and then for the use of his first son and the heirs of such first son, and, after the determination of that estate, for the use of his second, third, and all and every other son and sons, and their several and respective heirs; and for default of such issue, then to the use of all and every his daughter and daughters, and their heirs, to take as tenants in common, and not as joint-tenants; and for want of such issue, then for the right heirs of the survivor of himself and his wife for ever; it was held, that under these limitations the sons took successively estates tail, and the daughters an estate in fee.

Galley v. Bar-
rington,
2 Bing. R. 387.

Where a settlement limited the estate to the use of the first son of the body of *J. Galley* by *A. S.*, his intended wife, and for default of *such issue*, to the use of the second, third, and other sons of the body of *J. Galley* by *A. S.*, and the several heirs male of their several bodies, with further limitations to after-born children and the heirs male of their bodies; it was held, on a case sent from Chancery, that the first son of *J. Galley* by *A. S.*, born during his life, took an estate tail.

Wight v.
Leigh, 15 Ves.
564.

A devise to *A.*, and after his death to his first and other sons, and in default of male issue then to his eldest and other daughters and their heirs male for ever, gives *A.* an estate in tail male.

(D) How far Tenant in Tail may charge his Estate, and what Acts of his relating to the Inheritance shall bind the Issue, though the Entail continues.

Page 175.

7 G. 4. c. 45.

BY the 7 G. 4. c. 45. the 39 & 40 G. 3. c. 56. (at page 175) is repealed, except as to such proceedings under the said act as were commenced before the passing of the repealing act.

§ 2.

And by § 2. it is enacted, "that from and after the passing of this act, in all cases where money under the controul of any court of equity, or of or to which any individuals as trustees are possessed or entitled, shall be subject to be invested in the purchase of freehold or copyhold hereditaments, or both, or to be settled upon any person or persons, in such manner that it would be competent, in case such money had been invested in the purchase of real estates, for the person or persons who would be the tenant or tenants of any estate or estates tail therein, either alone or together, with the person

" or

“ or persons who would be the owner or owners of any particular
 “ preceding estate or estates therein, by deed, fine, or common re-
 “ covery, or any of them, or other lawful act, in the case of free-
 “ hold hereditaments, or by surrender and recovery, or either of
 “ them, or other lawful act, in the case of copyhold hereditaments,
 “ to bar such estate or estates tail, and the rights and interests
 “ of all persons in remainder after such estate or estates tail, it
 “ shall not be necessary to have such money actually invested
 “ in lands or hereditaments, in order that such estates tail and
 “ remainders over may be so barred, but that it shall be lawful
 “ for the High Court of Chancery, or such Court of Equity,
 “ under the control of which such money shall be, and in case
 “ of trustees for the said High Court of Chancery or the Court
 “ of Exchequer, in a summary way, upon petition of the person
 “ or persons who would be tenant or tenants of such estate or
 “ estates tail, and of the person or persons, if any, whose con-
 “ currence would be necessary and sufficient in order to enable
 “ the person or persons who would be tenant or tenants of such
 “ estate or estates tail, to bar the same, and the rights and in-
 “ terest of all persons in remainder after such estate or estates tail,
 “ such petitioners being adults, and where any of the parties are
 “ or is *femes covert*s or a *feme covert*, they or she being first sepa-
 “ rately examined in court, or upon a commission, and consent-
 “ ing (except only in cases where the fund in which she or they
 “ shall be interested shall be less than 200*l.*, in which case such
 “ consent shall not be required,) to make such orders and
 “ declarations as are herein-after mentioned; that is to say, in
 “ case such petition shall be presented by the person or persons
 “ who would, at the time of presenting the same, be tenant or
 “ tenants in tail in possession of the hereditaments to be pur-
 “ chased free from incumbrances, or shall be presented by the
 “ person or persons who would, at the time of presenting such
 “ petition, be tenant or tenants of the first estate or first estates
 “ tail, together with or with the consent of the person or per-
 “ sons, if any, who would be owner or owners of the antecedent
 “ particular estate or estates, or who would be entitled to any
 “ charge or incumbrance antecedent to the estate or estates of
 “ such tenant or tenants in tail, as the case may be, to order the
 “ money subject to such trusts to be paid to the petitioner or
 “ petitioners, or any of them, or to be paid and applied in such
 “ manner and for such purposes as the petitioners shall appoint
 “ and the court shall approve of; and in case such petition shall
 “ be presented by the person or persons who would at the time of
 “ presenting the same be tenant or tenants in tail in possession
 “ of the hereditaments to be purchased, but such petition shall
 “ be presented without the concurrence of all the persons
 “ (if any), who would be entitled to any charge or incumbrance
 “ affecting the hereditaments to be purchased antecedently to
 “ the estate of such tenant or tenants in tail, or shall be pre-
 “ sented by the person or persons who would, at the time of pre-
 “ senting such petition, be tenant or tenants of some estate or

“ estates tail in the hereditaments so to be purchased, together with
 “ or with the consent of the person or persons (if any) whose con-
 “ currence would be necessary and sufficient, in order to enable
 “ the person or persons who would be tenant or tenants of such
 “ estate or estates tail, in case the said hereditaments were pur-
 “ chased to bar the said estate or estates tail, and the rights and in-
 “ terests of all persons in remainder, after such estate or estates
 “ tail, but without the concurrence of all the persons who would be
 “ entitled to particular estates in, or to charges and incumbrances
 “ upon, the said hereditaments antecedently to such estate or
 “ estates tail, to declare that such estate or estates tail, and all
 “ remainders and reversions expectant thereon, is and are ab-
 “ solutely barred, and to order that the hereditaments to be
 “ purchased with the money subjected to the said trusts shall,
 “ when purchased, be settled (subject to the uses, trusts, estates
 “ and interests antecedent to such estate tail,) to the use of the
 “ person or persons who would have been entitled to the use of
 “ such estate or estates tail, his, her, and their heirs and assigns;
 “ and every such declaration and order shall be binding and
 “ conclusive, not only* the person or persons who would have
 “ been entitled to such estate or estates tail, but also upon all
 “ persons who could have claimed through or under such per-
 “ son or persons by force only of such entail, or in remainder
 “ or reversion after such estate or estates tail.

* *Sic.*

“ And be it further enacted, that in all cases where monies
 “ subjected to be laid out in the purchase of hereditaments, to
 “ be settled as aforesaid, shall happen to be invested in govern-
 “ ment or real or other securities, all such securities shall, for the
 “ purposes of this act, be considered as money, and shall and
 “ may accordingly be transferred, assigned, and disposed of
 “ under an order of the respective courts aforesaid, made in a
 “ summary way, upon the petition of such persons, and with
 “ such examination and consent, where necessary, as aforesaid
 “ in such and the same manner as monies subjected to be laid out
 “ in the purchase of hereditaments, to be settled as aforesaid,
 “ are herein-before authorized to be paid, applied and disposed
 “ of; and all declarations and orders to be made as to any such
 “ securities shall be of equal force and validity with the declar-
 “ ations and orders herein-before authorized to be made, as
 “ to money subjected to be laid out in the purchase of here-
 “ ditaments to be settled as aforesaid.”

If tenant in tail reserves an entire rent upon a farm in which some leasehold lands are mixed with the entailed lands, the lease is not good against the reversioner.

An adult tenant in tail is not obliged to keep down the interest on a charge affecting his estate; but, if he do so, his representatives will not be allowed it out of the estates charged.

But an infant tenant in tail is bound to keep down the interest of such a charge; for the remainderman has an equity against him; but the remainderman is in the power of an adult tenant in tail.

ESTATE-

Rees v. Philips, Wightw.
69.

Redington v. Redington,
1 Ball. & B.
143.; and see
Bertie v. Abingdon, 3 Meriv. R. 560.

Sergison v. Sealey, 2 Atk.
R. 416. Burges
v. Mawbey,
1 Turn. and
R. 167.

ESTATE-TAIL AFTER POSSIBILITY OF
ISSUE EXTINCT.

- (B) The Power this Tenant has over the Inheritance, and in what Respects he is considered as a bare Tenant for Life.

Page 180.

A TENANT in tail after possibility having been once tenant in tail in possession with the other donee, and therefore dispunishable for waste, may not only commit waste, but also convert to his own use the property wasted; she shall not be restrained in equity except for malicious waste.

Williams v.
Williams,
15 Ves. 427.

ESTATE FOR LIFE AND OCCUPANCY.

- (A) What Interest or Property in Land the Law calls an Estate for Life, either when there are express Words in the Deed, or when the Law creates it by Implication.

Page 182.

WHERE a copyhold was surrendered to the use of husband and wife for their natural lives, and the life of the longer liver of them, and from and after the decease of the survivor of them, to the right heirs of the survivor for ever; it was held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor with a contingent remainder in fee to the survivor.

Doe dem. Dor-
mer v. Wilson,
4 Barn. & A.
303.

- (B) Who upon the Death of Tenant for Life is to enjoy the Land: And herein of Occupancy.

Page 185.

THERE can be no general occupancy of copyholds, since the freehold is always in the lord; and the statutes 29 Car. 2. c. 3. and 14 G. 2. c. 20., appropriating estates *pur autre vie* where no special occupant exists, do not apply to copyholds.

Zouch dem.
Forse v. Forse,
7 East R. 186.

And one who was admitted tenant upon a claim as administrator *de bonis non* of a grantee of copyhold *pur autre vie*, having no title in such character, cannot recover in ejectment by virtue of such admission as a new and substantive grant by the lord.

3. The way to prevent the General Occupant, and herein of the Special Occupant, and the Alteration made in the Common Law by the 29 Car. 2. c. 3.

Page 190.

Where the tenant of lands granted to him and his heirs *pur autre vie*, devised them to A. B. without saying more, and A. B. died

Doe dem. Jeff
v. Robinson,

8 Barn. & C.
296.

died in the life-time of the *cestui que vie*; it was held, that the heir of the devisor was entitled to the lands as special occupant.

EVIDENCE.

(A) Who may be a Witness.

Page 202.

The Queen's
Case, 2 Bro.
& Bing. 284.

IF a witness without objecting, takes the oath in the usual form, he may be afterwards asked, whether he thinks the oath binding; but it is unnecessary and irrelevant to ask him if he considers any other form of oath *more* binding.

Sells v. Hoare,
3 Bro. & Bing.
252.

On an application for a new trial, it appeared that a witness who gave himself a false name at the trial, and was sworn on the Gospels, was at that time a Jew; held, that the objection came too late, and that the oath as taken, subjected the witness to the consequences of perjury if he had sworn falsely.

Rex v. Ser-
jeant, 1 Ry. &
Moo. 352.

On an indictment against the wife of *W. S.* and others, for a conspiracy in procuring *W. S.* to marry; it was held, that *W. S.* was not a competent witness in support of the prosecution. In all cases where husband and wife are admissible against each other, they are admissible for each other.

Rex v. Inhab.
of All-Saints'
Worcester,
1 Phill. on
Evidence, 74.

On an appeal against a removal of a pauper woman to her place of maiden settlement, the question was, whether her marriage with *A. B.* was good, or whether it was invalid by reason of his being married to another woman; the respondents called the first wife to prove her marriage with *A. B.*, and the quarter sessions admitted her evidence. The respondents then proved the pauper's settlement in the appellant parish, and her marriage with the second husband. The counsel for the appellants then contended, that the evidence of the first wife ought to be struck out; but the quarter sessions overruled the objection and stated the case for the opinion of the King's Bench. The court held, that (even admitting the authority of *The King v. Claviger* to its utmost extent) the evidence was admissible at the time it was offered; for the wife did not contradict the husband, as he had not been examined. She did not directly criminate him, as the proceeding applied to other matters, and not to any criminal charge against him, and her evidence could not be made the ground-work of any criminal proceeding. The court also expressed an opinion that the rule of *The King v. Claviger*, that a wife cannot give evidence *tending to criminate* her husband, was too large and general, and that the former wife would have been competent to prove her marriage, though the second marriage had been first proved by the respondents.

2 Term R. 265.

Warne v.
Bryant, 5 Barn.
& C. 590.; and
see 2 Taunt.
324.

If an order of *nisi prius* authorizes an arbitrator to examine the parties to a suit, he may examine a party in support of his own case.

9 G. 4. c. 52.

By the 9 G. 4. c. 32. the evidence of a Quaker or Moravian on affirmation is made receivable in criminal as well as civil cases;

cases; and for false and corrupt affirmation they incur the penalties of perjury.

3. *Whether a Counsel Attorney or Solicitor may be a Witness against his Client.*

Page 207.

A COMMUNICATION by a client to an attorney not to obtain advice as an attorney, but merely to get information as to a fact, may be disclosed by the attorney.

Bramwell v. Lucas, 2 Barn. & Cres. 745.

If an attorney is applied to to prepare a deed, and refuse, he cannot be called on to prove this fact as evidence against the party applying to him; for it is a confidential communication.

Cromack v. Heathcote, 2 Bro. & B. 4. 4 Moo. 357.

A steward is not a person, like an attorney, whose communications are privileged from disclosure.

Falmouth v. Moss, 11 Price, 455.

6. *How far a Person is disabled from being a Witness in respect of his having been attainted or convicted of a Crime.*

Page 211.

A person admitting himself to have sworn falsely on a former occasion, is not *incompetent* on that account, but it goes strongly to his credit; and he cannot give evidence in direct opposition to his former swearing.

Rex v. Teal, 11 East, 309.; and see Rands v. Thomas, 5 Maul. & S. 244.

Though a witness admits his having been convicted of felony, yet if this is insisted on to exclude his evidence, the record must be produced.

Rex v. Castell Careinion, 8 East, 77.

A party cannot avail himself in a civil suit of a conviction for perjury obtained on his own testimony against the other party to the suit.

Burdon v. Browning, 1 Taunt. R. 520.; and see

Rex v. Boston, 4 East, 572. Bartlett v. Pickersgill, *Ibid.* Smith v. Rummens, 1 Camp. R. 9.

(B) *How far a Person is disabled from being a Witness in respect of his being interested in the Success of the Cause.*

Page 212.

IN an action against an attorney for negligence in negotiating a grant of annuity to plaintiff, the person appearing on the deeds as grantor, may be called by the plaintiff to prove the deed a forgery; for he has no interest in the suit, and a verdict against the defendant could not be given in evidence by the witness if he were sued on the deed.

Hunter v. King, 4 Barn. & A. 209.; and see Rex v. Crocker, 2 New R. 87. Rex v. Wait, 1 Bing. R. 21.

By the 9 G. 4. c. 32. no person shall be deemed an incompetent witness in support of a prosecution for forgery, by reason of any interest he may be supposed to have in the forged instrument.

If the witness may help to discharge his own debt by a verdict being given on the side for which he is called, he is not competent.

Bland v. Ansley, 2 New R. 331. Upton v. Curtis, 1 Bing. 210.

Nix v. Cutting, 4 Taunt. 18. But the owner of goods may be called in an action of trover to prove property in himself, if the verdict cannot be evidence for him in any other action. The question is, whether the verdict would be evidence for the witness in another proceeding.

Ward v. Wilkinson, 5 Barn. & A. 410.; and see Nathan v. Buckland, 2 Moo. 153. Thomas v. Pearse, 5 Price, 547.

Doe dem. In ejectment the defendant cannot call a party to prove that he, the witness, is tenant in possession, and not the defendant; for the witness would lose his own possession if there were a verdict against defendant.

Lewis v. Bingham, 4 Barn. & A. 672.

Doddington v. Hudson, 1 Bing. 257. In an action on the case for an injury to the reversion, the tenant in possession may be a witness for the plaintiff.

Robinson v. Williamson, 9 Price, 156. On an issue to try a modus, the lessee of the vicar may be examined for him if he has released the vicar.

Bunter v. Tyndale, 1 Barn. & C. 689.; and see 5 Moo. 319. In replevin on an issue of *non tenuit*, &c. a co-lessee of the plaintiff (not party to the record) may be examined for the plaintiff, unless on the *voire dire* it appear that he is so interested jointly with the plaintiff that he would be liable to contribution.

Doe v. Tyler, 6 Bing. 590. A remainderman after a tenant in tail is not competent for the tenant in tail in an ejectment for the entailed property.

Gully v. Bishop of Exeter, 5 Bing. 171. Where a bishop has omitted to present to a living lapsed to him for want of presentation within six months, a party on whom the right devolves, if the bishop omits, is not a competent for one who claims in the same right as such party.

(As to the incompetency of a witness on the ground of his liability in one event of the suit to costs in addition to the debt, see Jones v. Brooke, 4 Taunt. 464. Townend v. Downing, 14 East, 567. Keightly v. Birch, 3 Camp. 523. Brind v. Bacon, 5 Taunt. 183. Edmonds v. Love, 8 Barn. & C. 407.)

Tomlinson v. Wilkes, 2 Bro. & B. 397. An assignee of a bankrupt having released his claims as creditor on the estate, is competent to prove the petitioning creditor's debt; for as assignee he has no interest.

5 Moo. 172. S. C.

Carter v. Abbott, 1 Barn. & C. 444. See further as to bankrupts' evidence. Emmett v. Bradley, 7 Taunt. 599. Morgan v. Price, 2 Barn. & C. 14. In an action on the statute 9 Ann. c. 14. by an assignee to recover back money lost by the bankrupt at play, the bankrupt was held an incompetent witness for the plaintiff, but his competency was restored by three releases. 1. By the bankrupt to the assignee of all the surplus. 2. By the creditors to the bankrupt of all actions, claims, &c. 3. By the assignee (who was not a creditor) to the bankrupt of all actions, claims, &c.

Moody v. King, 2 Barn. & C. 558. Afflalo v. Fourdrinier, 6 Bing. 506.; and *antè tit. Bankrupt.*

Morish v. Foote, 8 Taunt. R. 454.; and see Peake's Ca. 117. In case for negligently driving a mail coach against the plaintiff's waggon horse, it was held the waggoner could not be called for the plaintiff without a release; for if plaintiff recovered on his testimony, the waggoner would relieve himself from any action for negligence at suit of the plaintiff.

York v. Blott, 5 Maule & S. 71. One joint maker of a promissory note may prove the signature of the other, in an action against him upon it.

A dormant

A dormant partner, not a co-contractor, is competent for his partner to prove a contract.

Mawman v. Gillett,
2 Taunt. 325.

A co-defendant in *assumpsit*, who has suffered judgment by default, is not admissible against the other defendant, for he has an interest to fix him, in order to gain contribution.

Brown v. Brown,
4 Taunt. 752.
See Mant v.

Mainwaring, 8 Taunt. 139. *Sed vide* Hudson v. Robinson, 4 Maule & S. 475. Worrall Jones, 7 Bing. 395.

A co-contractor in *assumpsit* is not admissible as a witness for his co-contractor.

Evans v. Yeatherd, 2 Bing.
133.; and see Hall v. Rex, 6 Bing. 181.

In an action on a policy, if the sole question is as to the original destination of the ship, the captain may be called as to that fact, though a part owner; but not if the question be as to deviation.

De Symonds v. De la Cour,
2 New R. 374.

In an action on a policy, the party appearing on the policy as the party interested, cannot be a witness for plaintiff, though he have released to the plaintiff all claims in respect of the policy, and though on being called on to indemnify plaintiff from costs, he have procured a third party to give the indemnity, and have assigned to such party all interest in the policy; for the witness is still liable to the attorney for the costs of the action, and therefore is interested in the verdict.

Bell v. Smith,
5 Barn. & C. 188.

An executor though taking a pecuniary interest under a will is competent to support the will in an ejectment for real property disposed of by it; for the verdict cannot set up the will as a will of *personalty*.

Doe dem. Wood v. Teage, 5 Barn. & C. 335.

The mother of a defendant in ejectment who claims to retain possession of premises as heir at law to his father is competent for the defendant, although the effect of her testimony be to prove a seisin in law in her husband, which would give her a claim to dower.

Doe v. Maissey,
1 Barn. & Adol. 469.

Upon an issue whether a messuage is situated within a chapelry, a person who occupies rateable property within the chapelry is competent to prove that it is both at common law, and under the 54 G. 3. c. 170.

Marsden v. Stansfield,
7 Barn. & C. 815.

On the trial of an issue whether the owners of property within a chapelry are liable by immemorial usage to repair the chapel, an owner of property within the chapelry is not competent to disprove the liability, for he is interested to remove the burden.

Rhodes v. Ainsworth,
1 Barn. & A. 87.

A parishioner is a competent witness for his parish, if not actually rated, though rateable; for the mere liability does not give him an interest.

Rex v. Kirdford, 2 East,
559.

On a question of title between a parish and individuals, where the parish claimed lands by virtue of an inclosure act, which lands would, if recovered, be vested in trust for the parish, in aid of poor rates, rated inhabitants were held admissible, the case being within the 54 G. 3. c. 170.

Meredith v. Gilpin, 6 Price,
146.

A member of a corporation is not competent to support a claim by the corporation, though he release his interest in the subject-matter of the suit.

Doe v. Tooth,
3 Young & J. 19.

Page 217.

Rex v. Williams, 9 Barn. & C. 549.

1 Stra. 55.
Hall v. Curzon,
9 Barn. & C.
646.; and see
5 *Id.* 585.

ADD to the cases in note. — Upon an indictment on the 21 Jac. 1. c. 15., or 8 Hen. 6. c. 9., whereby justices are empowered to give restitution of possession of lands entered upon by force, or holden by force, to the respective tenants thereof, the tenant whose land has been entered upon or withheld by force is not a competent witness.

A co-obligor in a bond may be a witness in an action to render his co-obligor liable; and so also a member of a trading company is competent to prove the defendant a partner in it.

(D) Of compelling a Witness to appear and give Evidence.

Barrow v. Humphreys,
3 Barn. & A.
591. Malcolm
v. Ray, 3 Moo.
222.; and see
5 Taunt. 260.
Malcolm v.
Day, 3 Moo.
579.

IT seems that a party subpœnaed to the assizes, and not attending, is guilty of a contempt, though the cause is not called on. But the Court of Common Pleas will not grant an attachment unless the affidavit state that the witness was called at the trial.

1 Marsh. 410. 6 Taunt. 9. 1 Bing. R. 366.

A witness is liable to attachment if he leave the court, thinking, without any sufficient ground, he is not wanted, and the plaintiff is nonsuited for want of his evidence.

Bennet v. Watson,
3 Maule & S.
1. Rex v. Ring,
8 Term R. 585.

A justice may commit a *feme covert*, or other party, who is a material witness upon a charge of felony brought before him, and who refuses to appear at the sessions, or to give sureties for appearance; and a witness's attendance in such case may be compelled by subpœna from the crown-office.

Willis v. Peckham,
1 Bro. &
Bing. 515.; and see
7 Moo. 120. 5 Maul. & S. 156.

A witness cannot recover compensation for time, though an express promise has been made.

Hallet v. Mears,
13 East, 15.;
and see Battye
v. Gresley,
8 East, 519.
Daws v. Dale,
1 Moo. & M.
514.

One subpœnaed, but who refuses at the trial to give evidence, because his expenses are not paid, may yet maintain *assumpsit* for the necessary expenses of attendance against the party who subpœnaed him.

A person bringing papers under a *subpœna duces tecum*, may be compelled to produce them, without being sworn.

(E) Of the Manner of giving Evidence.

Doe v. Perkins,
3 Term
R. 749.; and
see 8 East R.
273. Maugham
v. Hubbard, 8
Barn. & C. 14.

A WITNESS may refresh his memory from any book or paper, if he can swear to the fact from recollection; but if he cannot swear to the fact, except from finding it in the paper, he original must be produced.

Queen's case,
2 Bro. & B.
236.

Two or three lines of a letter may be exhibited to a witness, without showing the whole, and the witness may be asked whether he wrote the part exhibited. But if he deny, he cannot be examined to the contents of the letter.

It is not allowable, on cross examination in the statement of a question to a witness to represent the contents of a letter, and to ask the witness whether he wrote a letter to any person with such contents, or contents to the like effect, without having first shown the witness the letter, and having asked him whether he wrote that letter.

Queen's case,
2 Bro. & B.
286.

In order to discredit a witness by proof of a contradictory statement, it is not enough to ask him generally whether he has ever made such a statement, but particulars must be specified to to him.

Angus v.
Smith, 1 Moo.
& M. 473.

An examined copy of a deposition in Chancery is admissible in evidence, for the purpose of contradicting the testimony of the same person when produced afterwards as a witness.

Highfield v.
Peake, 1 Moo.
& M. 109.

Under 13 G. 3. c. 63. § 44. a *mandamus* is grantable to examine witnesses in *India* on behalf of a *defendant* in a civil suit.

Grillard v.
Hogue. 1 Bro.
& Pull. 177.

& B. 519.; and see 1 Bos.

It is an inflexible rule in the Exchequer that a witness who is present in court during a trial when he ought not to have been there, under an order made for that purpose, cannot be examined as a witness; but it seems discretionary with the judge in other courts.

Attorney-
General v.
Bulpit, 9 Price,
4. Parker v.
M'William,
6 Bing. 685.

Where a commission to examine witnesses abroad directed the depositions to be reduced to writing in the *English* language, and sent to *England*, and to swear an interpreter to interpret the evidence of the witnesses not understanding the *English* language, and the depositions were reduced to writing in the foreign language, and translated within six weeks into *English* by the interpreter, this was held sufficient.

Atkins v. Pal-
mer, 4 Barn.
& A. 577.

It is no objection in such case that a clerk to the plaintiff's attorney is one of the commissioners.

4 Moo. 424.

(F) Of written Evidence.

Page 248.

IN case of a private act of parliament, though an examined copy of the original is the proper evidence, yet if a party has done an act under the statute, against which the other appeals, the appellant need only produce a common printed copy.

Rex v. Shaw,
12 East, 479.

To prove a copy of a record, it is sufficient merely to prove that the paper offered agrees with what the officer read as the record; it is not necessary for the persons examining to exchange.

Rolf v. Dart,
2 Taunt, 52.

A verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence for a jury.

Vooght v.
Winch,
2 Barn. & A.
662.

Under the general issue in *assumpsit*, a judgment recovered for the same cause of action may be given in evidence.

Stafford v.
Clarke, 2 Bing.
R. 577.

Copies

Hennell v. Lyon, 1 Barn. & A. 183. Copies of bills and answers in courts are admissible in evidence for the convenience of keeping the originals in their proper place.

Dartmouth v. Roberts, 16 East, 334. Salter v. Turner, 2 Campbell, 87. Ewer v. Ambrose, 4 Barn. & C. 25.

Roe v. Ferrars, 2 Bos. & Pull. 548.; and see 4 Maule & S. 497. If defendant give in evidence an answer in Chancery, the plaintiff is not entitled to read any statements in it which are stated as hearsay.

Ayrey v. Davenport, 2 New R. 474. The judgment book is not evidence of the judgment entered therein, though the record has not been made up, and the person interested to prove the judgment is no party to the action.

Henry v. Adey, 3 East, 221.; and see Appleton v. Braybrook, 6 Maule & S. 34. The seal of the court to a foreign judgment must be proved, as well as the judge's handwriting.

Waldron v. Coombe, 3 Taunt. 162. As to certain admissible certificates, see 6 Term. R. 619. 638. The certificate of a *British* Vice-consul, of the amount of proceeds of damaged goods, which, by the law of that country, must be sold under his inspection, is not evidence.

Drake v. Marryat, 1 Barn. & C. 473. Nor is the certificate of an agent of *Lloyd's* evidence against an underwriter, though a member of *Lloyd's*.

Doe dem. Batten v. Murless, 6 Maule & S. 110. *Sed vide* 1 Bing. 209. In ejectment by the vendee of a term sold under a *feri facias* against the execution debtor, it is sufficient to produce the *fi. fa.* without the judgment.

Ramsbottom v. Buckhurst, 2 Maule & S. 565. In an action for use and occupation, by plaintiff claiming under an *elegit*, an examined copy of the judgment-roll, containing the award of *elegit* and return of the inquisition, is evidence of plaintiff's title, without proving a copy of the *elegit* and of the inquisition.

Jones v. Stevens, 11 Price R. 235. Where one writ was produced, together with three declarations and three rules to plead, this was held sufficient evidence of three actions having been commenced by this process.

Gervis v. Grand Western Canal Company, 5 Maule & S. 76. A writ of *supersedeas*, reciting that a commission of bankrupt issued on such a day, is evidence of that fact.

Glossop v. Pole, 3 Maule & S. 175. In case against the sheriff for a return of *nulla bona* to a *fi. fa.*, an inquisition taken by him to ascertain the property in the goods, and finding it in *A. B.*, a third person, is not evidence for the sheriff.

Rex v. Holt, 5 Term R. 456. Attorney-General v. Theakstone, 8 Price, 89. A gazette is evidence of all acts of state; so also to prove an averment that "divers addresses had been presented to his majesty by his subjects," which was a fact stated in the gazette. So also of a proclamation under an order in council.

Rex v. Sutton, 4 Maule & S. 552. The king's proclamation, reciting a fact, is evidence to prove that fact; and so also is a preamble to an act of parliament, to prove a fact recited in it.

By

By the 51 G. 3. c. 60. (local Act,) the register book of the *Bristol Canal Company* is evidence in an action brought by them for calls, of the defendant's being proprietor of the number of shares affixed to his name.

Bristol and Taunton Canal Navigation Co. v. Amos, 1 Maule & S. 569.

Entries in a steward's book above thirty years old, and coming from the proper custody, are evidence without showing the handwriting of the steward.

Wynne v. Tyrwhitt, 4 Barn. & A. 376.; and see 3 Bro. & B. 132.

A will, more than thirty years old, is evidence without proof of execution, although testator died within thirty years, and although some of the witnesses are living.

Doe v. Wolley, 8 Barn. & C. 22.

A book kept at the *India House* from returns given in on oath, pursuant to the 53 G. 3. c. 155., containing the lists or numbers of passengers going on board an *East India* ship, is evidence to show the value of the voyage, on the ground that it is a public book kept by authority of an act of parliament.

Richardson v. Mellish, 2 Bing. 229. and see 4 Taunt. 787.

Returns of sales of corn under the 1 & 2 G. 4. c. 87. are not conclusive evidence to shew to whom the corn was delivered.

Woodley v. Brown, 2 Bing. 527.

An entry in public corporation books is not evidence for the corporation, if the entry be of a private nature; for a corporation could otherwise make evidence for themselves.

Marriage v. Lawrence, 3 Barn. & A. 142.

In an action for a penalty for using a gun, being unqualified, where the defendant claims to act as gamekeeper under a deputation, evidence of the real title to the manor is admissible for the purpose of negating the existence of a colourable title in the person under whom the defendant claims to act. And entries in the books of the clerk of the peace, of deputations formerly granted to gamekeepers by the real owner of the manor, are also evidence to shew that manorial rights were publicly exercised by him, and that the person whose title was set up by defendant knew that he had not any title whatever.

Hunt v. Andrews, 3 Barn. & A. 341.

Communications in official correspondence, relating to matters of state, cannot be produced in evidence in an action by an individual against a person holding an office, for an injury charged to have been done in such office, not only because such communications are confidential, but because the disclosure of secrets of state is injurious to the country.

Anderson v. Hamilton, 8 Price, 244 n. 2 Bro. & B. 156 n.

The copy of an original letter, giving notice of dishonour of a bill, is admissible in evidence without notice to produce the original letter.

Kine v. Beaumont, 3 Bro. & B. 288. 7 Moo. 112.

Sed vide 1 Moo. & Malk. 31.; and see *post*, 840.

A receipt is not conclusive evidence of payment; it may be shewn, that the giving the receipt was fraudulent, and that the money was not paid.

Straton v. Rastall, 2 Term R. 566. Skaife v. Jackson,

3 Barn. & C. 421.; and see 7 Bing. 574.

In an action, for use and occupation, against the defendants, assignees of a bankrupt, the defendants produced, under a notice from the plaintiff, the assignment of the bankrupt's effects; held, that

Orr v. Morice, 3 Bro. & B. 139.; and see 6 Barn. & C. 30.

5 Barn. & C.
589.

Cooke v.
Tanswell,
8 Taunt. 450.
2 Moo. 513.

Talbot v. Hod-
son, 7 Taunt.
251. 2 Marsh.
527.

Doe v. East
London Wa-
ter-works Co.
1 Moo. & M.
149.

7 Taunt. 251.

Gurney v.
Langlands,
5 Barn. & A.
330. 8 Price
653. *Sed vide*
Goodtitle v.
Braham, 4 Term R. 497.

George v. Sur-
rey, 1 Moo. &
M. 516.

Morewood v.
Wood, 14 East,
327. n.; and see
7 East, 282. n.
1 Crompt. & J.
47.

Nelson v.
Whittal,
1 Barn. & A.
19. In Kay v.
Brookman,
1 Moo. & M.

286. it was held, no other evidence was necessary than proof of the witness's handwriting; and see Page v. Mann, *Id.* 79. Mitchell v. Johnson, *Id.* 176. Where the plaintiff in an action on a charter-party had given to the attesting witness an interest subsequent to the execution, it was held his handwriting could not be proved. Hovill v. Stephenson, 5 Bing, 493.

Burt v. Wal-
ker, 4 Barn. &
A. 697.

Turner v.
Power, 7 Barn.
& C. 625.

that the deed was admissible without proof of its execution, the defendants having occupied under it.

If a declaration on a deed aver that the deed is in possession of the defendant which is not traversed, and on *non est factum* pleaded, the plaintiff give notice to produce the deed, and the deed is not produced, the plaintiff may give parol evidence of it, without calling the subscribing witness, and this although the plaintiff's notice state the name of the subscribing witness.

Proof that a party signed a deed which bears on the face of it a declaration that the party sealed and delivered it, is evidence for the jury that the party did seal and deliver it.

If a deed be produced purporting to bind a trading company, proof that the person executing it was their general law agent, is *prima facie* sufficient, without shewing that he was authorized to execute the particular deed.

If an attesting witness to a deed deny having seen it executed, other evidence of the fact is admissible.

The evidence of an inspector of franks, who has never seen the party write, to prove, from his general knowledge of handwriting, that the signature to an instrument is an imitation and not genuine, is entitled to very little weight, even if admissible; it is very doubtful whether it is admissible.

An instrument executed by mark may be proved from inspection by a person who has seen the party so execute instruments.

The handwriting of a person dead many years may be proved by shewing its resemblance to the handwriting of his will; (no objection was taken by the bar), and the court or jury may compare the handwriting of two documents.

In an action on an instrument where the subscribing witness is dead, it is doubtful whether any other evidence is necessary than the proof of the subscribing witness's handwriting. At all events, it is quite sufficient to shew that the defendant was present at the making of the instrument.

Where in an action on a bond the clerk of defendant's attorney was the subscribing witness, and, when subpœnaed, said he would not attend, and the trial was put off twice in consequence of his absence, and search had been made at defendant's house and in the neighbourhood, and on receiving information that the witness was gone to *Margate*, enquiry was there made without success; it was held, that under these circumstances evidence of his handwriting was admissible.

If by a parol agreement a landlord agree to let and a tenant to take a farm, upon the terms of a certain lease, the lease cannot be produced to prove the terms, unless duly stamped.

An

An indorsement on the feoffment (purporting to be made by the attorney appointed to deliver seisin), that he had done so in presence of *A.*, is not evidence of that fact, though the deed is produced by defendant at desire of the plaintiff, unless the defendant claims under it.

Doe v. Marquis of Cleveland, 9 Barn. & C. 864.; and see 5 Barn. & C. 589. 3 Taunt. 60. 5 Bro. & Bing. 139. 6 Barn. & C. 28.

The evidence of a subscribing witness is never dispensed with on the ground of the instrument coming from the adverse party, except where it is produced by him at the trial.

Vacher v. Cox, 1 Barn. & Adol. 150.

In trover for a chattel by the vendee of an executor, the will is not evidence of the executor's title, only the probate.

Pinney v. Pinney, 8 Barn. & C. 335.

The time of commencement of an action may be proved by parol evidence of the attorney, without producing the writ.

Lester v. Jenkins, 8 Barn. & C. 339.; and see 5 Barn. & A. 847. 3 Barn. & C. 317.

(G) Whether parol Evidence admitted to explain what appears on the Face of a Deed or Will.

Page 308.

PAROL evidence may be admitted to explain a written instrument, which on the face of it appears equivocal.

Rex v. Laindon, 8 Term R. 379.; and see *Stammers v. Dixon*, 7 East R. 200.

Devise of "my estate of *Ashton*," the testator having a maternal estate, comprehending a manor and capital farm and lands in the parish of *Ashton*, as well as several other estates, some in adjacent parishes, some ten and fifteen miles distant; evidence is not admissible to show that he was accustomed to call all his maternal estate his "*Ashton* estate," in order to raise the inference that he meant to devise the whole by that name.

Doe v. Oxenden, 3 Taunt. 147.; and see *Doe v. Greening*, 3 Maule & S. 171. *Doe v. Lyford*, 4 Maul. & S. 550.

Devise of "all that my farm called *Troques Farm*, now in the occupation of *A. C.*," is not necessarily limited to the lands of *Troques Farm* in the occupation of *A. C.*, but may be shown by evidence to extend to other lands of *Troques Farm*, not in his occupation.

Goodtitle v. Southern, 1 Maule & S. 299.; and see *Beaumont v. Field*, 1 Barn. & A. 247. *Carruthers v. Seddon*, 6 Taunt. 14.

Where a testator devised to *Matthew W.*, his brother, and *Simon W.*, his brother's son, a certain estate, it appeared that the testator had three brothers, each having a son named *Simon*; but this was held not to raise any latent ambiguity, so as to let in parol evidence, for it was clear the testator meant *Simon* son of *Matthew*.

Doe v. Westlake, 4 Barn. & A. 57.; and see *Doe v. Huthwaite*, 3 Barn. & A. 632.

A bill against an attorney was filed of *Michaelmas* term, and appeared by the memorandum to have been filed on the 28th *November*; held, that evidence was admissible to shew that it was actually filed on the 24th *December*.

Wilton v. Girdlestone, 5 Barn. & A. 847.

The consideration expressed in a deed of conveyance was 28*l.*, but parol evidence was admitted to prove that 30*l.* was the real consideration.

Rex v. Scammonden, 3 Term R. 474.; and see

Baker v. Dewey, 1 Barn. & C. 704. *Halliley v. Nicholson*, 1 Price, 404. *Russell v. Dunskey*, 6 Moo. 233.

Wadley v. Bayliss, 5 Taunt. 752.; and see Bendyshe v. Pearce, 1 Bro. & B. 460. To explain an ambiguous award of a road under an inclosure act, evidence of contemporaneous acts of the occupiers of the land may be received.

Yates v. Pym, 6 Taunt. 446. On a warranty of prime singed bacon evidence is not admissible of a practice in the bacon trade to receive bacon to a certain degree tainted, as prime singed bacon.

Aveson v. Kinnaid, 6 East, 195. After the hand-writing of an attesting witness to a bond had been proved, *Heath J.* admitted evidence of a declaration by deceased, when dying, that he had been concerned in forging the bond.

Woodbridge v. Spooner, 3 Barn. & A. 233.; and see Free v. Hawkins, 8 Taunt. 92. 1 Moo. 535. Hale v. Small, 8 Taunt. 730. 3 Moo. 58. Hogg v. Snaith, 1 Taunt. 347. Moseley v. Hanford, 10 Barn. & C. 729. Where a promissory note purports to be payable on demand, parol evidence is not admissible to shew that, at the time of making it, it was agreed that it should not be payable till after the decease of the maker.

Wilson v. Hart, 1 Moo. 45. Parol evidence of a broker may be admitted to show that a sale was to a third person, for whom the buyer was agent, although the bought note and invoice were in the name of the buyer.

Rippiner v. Wright, 2 Barn. & A. 478. Rex v. Castle Morton, 3 Barn. & A. 588. Where an agreement on unstamped paper has been lost or destroyed, no parol evidence can be given of its contents.

(H) Of Presumptive Proof.

Page 318.

Doe v. Deakin, 4 Barn. & A. 435. THE fact of a tenant for life not having been seen or heard of for fourteen years, by a person residing near his estate, although not a member of his family, is *prima facie* evidence of the death of the tenant for life.

Vooght v. Winch, 2 Barn. & A. 662.; and see Miles v. Rose, 5 Taunt. 705. In a public navigable river twenty years' possession of the water at a given level, is not conclusive as to the right.

Reed v. Williams, 5 Taunt. 257. A deed whereby a party conveys one full moiety is *prima facie* evidence that the grantor is the owner of the other moiety.

Rex v. Joliffe, 2 Barn. & C. 54.; and see Cross v. Lewis, 2 Barn. & C. 686.; 2 Bro. & B. 405. 667. A regular usage for twenty years, unexplained and uncontradicted, is sufficient to warrant a jury in finding the existence of an immemorial custom.

Calder v. Rutherford, 3 Bro. & B. 302. On an agreement to pay 100*l.* if the plaintiff would not send herrings for a twelvemonth to the *London* market, and particularly to the house of *J. S.*, and the plaintiff proved that he had sent no herrings during the twelvemonth to that house, it was held sufficient to entitle him to recover, the defendant not proving that the plaintiff had sent herrings to the *London* market.

Rex v. Twining, 2 Barn. & A. The law always presumes against the commission of crime; and, therefore, where a woman, twelve months after her first husband

husband was last heard of, married again, the sessions were held right in presuming that the first husband was then dead, and it was for the other party to prove him alive. In this case the presumption of law that a party is living till a certain number of years after he was heard of, must yield to the higher presumption that he has not committed a crime.

Primâ facie the presumption is, that the strip of land between the highway and the adjoining inclosure is, as well as the soil of the highway *ad medium filum viæ*, the property of the owner of the inclosure, whether freeholder, leaseholder, or copyholder. But this presumption may be rebutted by evidence shewing the right to be in the lord of the manor or other person; and if the strip of land communicates with open commons, the evidence of ownership applying to the larger portions applies to this.

After a lapse of thirty years from the date, and after full service by the apprentice, the court will presume that lost indentures of apprenticeship were duly stamped, and this notwithstanding it is proved by an officer from the stamp-office that, on due search it did not appear that such an indenture had been stamped or enrolled.

But the court will not, even after a long and undisturbed enjoyment, presume a bargain and sale, and enrolment thereof in Chancery.

Where a defendant's ancestor came into possession of certain lands in 1752, as a creditor under a judgment against the then owner of the land, and defendant's family had been in possession ever since, it was held, (nothing appearing as to whether the debt was satisfied or not,) that the original possession being accounted for, the length of possession was only *primâ facie* evidence of a subsequent conveyance to defendant's family, and that the jury ought not to presume such conveyance unless they were satisfied that one was executed.

(I) Where the Law requires the highest Proof the Nature of the Thing is capable of.

Page 322.

IF two parts of an instrument are prepared, but only one is stamped, the party having the unstamped part may give secondary evidence, if the other party refuse on notice to produce the stamped part.

In *indebitatus assumpsit* for work and labour, if the plaintiff prove his case by other evidence he is not precluded from recovering by the defendant's proving the existence of an unstamped and unsigned agreement, fixing the price, and which defendant gave no notice to produce.

In an action for maliciously, and without probable cause, charging plaintiff with an assault before a magistrate, the magistrate proved that the depositions taken before him were reduced

A. 286.; and see 3 East, 192. 10 East, 211. 2 Camp. 113.

Steel v. Prickett, 2 Stark. Ca. 463. Grose v. West, 7 Taunt. 39.; and see Doe v. Pearsey, 7 Barn. & C. 304.

Rex v. Long Buckby, 7 East, 45.

Doe v. Waterton, 3 Barn. & A. 149.

Doe dem. Fenwick v. Reed, 5 Barn. & A. 232.

Garnons v. Swift, 1 Taunt. 507.

Stevens v. Pinney, 8 Taunt. 327. 2 Moo. 349.; and see Gorton v. Dyson, 1 Bing. 219.

Freeman v. Arkell, 2 Barn. & C. 494.; and

see Brewster
v. Sewell,
3 Barn. & A.
296.

duced into writing, and that he delivered them at the Court of Quarter Sessions to the clerk of the peace or his deputy; the clerk of the peace stated, that an indictment for the assault was preferred, and that the grand jury returned *ignoramus*, and that it was usual, in such cases, to throw away or destroy the depositions, and that he had searched and could not find them. Held, that parol evidence of their contents was admissible, and that it was not necessary to call the deputy clerk of the peace to show that the original depositions were not in his possession, inasmuch as it was his duty, if he had received them, to deliver them to his principal, and not being in his custody, it was to be presumed that they were lost or destroyed.

Dickinson v.
Coward,
1 Barn. & A.
677.; and see
Peacock v.
Harris,
10 East, 104.

In an action by the assignee of a bankrupt, where the defendant had exhibited an account between him and the bankrupt, and made a part payment to the plaintiff on account, this was held *prima facie* evidence of the plaintiff being assignee, without producing the proceedings, there being no notice to dispute them.

6 Barn. & C.
398.

There are three descriptions of cases where notice to produce an instrument is unnecessary; 1, where the instrument produced and that to be proved are duplicate originals; 2, where the instrument to be proved is a notice, as a notice to quit, or a notice of dishonour of a bill of exchange. In *Kine v. Beaumont*, 3 Bro. & B. 288. the Common Pleas, after consulting the judges of the other courts, held that the copy of an original letter, giving notice of dishonour of a bill, was admissible, without notice to produce the original letter. The 3d case is where, from the nature of the suit, the opposite party must know that he is charged with possession of the instrument, as in trover for a bond or note.

Sed vide
1 Moo. & M.
31.

A copy of an attorney's bill delivered under the statute is within the second class above, as it is a notice of the amount of plaintiff's demand, and that he will enforce it by action, unless defendant tax the bill.

Colling v.
Tereweek,
6 Barn. & C.
394.

A surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls; held, that such surrender and presentment might be proved by a draft of entry from the memorials of the manor, and the parol testimony of the foreman of the homage jury.

Doe v. Callo-
way, 6 Barn.
& C. 484.

The declarations of a master of a pauper apprentice as to what was done with the indentures, were held inadmissible, since the master being living should be called.

Rex v. Inhab.
of Denis,
7 Barn. & C.
620.; see Rex
v. Morton, 4 Maule & S. 48.

Turner v.
Power, 1 Moo.
& M. 151.

In an action for rent of land verbally let on the same terms as the former tenant's lease, such lease must be produced properly stamped.

Norwich Com-
pany v. Theo-
bald, 1 Moo.
& M. 153.

Evidence that an advertisement was inserted in a country newspaper circulated at the residence of the party, is not admissible as proof of notice of the facts in the advertisement, unless it be shewn that he took in the paper.

In an action for work and labour, where it is shewn that the work was commenced under a written agreement, such agreement ought to be produced; and the plaintiff cannot recover without it for extras, although a particular item was proceeded in, after an admission by the defendant that it was an extra.

Where a court prints and circulates copies of its rules for the guidance of its officers, the production of one of these printed rules is good evidence of the rules which the officers are to act on, though the original rules are kept under the seal of the court, and the copy is not shewn to be examined.

Where the plaintiff has proved by witnesses a case of implied or oral contract, he cannot be nonsuited by the defendant's producing an unstamped written instrument, purporting to contain the terms of the contract.

Where the plaintiff's witness proved an acknowledgment by defendant that he held under *T.*, and stated that he the witness had drawn an agreement touching the premises, between plaintiff and *T.*, it was held that the plaintiff was bound to produce the writing.

(K) Of Hearsay Evidence.

Page 324.

ON a *parol* demise, rent to take place from the following *Lady Day*, evidence of the custom of the country is admissible to shew that by *Lady Day* is meant old *Lady Day*; *aliter* if the demise is by deed.

What a dead witness has sworn to on a former trial between the same parties, is evidence in the cause, and may either be read from the judge's notes, or proved by the recollection or notes of any person who heard it.

It is no objection to evidence of reputation of a *modus* that the deceased person from whom the hearsay came was liable to pay tithes.

Evidence of reputation is not admissible in support of a *farm modus*.

(As to the admissibility of hearsay evidence on questions as to private prescriptive rights, see *Barnes v. Mawson*, 1 Maule & S. 81. *Blacket v. Lowes*, 2 Maule & S. 494. *Doe dem. Didsbury v. Thomas*, 14 East. 323. *Weeks v. Sparke*, 1 Maule & S. 679.)

A declaration by the owner or occupier of adjoining land that his neighbour's land extends to such a spot, accompanying an act of forbearance to go beyond the spot for that reason (or without such act, if he speaks against his interest), is evidence that the land extends so far.

On an issue in trespass whether certain trees were the freehold of the plaintiff or not, it appeared that the trees grew in a woody belt, of considerable extent, entire and undivided, which encircled plaintiff's manor, and lay contiguous to a number of

Vincent v. Cole, 1 Moo. & M. 257. *Sed vide Id.* 413.

Dance v. Robson, 1 Moo. & M. 294.

Fielder v. Ray, 6 Bing. 332.

Fenn v. Griffith, 6 Bing. 533.

Doe dem. Hall v. Benson, 4 Barn. & A. 588. *Doe v. Lea*, 11 East, 312.

Mayor of Doncaster v. Day, 3 Taunt. 262.

Harwood v. Sims, Wightw. 112.; and see *Moseley v. Davies*, 11 Price, 162.

Pritchett v. Honeyborne, 1 Young & J. 135.

Sir Thomas Stanley v. White, 14 East, 332.

Ibid.; and see *Tyrwhitt v. Wynne*, 2 Barn. & A. 554. *Hollis v.*

Goldfinch,
1 Barn. & C.
218. Doe v.
Sisson,
12 East, 62.

closes belonging to several owners, one of which closes was that of the defendant; evidence was held admissible of acts of ownership in different parts of the belt (not merely those adjoining defendant's land) of those under whom plaintiff claimed, which had been acquiesced in by owners of the adjoining land; for this was evidence of a general right through the whole extent of such enclosure, which might be presumed to have belonged formerly to one owner.

Bullen v. Michel, 2 Price
R. 399.; and
see Doe v.
Thynne,
10 East, 206.

Ancient entries made by the monks of an abbey relating to an endowment by them of a vicarage, are good evidence (*quantum valeant*) of their subject-matter, although such entries be mixed with extraneous memoranda, and the book be not confined or appropriated to subjects *ejusdem generis*.

Mather v. Jackson, 1 Young & J. 65. Rowe v. Brenton, 8 Barn. & C. 737. Plaxton v. Dare, 10 Barn. & C. 17. An old deed between a public body claiming tolls and others liable thereto, regulating the amount of payment, is evidence in the nature of reputation of the existence of the tolls. Brett v. Beales, 1 Moo. & M. 416.; and see *Id.* 398. Maddison v. Nuttall, 6 Bing. 226.

2 Stra. 1129.
10 East, 118.
7 Bing. 433.

Entries of charges made by an attorney in his books, shewing the time of the making an instrument, are admissible evidence after the attorney's death, the entries being shewn to be paid.

Middleton v.
Malton, 10
Barn. & C. 317.
and see 8 Barn.
& C. 556.
3 Brod. & B.
152.

An entry made by a deceased collector of taxes in a private book kept by him for his convenience, charging himself with monies is evidence against the collector's sureties after his death, although the parties who paid the money to him are alive; for the entry is to the collector's prejudice.

Doe v. Bray,
8 Barn. & C.
813.

An entry in the registry-book by the minister of the parish of the baptism of a child, which had taken place before he became minister, or had any connection with the parish, and of which he received information from the parish clerk, is not evidence, nor is the private memorandum of the fact made by the clerk present at the baptism.

Rex v. Inhab.
of Warminster,
5 Barn. &
A. 121.

The examination of a soldier taken under the mutiny act, as to his place of settlement, is to be received as evidence, even though he be dead, or absent from the kingdom, at the time when the appeal is tried.

Rex v. Mead,
2 Barn. & C.
605.; and see
4 Barn. & C.

Dying declarations are only admissible where the death of the party is the subject of charge, and the circumstances of the death the subject of the declaration.

230. Doe v. Ridgway, 4 Barn. & A. 53.

Johnson v.
Lawson,
2 Bing. R. 86.

Declarations of servants and intimate acquaintances are not admissible in questions of pedigree, but only those of kindred.

(L) Of the Parties' Confession, ||and of Admissions.||

Page 327.

Randle v.
Blackburn,
5 Taunt. 245.

THE whole of an admission or account must be taken together, as well the statements favourable as those unfavourable to the party.

Baerman v.
Radenius,
7 Term R. 663.

The defendant may give in evidence, the admission of the plaintiff on record, though he be only a trustee.

Or

Or of a party really interested, though not on the record.

1 Wils. 257.
4 Camp. 38.; and see *Spurgo v. Brown*, 9 Barn. & C. 936.

But the party making the admission or declaration, must be identified with the party on the record, or the evidence is not admissible.

Beauchamp v. Parry, 1 Barn. & Adol. 89.

An acknowledgement by a trader made after an act of bankruptcy, though before the issuing the commission, is inadmissible in evidence, in an action by the assignees, to prove the petitioning creditor's debt; but in an action by the bankrupt against his assignees, such admissions are evidence.

Smallcombe v. Bruges, 13 Price, 136.
Jarret v. Leonard, 2 Maul. & S. 265.; and see 1 Camp. 376.

But declarations before the act of bankruptcy, are admissible for the defendant in an action by the assignees, to prove the petitioning creditor's debt fraudulent.

Thompson v. Bridges, 8 Taunt. 336.
2 Moo. 376.

Declarations of a party who has been holder of a bill of exchange cannot be received in evidence, unless made while he had the bill in his possession.

Pocock v. Billing, 2 Bing. 269.

An admission, in order to be evidence, should be of a mere fact within the party's knowledge, not of a conclusion mixed up of law and fact; thus an admission by a party suing for goods in trover, that he had been discharged under the insolvent act since the sale of the goods, is not evidence that he had no title to sue; for such discharge, unless all the legal requisites under the act have been complied with, does not divest him of his right.

Summersett v. Adamson, 1 Bing. 75.
7 Moo. 374.

Declarations of a widow in possession of premises, that she had them for her life, and that after her death they would go to the heirs of the husband, are admissible evidence to negative the fact of her having had twenty years' adverse possession.

Doe dem. Human v. Pettett, 5 Barn. & A. 223.

The general rule is, that declarations of the wife are not evidence for or against the husband.

2 *Phill. Evid.* 76.

In trespass against husband and wife, the wife's confession of trespass committed by her, is not evidence against the husband; nor are her declarations evidence in his favour.

Denn v. White, 7 Term R. 112.
Hodgkinson v. Fletcher,

4 Camp. 70. *Scholey v. Goodman*, 1 Bing. 349.

Where the wife has acted for the husband in his business, and by his authority and consent, he adopts her acts, and will be bound by any admission or acknowledgement made by her respecting that business.

Anderson v. Saunderson, *Holt's N.P.C.* 591.
Clifford v. Burton, 1 Bing. 199.

Phill. on Evid. v. i. 79.

Where one of several partners made a contract in his individual capacity, and at the time declared that the property was his alone; this declaration was held evidence against all the partners in a joint action on the contract.

Lucas v. De la Cour, 1 Maul. & S. 249; and see *Booth v. Quin*, 7 Price, 193.

An acknowledgement of a debt made by a debtor after arrest, but before an escape, is evidence against the marshal in an action for an escape.

Per Bayley J.
Rogers v. Jones, 7 Barn. & C. 86.

Where a party examined before commissioners of bankrupt, admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy; this was held not evidence of an account stated with the assignees; and it seems that an ad-

Tucker v. Barrow, 7 Barn. & C. 623.

mission obtained on such a compulsory examination, is not evidence at all against the party in a civil suit.

Paul v. Meek,
2 Young & J.
116.; and see
3 Young & J.
80.
A lessee who executes a counterpart of a lease, cannot dispute its admissibility in evidence, or impeach its validity on the ground of its not being properly stamped.

Tomkins v.
Ashby, 1 Moo.
& M. 32.
A demurrer or plea to a bill in equity, does not so far admit the facts charged in it, as to be evidence against the defendant of those facts in a future *action between the same parties*.

Clay v. Langs-
low, 1 Moo.
& M. 45.
On a plea in abatement of non-joinder of *A. B.* as defendant, his declarations made before action brought, are evidence in support of the plea.

Fenwick v.
Thornton,
Id. 51.
The declarations of a party suing as assignee of a bankrupt made before he became such, are not evidence against him.

Bernasconi v.
Anderson,
1 Moo. & M.
183.
An acknowledgement of a debt without specifying any amount, is not sufficient to entitle the creditor to nominal damages on a count upon an account stated.

Fellowes v.
Williamson,
1 Moo. & M.
306.
In *case* for a false representation of the solvency of *A. B.*, whereby the plaintiffs trusted him with goods, their declarations at the time they trusted him are admissible in evidence for them.

Melen v. An-
drews, 1 Moo.
& M. 336.
The deposition of a witness taken in a judicial proceeding, in the presence of the party there charged, is not admissible in another proceeding against that party, although he was present, and had the opportunity of cross-examining.

Rex v. Reed,
1 Moo. & M.
403.
If the examination of a prisoner taken in writing is inadmissible by reason of irregularity, parol evidence of what he said at the examination may be received.

Wallace v.
Small, 1 Moo.
& M. 446.
An offer of a specific sum by way of compromise is admissible in evidence, unless accompanied by a caution that the offer is confidential.

Daniels v. Pot-
ter, 1 Moo. &
M. 501.
In case for negligence, the declarations of one defendant who has suffered judgment by default are not admissible in evidence against the others to shew the circumstances of the injury, although such others are, independently, shewn to be concerned in it.

Provis v.
Reed, 5 Bing.
435.
Declarations of a testator in subversion of a will are not admissible in evidence, though both parties claim under him, and though they are offered with a view to shew the manner in which the will was executed.

EXCOMMUNICATION.

(C) By whom Excommunication is to be pronounced.

Page 335.

Ackerley v.
Parkinson,
3 Maule & S.
411. (a) Since
53 G. 3. c. 127.
excommunica-
tion could not
issue for such a cause. See letter (E).

IF an ecclesiastical judge excommunicate without malice (a), for disobedience of the order of his court, made in a matter in which the court has jurisdiction, he is not liable to an action on the case, although the proceedings may be irregular, and set aside on appeal.

(D) What

(D) What Inconveniences and Disabilities it lays the Party excommunicated under.

THE votes of persons excommunicated have been frequently objected to at elections, but the decisions of the House of Commons do not appear. 8 Journals, 118. 13 Journ. 42. According to *Bracton*, *Excommunicato interdicatur omnis actus legitimus ita quod agere non potest, &c.*, and the testimony of such persons was formerly rejected in courts of law, and has been considered inadmissible by authors, on the ground of a *dictum* of Lord Coke (2 Bulstrode's Rep. 155.). But all doubt appears now to be removed as to their capacity to vote by the 53 G. 3. c. 127. § 2, 3., which enacts, that no sentence of excommunication shall be pronounced by Ecclesiastical Courts in cases of contempt or disobedience to their order, and that persons excommunicated shall in no case incur any civil penalty or disability whatever.

Dodd's Doubtful Questions in the Law of Elections, p. 59.

(E) Of the Proceedings on the Writ of *Excommunicato Capiendo*.

A WARRANT issued in pursuance of a writ *de contumace capiendo* stated that the defendant was attached for nonpayment of costs, in a cause of appeal and complaint of nullity, lately depending in the Arches Court of *Canterbury*; held, that this warrant was insufficient in not stating with certainty the nature of the cause, so as to show that it was one apparently within the jurisdiction of the Ecclesiastical Court.

Rex v. Dugger, 5 Barn. & Ald. 791.

EXECUTION.

(C) Of the several Kinds of judicial Writs which lie after Judgment.

Page 376.

BY rule of the K. B., the attorney concerned for the plaintiff in the cause, or his agent, shall upon all bailable *mesne process*, and every writ of *attachment* and *fieri facias*, and *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney or agent may be able to give.

Reg. Gen. B. R. H. T. 2 & 3 G. 4. 5 Barn. & A. 560.

2. Of the *Elegit*.

Page 378.

Where two *elegits* are issued the same day, upon judgments signed in the same term, the sheriff may extend on each an entire moiety of the defendant's land, although the judgments are at the suit of different plaintiffs, and the inquisition on the second *elegit* recites that a moiety has been extended on the first.

Doe dem. Davis v. Creed, 5 Bing. 327.

3. *Of the Capias ad satisfaciendum.*

Page 383.

Crozier v. Pil-
ling, 4 Barn.
& C. 26.

A plaintiff is bound to accept from defendant in custody under a *ca. sa.* the debt and costs when tendered to him, and to order the sheriff to discharge him; and if he refuse, he is liable to an action on the case.

Fothergill v.
Walton,
4 Bing. 711.

Where the defendant was taken on a *ca. sa.*, and the plaintiff died, and administration to him was taken out, the court refused without the authority of the administratrix to discharge defendant out of execution, although the administratrix and the assignees (the plaintiff having become bankrupt,) disclaimed all interest in the action.

4. *Of the Fieri facias and Levari facias.*

Page 387.

Wooderman
v. Baldock,
8 Taunt. 676.;
1 Maule & S.
251. 3 Moo.
11.; and see
Doker v. Hasler,
2 Bing. 479. Leonard
v. Baker, 1 Maule & S. 257. Jephson
v. Ingram, 1 Moo. 189. See notes to Twine's Ca. 3 Coke R. (ed. Thomas and Fraser).

Goods assigned to a trustee, and in possession of the *cestui que trust* pursuant to the assignment, cannot be taken under an execution against the *cestui que trust* by a creditor knowing the goods to be property of the trustee.

Sparrow v.
Earl of Bristol,
1 Marsh R. 10.

The sheriff may, under an execution against a tenant, sell any remaining interest of the tenant in a farm, which he is about quitting, however short.

Winn v. In-
gilby, 5 Barn.
& A. 625.

A sheriff under a *fieri facias* cannot seize fixtures, where the house is the freehold of the party against whom the execution issues.

Farrant v.
Thompson,
5 Barn. & A.
826.; and see
Gordon v.

And if machinery is wrongfully severed from the soil by the tenant, it is not seizable as the tenant's goods and chattels, for the landlord is entitled to bring trover for it even during the term.

Harper, 7 Term

R. 9. which does not conflict with the principal case. and tit. *Sheriff*, Vol. VII.

Payne v.
Drew, 4 East
R. 525.

Though a *fieri facias* binds the goods against the defendant from the time of delivery, yet the property is not divested out of the defendant till execution executed, and therefore a seizure and sale under a second execution will prevail; but the first plaintiff will have his remedy against the sheriff, unless he himself has been guilty of laches.

Lovick v.
Crowder,
8 Barn. & C.
132.

In *March* the then sheriffs of *London* seized the goods of a debtor under a *fieri facias*; an officer was put in possession of the goods, but the execution creditor directed the sheriffs not to sell, and the debtor continued to have the control of the goods till *November*, when another creditor sued out a *fieri facias*, directed to the succeeding sheriffs of *London*: held, that the latter were bound to levy under this second *fieri facias*, and, that it was their duty when they found the officer of the former sheriffs in possession, to enquire into the facts, and if they had done so, they would have learned that the first execution was fraudulent.

If the sheriff seize and sell a lease under a *fieri facias* before the return, his assignment of the term is valid, though made after the return. Doe v. Dons-
ton, 1 Barn. &
A. 230.

If the sheriff seize a tenant's growing crops under a *fieri facias*, and before he sell a *hab. fac. possessionem* is delivered to him, founded on a judgment in ejectment at suit of the landlord, the demise being laid before the issuing of the *fieri facias*, the sheriff cannot sell the growing crops under the *fieri facias*, for the tenant is a mere trespasser from the day of the demise. Hodgson v.
Gascoigne,
5 Barn. & A.
88.

Where a defendant has received judgment of fine and imprisonment for a misdemeanor, a *levari facias* may issue immediately, to take his goods in execution for the fine. Rex v. Woolf,
2 Barn. & A.
609.

By the 56 G. 3. c. 50. reciting that it is expedient that the execution of legal process should be so regulated as to be consistent with good husbandry, and the covenants and agreements between owners and occupiers of lands let to farm, it is enacted that no sheriff shall, by virtue of any process, carry off, or sell or dispose of for the purpose of being carried off, from any lands let to farm any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or turnips, or any manure, compost, &c. nor any hay, grass, tares or vetches, nor any roots or vegetables, being the produce of such lands, in any case where according to any covenant or written agreement for the benefit of the owner or landlord, such hay, grass, tares and vetches, roots or vegetables ought not to be taken off or withholden from such lands, or which by the tenor or effect of such covenants, &c. ought to be used or expended thereon, of which covenants, &c. the sheriff shall have had written notice before sale: and that the tenant or occupier of lands against whose goods process shall issue, shall give written notice to the sheriff of such covenants, &c. and also of the name and residence of the owner or landlord of such lands; and the sheriff shall before sale send notice by post to such owner or landlord, and also to his steward or agent, stating the fact of possession having been taken of any crops or produce herein-before mentioned, and such sheriff, &c. shall in the absence or silence of the landlord, &c. postpone the sale till the latest day he can appoint. 56 G. 3. c. 50.

Provided that such sheriff, &c. may dispose of any such crops or produce, to any person agreeing in writing to use and expend the same on the land, according to the custom of the country, in case no agreement shall exist, or according to such agreement, where one shall be shewn; and, after such sale or disposal, &c. it shall be lawful for such person to use all such necessary barns, &c. for that purpose, as the sheriff shall assign; and the sheriff, on request of the landlord, shall permit him to bring any action on any such agreement, in the sheriff's name, the landlord indemnifying the sheriff against all costs.

And further, that no sheriff shall by virtue of any process sell or dispose of any clover, rye, grass, or other artificial grass, which shall be newly sown and growing under any crop of standing corn.

- (D) Where the Party shall be concluded by the Election of one of them, and what further Remedy he has when he has not received entire Satisfaction on his first Writ, and this, either against the Party or the Sheriff.

Page 393.

Clarke v. Clement, 6 Term R. 525.

IF the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.*, he cannot afterwards retake him, or take any of the others.

Ballam v. Price, 2 Moo. 235.

If a plaintiff take the note of one of two defendants taken on a *ca. sa.*, in satisfaction of the damages, it is a discharge of the other defendant.

Mackie v. Warren, 5 Bing. 176.

The court will not discharge a defendant from custody under a *ca. sa.*, on the ground that he has been before irregularly taken and discharged under criminal process, at the instance of the plaintiff.

- (E) Of the Authority and Jurisdiction of the Court out of which the Execution issues: And herein of the Manner of executing a Judgment where the Record has been removed from an inferior to a superior Court.

Page 399.

Woolley v. Kelly, 1 Barn. & Cres. 68.

WHERE a verdict was taken for the plaintiff for 400*l.* damages, in an action against several defendants, subject to a point of law for the court, and in case the law was decided in favour of the plaintiff, then subject to the award of a barrister as to damages, the law being decided in favour of the plaintiff, and the arbitrator declining to proceed in the reference, and one of the defendants refusing to name another arbitrator, the court ordered judgment and execution to issue against the defendant, for the damages found by the jury, unless he would consent to refer to some other arbitrators.

- (I) To what Time the Execution shall have Relation, so as to avoid any Alienation of the Party: And herein of the Statute of Frauds.

Page 410.

Jones v. Atherton, 7 Taunt. 56.
2 Marsh. 375.;
and see Hutchinson v. Johnson, 1 Term R. 729.

IF a sheriff having seized goods of the defendant under one execution, receives another execution against the same goods at the suit of another party, the goods are bound by the second writ from the time of its delivery to the sheriff, subject of course to the prior execution, and this without any warrant on the second writ or any further seizure.

If the sheriff having two executions against a defendant's goods seize them, and they are not sufficient to satisfy more than the first execution, and that execution is set aside by the court, and the sheriff without giving notice to the plaintiff in the second execution, or applying to the court, pay over the money to the defendant, and on being ruled to return the second writ return *nulla bona*, he is liable to the plaintiff on the second execution for the amount so paid over.

Saunders v. Bridges, 3 Barn. & A. 95.

In an action against the sheriff for a false return of *nulla bona* to a writ of *fiery facias*, the sheriff proved that he had seized all the goods of the debtor under a *fiery facias* in another suit before the plaintiff's writ was delivered to him; the plaintiffs in answer proved that the judgment upon which the first execution was sued out was entered upon a warrant of attorney fraudulently executed by the debtor in order to defeat the plaintiffs' execution, and that they gave notice to the sheriff to retain the proceeds of the goods levied. The sheriff on the first day of the next term was served with a rule to return the writ of *fiery facias* under which he first levied. He did not give any notice to the plaintiffs by whom the second *fiery facias* had been sued out that he had been served with such a rule, and at the expiration of the six days mentioned in that rule, the sheriff's officer paid over the proceeds of the goods levied to the plaintiff at whose suit the first *fiery facias* had been sued out; held, that this was misconduct in the sheriff and rendered him liable to the plaintiff in the second execution.

Warmoll v. Young, 5 Barn. & C. 660.

(P) Of the Party's Remedy when there hath been an irregular Execution, and how the same is to be set aside.

Page 419.

A *FIERY FACIAS* directed in the first instance to the bailiff of the *Isle of Ely* out of the Court of King's Bench is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken.

Grant v. Bagge, 3 East, 128.

If an execution be issued for the penalty of a bond given for securing an annuity, when the warrant of attorney authorizing the judgment only authorizes execution to be taken out for the arrears, the court will set aside the execution *in toto*.

Tilby v. Best, 16 East, 163.

The Court of King's Bench refused to set aside an execution against the goods of a person who having been discharged under an insolvent debtor's act, gave a note for that part of the debt remaining undischarged.

Best v. Barker, 8 Price, 533.

But an execution issued against the goods of a defendant on a judgment recovered was set aside, and the money levied restored, the defendant, pending the action, having been discharged under the insolvent act 1 G. 4. c. 199.

Darley v. Brown, 8 Price, 607.

Where a sheriff under a *fiery facias* against *A.* seized and sold the furniture in his house where he lived with a woman to whom

Glaspoole v. Young,

he

9 Barn. & C.
696.; and see
2 Stark Ca.
396.

he had been married, and to whom the goods belonged before marriage, it was held, that the woman having afterwards discovered that the marriage was void might maintain trover against the sheriff, and recover the value of the goods, though it exceeded the price for which they were sold.

Warwick v.
Bruce, 4Maul.
& S. 140.

After verdict, and judgment affirmed on error, the court refused to stay execution till the trial of an indictment against two of the plaintiff's witnesses for perjury.

Gill v. Hinck-
ley, 1 Moo.79.

Where a defendant has entered into a consolidation rule, and the plaintiff has obtained a verdict in the cause tried, which is turned into a special verdict in order to bring error into the King's Bench, the Court of Common Pleas will stay execution against the defendant till the result of the writ of error be known, on the defendant giving security to be bound by the judgment of King's Bench.

EXECUTORS AND ADMINISTRATORS.

(A) What Persons may be Executors.

Page 425.

IT is said at p. 426 that persons excommunicated cannot be executors or administrators, but this seems removed by 53 G. 3. c. 137. § 3., which provides that no such person shall incur any civil penalty or incapacity whatsoever; see tit. "EXCOMMUNICATION."

9. *Of making Creditors Executors.*

Page 431.

De Tastet v.
Shaw, 1 Barn.
& A. 664.; and
see Moffatt v.
Van Millen-
gen, 2 Bos. &
Pull. 124 n.

An executor sued for a debt of the testator cannot either plead as a specialty debt outstanding, or retain, a debt due from the testator to the executor (they having been partners), on an unliquidated partnership account secured by a covenant from the testator to the firm; for this is not a debt due *at law* and could not have been sued for at law.

Picard v.
Brown,
6 Term R. 550.

In debt on bond against an administrator if he plead a bond debt due to himself and retainer, he need not aver that it was given for a just debt, nor set out his administration; for the plaintiff admits him lawful administrator.

Thompson v.
Grant, 1 Rus-
sell R. 540.

The executor of an executor is entitled to retain out of the balances of the produce of the original testator's *West Indian* plantations received by him as consignee appointed by the court, debts due from the testator to him either in his own right or as executor of the deceased executor.

Dines v. Scott,
1 Turn. &
Russ. 358.

An executor on a bill for an account cannot call his co-executor to whom he has paid over money to prove it was duly applied.

Farrington v.
Clarke,

Where the defendant acting under a power of attorney from the plaintiff took out administration in *Bengal* to the estate of a deceased

deceased debtor by bond to the plaintiff, and received monies under the administration; it was held that he could not recover as against the plaintiff on the ground of a subsequent administration obtained by other creditors in this country. 2 Chitt. 429.

Quere, Whether the heir of the obligor in a bond being one of the two surviving executors of the obligee, is entitled to retain the amount of the bond out of the produce of the estate descended to him? If in a suit instituted by creditors he accounts for the produce of the real estate in the master's office, and he and his co-executors prove the bond debts under the decree, he is not entitled to retain. Player v. Fox-hall, 1 Russ. 538.

10. *Of making Debtors Executors.*

Page 432.

A debt due from an executor to a testator, is assets for the same reason that the executor of a creditor may retain, because he cannot sue himself.

Simmons v. Gutteridge, 13 Ves. 264.

An executor admitting a balance due from him to the testator upon an unsettled account, was ordered to pay the money into court though there were debts of the testator outstanding; the testator had been dead three years.

Mortlock v. Leathes, 2 Meriv. R. 491.

Where the payee and holder of a promissory note appoints the maker his executor, the debt is discharged, and no action can be maintained on the note even by a person to whom the executor has endorsed it.

Freakley v. Fox, 9 Barn. & C. 130.

(B) Of the different Kinds of Executors and Administrators.

2. *Of an Administrator de bonis non, where the first Administrator dies, or the executor dies intestate, or without Probate of the Will.*

Page 440.

IF a bill of exchange is indorsed generally and delivered to *A. B.* as administrator of *C.* for a debt due to the intestate, and *A. B.* die intestate after the bill became due, the bill vests in the administrator *de bonis non* of *C.* who may sue thereon; for the first administrator might have sued in his representative character.

Catherwood v. Chabaud, 1 Barn. & C. 150.

The administrator of an executor cannot sue for double value of lands held over after notice to quit under a demise from the testator contrary to 4 G. 2. c. 28., without taking out administration *de non bonis*; and this, although the tenant has attorned to the administrator.

Tingrey v. Brown, 1 Bos. & Pull. 310.

In *assumpsit* brought by the administrator *de bonis non*, the promise may be laid to have been made to the first administrator.

Hirst v. Smith, 7 Term R. 182.

3. *Of an Executor de son tort.*

Page 443.

Edwards v.
Harben,
2 Term R. 587.

If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession, and on the debtor's death in possession the creditor sell them, he is liable as executor *de son tort* for the deceased's debts; for the debtor's remaining in possession made the bill of sale fraudulent against creditors.

Cottle v. Al-
drich, 4 Maul.
& S. 175.

A person cannot be charged as executor *de son tort* while he acts under a power of attorney from one of several rightful executors, but if he continue to act after such executor's death, the authority is ended, and he may be charged as executor *de son tort*; and this although he act under the advice of another executor who has not proved.

Curtis v. Ver-
non, 2 Term
R. 587. affirm-
ed in C. S.
2 H. B. 18.

An executor *de son tort* cannot discharge himself of an action brought by a creditor by delivering over the effects to the right-ful executor *after action brought*.

Mountford v.
Gibson, 4 East
R. 441.

A creditor receiving goods of an intestate from his widow, cannot protect his possession against the rightful executor, suing in trover, on the ground of such delivery being made by one acting as executor *de son tort*, where the delivery was not made *in a course of administration* but was a single act of inter-meddling.

(C) *Of the Manner of appointing an Executor.*

Page 450.

Dix v. Reid,
1 Sim. & Stu.
237.

TESTATOR named two persons as executors, with a legacy of 30*l.* each, conditioned on their taking upon themselves the trusts, and then said, — "I give to my cousin *J. K.* 50*l.*, whom I appoint joint executor, and also to *J. K.*'s sisters 50*l.* each;" it was held, the legacy to *J. K.* was not annexed to and depending on his taking the office.

(D) *Of appointing Co-executors.*

Page 453.

Denne v.
Judge, 11 East,
589.; and see
as to this stat.
Gilb. Uses, by
Sugden, 128.

BY 21 H. 8. c. 4. lands devised to be sold by executors may be legally sold by the executors who act without those who refuse to take upon them the office. The statute does not extend to the case of death of an executor. The devise must be to persons *as executors*; or at least the fund, when raised, must be distributable by them in that character; and at all events, the statute does not help a case where the conveyance purported to be executed by the five executors, but the
execution

execution of only three could be proved. But such a conveyance was good as to three fifths being a severance of the joint tenancy.

note. Bonifant v. Greenfield, 1 Leon. 60. Cro. Eliz.

80. Mackintosh v. Barber, 1 Bing. R. 50.

An assignment of assets, and a judgment confessed to a creditor by one executor, are not available against the dissent of the other executors, on behalf of the creditors in general, at least while they remain executory.

Lepard v. Vernon, 2 Ves. & B. 51.

Where a legacy was by order directed to be paid to *A. B.*, who died, leaving executors, and one executor died, on application the court ordered the legacy to be paid to the surviving executors, without acquittance from the executor of the deceased executor.

Moodie v. Bainbridge, 6 Madd. 107.; and see 3 Ves. & B. 72. Coop. R. 58.

An executor who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of the estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate.

Davis v. Sparling, 1 Russ. & M. 64.

(E) Of the Probate of Wills, and granting Administration.

Page 457.

THE property of a testator vests in the executor from the time of his death; and therefore, where an executor under one will obtained probate, and afterwards the executor appointed by a subsequent will obtained probate (the first probate being revoked), the rightful executor was held entitled to recover in trover against the other executor the full value of goods of the testator, sold by him after notice of the second will, and the first executor was not entitled to shew, in reduction of damages, an administration of assets.

Woolley v. Clark, 5 Barn. & A. 744.

In trover for a chattel claimed by the plaintiff as vendee of an executor, the will is not evidence of the title of the executor. The probate must be produced.

Pinney v. Pinney, 8 Barn. & C. 335.

The title of three, claiming as executors, is well evidenced by the probate granted to one only of the will appointing them all.

Walters v. Pfeil, 1 Moo & Malk. 362.

To get money out of the Court of Chancery, however small the amount, a prerogative probate is necessary.

Thomas v. Davies, 12 Ves. 417.

Where personal property is bequeathed to the executors as trustees, the probate of the will is an acceptance of the trusts.

Mucklow v. Fuller, 1 Jac. 198.

(H) What

(H) What shall be deemed the Testator's Personal Estate or Assets in the Hands of the Executor.

Page 485.

Clay v. Willis,
1 Bar. & C.
364.

IT is now settled, that a devise of land to trustees and executors, in trust to pay debts, creates equitable and not legal assets. And a devise of an equity of redemption, to pay debts, also creates equitable assets; because the subject-matter is equitable property at the testator's death; therefore, if *A.* mortgage land, with a power of sale by the mortgagee, on trust to pay the mortgages, and then pay over the surplus to *A.*, his executors, or administrators, and then *A.* die before sale, having devised his real and personal property to his executors, to sell and pay debts, &c., and the mortgagees then sell, and pay the surplus money to an agent of the executors, the executors cannot recover the money from the agent as money had and received to their use, since the money is not legally vested in them, but is equitable assets.

1 Will. 4. c. 47.
§ 9.

By the 1 W. 4. c. 47. repealing the 47 G. 3. c. 2. § 74. the lands of a trader liable to bankruptcy, which were before assets in the hands of his heir for specialty debts, shall be assets to be administered in courts of equity for all debts, simple contract as well as specialty; specialty debts to be first paid.

47 G. 3. c. 2.
Hitchon v.
Bennett,
4 Madd. R. 180.

The act 47 G. 3. c. 2. only applies to persons who were traders *at the time of their decease*, and the words of the new act are of the same import.

Young v.
Cawdrey,
8 Taunt. 734.
3 Moo. 66.;
and see Toller

All sums stated in the executor's inventory, exhibited to the spiritual court as supposed to be recoverable are assets in his hands, unless the executor prove a demand and refusal.

Bentham v.
Wiltshire,
4 Madd. 44.;
and see 1 Jac.
& Walk. 189.
Co. Litt. 115 a.

Executors have only power to sell the real estate where such power is expressly given to them, or necessarily to be implied from the produce being to pass through their hands in the execution of their office.

Byrne v. God-
frey, 4 Ves. 6.

Though testator declared to his executor, that he never meant to call for payment of a promissory note, it was held part of the assets, a charge on the real estate having failed for want of a proper attestation of the will.

3 Bro. P. C.
556. 7 Ves.
447.

An advowson in gross is assets by descent for payment of specialty debts by common law.

Holmes v.
Coghill,
7 Ves. 499.

A power to raise money unexecuted is not assets, and the money cannot be raised.

George v. Mil-
banke, 9 Ves.
190.

But if the power is executed in favour of volunteers, the court lays hold of the money as assets; the equity, however, of a party purchasing of the volunteer shall be preferred to that of the general creditors having no specific charge.

A re-

A remittance to the intestate of bills and notes to honour acceptances drawn by the remitter, which came to the hands of the administrator, the intestate dying the day before it arrived, is not general assets, but is to be applied according to the remitter's specific appropriation. Hassall v. Smithers, 12 Ves. 119.

A debt due from an executor to his testator is assets, for the same reason that he may if a creditor retain; viz. that he cannot sue himself. Simmons v. Gutteridge, 13 Ves. 262.

To the cases in note (a), p. 496, as to expressions of the testator's intention, that the executor should not have the surplus to his own use, must now be added the important alteration in the law made by the act for making better provision for the disposal of the undisposed of residues of the effects of testators, 1 W. 4. c. 40., whereby it is enacted, that when any person shall die, after the 1st of *September* next after the passing of the act, having by his will or codicil appointed any executor, such executor shall be deemed by courts of equity to be a trustee for the person entitled to the estate under the statute of distributions, in respect of any residue not disposed of, unless it shall appear by the will or codicil that the person so appointed executor was intended to take such residue beneficially. Mence v. Mence, 18 Ves. 348.

By § 2. it is provided, that nothing therein shall affect any right to which any executor, if the act had not passed, would have been entitled in cases where there is not any person who would be entitled to the testator's estate under the statute of distributions, in respect of any residue not expressly disposed of. § 2.

By § 3. it is provided that nothing herein contained shall extend to that part of the united kingdom called *Scotland*. § 3.

Where a rectory falls vacant, the advowson of which belongs to a prebendary in right of his prebend, and the prebendary dies without having presented, the presentation does not belong to his personal representative. Rennel v. Bishop of Lincoln, 3 Bing. 223.

(I) How the Personal Estate, after Debts paid, is to be distributed when the Party dies Intestate; And herein, of the Share the Husband or Wife are entitled to; and of the ascending, descending, and collateral Line, and Admission of the Half-Blood; and where the Distribution shall be *per Stirpes*, and not *per Capita*.

Page 502.

AN administrator is not bound by the condition of the bond, given in pursuance of the statute of distributions, to distribute the surplus of the intestate's estate after payment of debts, &c. until a decree, directing him to do so, has been made by the court into which his inventory and account have been exhibited. Archbishop of Canterbury v. Tappen, 8 Barn. & C. 151.

(L) What

L) What shall be a *Devastavit*, either in Executors or Administrators; And herein of the Order of paying Debts and Legacies.

Page 510.

Webster v. Spencer, 3 Barn. & A. 360.

IT does not amount to a *devastavit* if an executor lend out money of the testator, not wanted for the uses of the will, on private security, provided he exercises a fair and reasonable discretion on the subject.

Powell v. Evans, 5 Ves. 839. Eagleton v. Coventry, 8 Ves. 466.; and see French v. Hobson, 9 Ves. 103. Wilkes v. Steward, Coop. R. 6.

Executors ought not, without great reason, to permit money of the testator to remain on personal security longer than is absolutely necessary, especially where infants are concerned; and an executor, on the same principle, is bound to pay into court money due on personal security from himself.

Ex parte Lacey, 6 Ves. 628.

An executor cannot buy up debts for his own benefit.

Raphael v. Boehm, 11 Ves. jun. 108.

Ex parte James, 8 Ves. 346. An executor, bound to accumulate, cannot account as if the money had been laid out in the funds if it was not so laid out, or being so, he had sold out at an advance.

Sims v. Doughty, 5 Ves. 243.

An executor shall be allowed to retain out of a legacy to his co-executors, in respect of a *devastavit* committed by him.

Chalmer v. Bradley, 1 Jac. & W. 65.; and see Simmons v. Bolland, 3 Meriv. 547.

Executors advancing to creditors more than the value of testator's personal estate, acquire an absolute right to them.

Macleod v. Drummond, 17 Ves. 168.

An executor's depositing assets as a security for his own debt and for future advances to him, is inconsistent with his duty, though under circumstances indicating that he intended to apply the money borrowed to the purposes of the will.

Turner v. Turner, 1 Jac. & W. 39.; and see Crackett v. Bethune, *Id.* 586.

An executor will be charged with interest on the balances in his hands, though not prayed by the bill.

Paice v. Archbishop of Canterbury, 14 Ves. 364.

Where every thing is left to the discretion of the executors, they will be allowed a payment for mourning rings, though not directed by the will.

Burden v. Burden, 1 Ves. & B. 170. Freeman v. Fairlie, 3 Meriv. 24.

A partner, appointed executor by the will of his late partner, was held not entitled to an allowance for carrying on the joint trade after his testator's death, there being no such stipulation; but he was allowed his late partner's share of necessary expenses.

Rutherford v. Dawson, 2 Ball & B. 17.; and see 3 Madd. 62. Coop. 6.

An executor is never called on to lodge money in court, except on an affidavit of his insolvency, or where he admits a clear balance in hand after payment of debts.

Skinner v. Sweet, 3 Madd. R. 244.

Where an executrix, in respect of receipts, was much indebted to the estate, an annuity to which she was entitled under the will was applied in payment of the debt.

4. *What shall be allowed on account of Funeral Expenses.*

As against a creditor, the rule of law is, that an executor shall be allowed no more for funeral expenses than is absolutely necessary, regard being had to the degree and condition of the deceased; and therefore, where the deceased had been a captain in the army, and at the time of his death was on half pay, 79*l.* was held too large a sum as against a creditor. *Seemle*, that in such a case 20*l.* is a reasonable sum as against a creditor.

Hancock v.
Podimore,
1 Barn. &
Adol. 260.

[(L 2.) Where the Personal Estate shall be first applied in Discharge of Debts: And herein of marshalling the Assets.]

Page 522.

IN order to exonerate the personal estate from the payment of debts, the will must contain express words for that purpose, or a clear manifested intention: a declaration plain, or a necessary inference, tantamount to express words. The intention need not be so manifested as that all persons must necessarily agree in it, but so as to convince the mind of the judge deciding the question.

Bootle v.
Blundell,
1 Meriv. R.
193. 19 Ves.
494. Greene
v. Greene,
4 Madd. R.
148. Gittins
v. Steele,

1 Swanst. 24. Tower v. Lord Rous, 18 Ves. 132.

A final decree upon a sum ascertained is equal to a judgment at law; but a mere decree for an account of plaintiff's demand, and of the personal estate, come to the hands of the defendant, with a mere direction for payment out of the result of that account does not prevent the executor paying debts; there must be a report and a final decree upon it.

Perry v. Philips, 10 Ves.
34.; and see
Morrice v.
Bank of Eng-
land, Ca. temp.
Talb. 217.
3 P. Will. 402.

4 Bro. P. C. 287. Smith v. Eyles, 2 Atk. 385. Martin v. Martin, 1 Ves. 211.

A judgment in the lord mayor's court, obtained against the garnishee, does not entitle the plaintiff to rank as a specialty creditor in the administration of the garnishee's assets.

Holt v. Mur-
ray, 1 Sim. 485.

The year allowed to executors and administrators for payment of legacies, is only for convenience, and does not prevent the vesting of the fund.

Garthshore v.
Chalie, 10 Ves.
13.

An executor who has paid legacies cannot allege that debts are outstanding.

Freeman v.
Fairlie,
3 Meriv. R. 38.

It seems that a surety who pays off a specialty debt is considered a specialty creditor of his principal.

Robinson v.
Wilson,
2 Madd. 434.

It is a principle in marshalling assets, that where a creditor has two funds, he shall not, by his option to resort to one, defeat persons who have only that one fund to look to; and if he do, those persons shall stand in his place. Upon this principle, a vendor's lien on an estate sold to a deceased person has been extended to the benefit of the persons entitled to the personalty against the heir claiming to have the estate paid for out of the personalty.

Trimmer v.
Baynes, 9 Ves.
209.; and see
Ambler, 614.

Anon. 18 Ves.
258.

The bond of a married woman, given for a debt contracted during coverture, being a nullity, shall have no priority in the marshalling her separate assets after her decease.

Turner v. Turner, 1 Jac. & W. 39.

Where there are sufficient assets to pay all debts, executors may pay simple-contract debts not bearing interest before specialty debts bearing interest, unless specialty creditors complain; the legatees cannot complain.

Harmood v. Oglander, 8 Ves. 125.; and see 2 Bro. C. C. 257.
12 Ves. 154.

In the administration of assets, ordinarily the first fund applicable is the personal estate not specifically bequeathed; then land devised or ordered to be sold for payment of debts not merely charged; then descended estates; then lands charged with the debts; and the distinction is between a mere charge upon the real estates, and proposing the mode in which debts are to be paid.

Gilpin v. Lady Southampton, 18 Ves. 469.; and see Paxton v. Douglas, 3 Ves. 520.

In order to prevent abuse by executors procuring a creditor to institute a suit, whereby, on decree, they were protected from any suit by other creditors, and could thus retain assets, Lord Eldon introduced the rule, that where the executor's answer did not set forth what the assets were, the executor should state them by affidavit; and then an injunction should be granted against any creditor suing, upon the executor's bringing the assets into court to be disposed of as the court should direct.

Clarke v. Ormonde Jacob's R. 108. Id. 122.

If a suit be commenced for administration of the estate, it is the duty of the executors, by putting in their answer speedily, to facilitate the obtaining a decree, under which the estate may be protected from actions. And where creditors are proceeding at law after a decree, the executor should move to restrain them, or he may become responsible.

Maltby v. Russell, 2 Sim. & Stu. 227.

Executor or administrator, after suit for an account, may pay simple contract or specialty debts.

Terwest v. Featherley, 2 Meriv. R. 480.

Where an executor pleaded, to an action by a creditor on a bond of the testator, first, *non est factum*; secondly, *plene administravit*, and a verdict was found for the plaintiff on both pleas, Lord Eldon refused to stay an execution on the judgment by injunction, on the ground that the court could not interfere where the executor had, by pleading, rendered himself liable to a judgment *de bonis propriis*.

Brooke v. Skinner, Id. in notis. Lord v. Wormleighton, Jac. R. 148.; and see

But in a subsequent case (not distinguishable as to the judgment to which the plaintiff at law was entitled), his lordship granted the injunction on the executor paying the plaintiff's costs at law; saying he was not sure he had not a wrong notion in the former case.

Dyer v. Kearsley, 2 Meriv. 482. n. where a like order was made where the executor had suffered judgment by default at law. It is to be observed, that in neither of the two former cases had the executor rendered himself liable to the debt *de bonis propriis*, but only to the costs, since it is only where he pleads *ne unques* executor, or a release to himself, which he must know to be false pleas, that he is liable to a judgment for debt and costs, *de bonis testatoris*, si, &c. et si non, &c. *de bonis propriis*, see 1 Will. Saund. R. 356 b. (edit. Patteson,) and the cases there cited. *Antè Executors* (M), p. 526.

Clarke v.

It is the duty of an executor, as far as possible, to preserve articles

articles specifically bequeathed according to the testator's wish; and unless compelled, they ought not to apply them to payment of debts. Ormonde, 1 Jac. 108.

Where the vendor of an estate would have absorbed the personal assets in payment of his purchase money, a rateable contribution was decreed, as between the devisee of the estate and the legatees and annuitants under the purchaser's will. Headley v. Readhead, Coop. 50.

Where a bond is given by principal and surety, and at the same time a mortgage is made for securing the debt, the surety, if he pays the bond, has a right to stand in place of the mortgagee. Copis v. Middleton, 1 Turn. & Russ. 231.

A person mortgaged freehold estates, and two months afterwards he surrendered copyholds to the use of the mortgagee to secure the same debt. In a suit after the death of the mortgagor, for the administration of his assets, the freeholds were sold with consent of the mortgagee, and the personal estate having been exhausted, the mortgage debt was, by order of the court, satisfied out of the proceeds of the freeholds; it was held, that the specialty creditors of the mortgagor were entitled to stand in the place of the mortgagee against the copyholds, to the extent of the sum which the mortgagee had received from the freehold estate. Gwynne v. Edwards, 2 Russell, 289.

(M) In what Cases an Executor may make himself
liable de bonis propriis.

Page 525.

THE doctrine (p. 526), as to the executor's liability to costs on pleading false pleas, is subject to this qualification.

According to the modern cases the executor defendant will be entitled to the general costs, though he may have pleaded the general issue and failed on it, provided he has pleaded any one plea which goes to the whole cause of action, and succeeded on it. Hogg v. Graham, 4 Taunt. 135. Edwards v. Bethel, 1 Barn. & A. 254. Ragg v. Wells, 8 Taunt. 129.; and see Hindsley v. Russell, 12 East, 232.

If an executor pleads *non assumpsit* and *plenè administravit*, and the first plea is found for the plaintiff, who takes judgment of assets *quando* as to the second, the plaintiff is entitled to judgment *de bonis propriis* for the costs, if there are not assets to satisfy them. Marshall v. Willder, 9 Barn. & C. 655.

(N) What Actions Executors or Administrators may
 bring in Right of those they represent.

Page 529.

AN administrator cannot have any action for a breach of promise of marriage to the intestate, where no special damage is alleged to have been sustained; for this case falls within the rule *actio personalis moritur cum personâ*. Chamberlain v. Williamson, 2 Maule & S. 408.

Kingdon v.
Nottle,
1 Maule & S.
355. (a) The
devisee of the
land after-
wards sued on the covenant and succeeded. S. C. 4 Maule & S. 53.

King v. Jones,
1 Marsh R.
107.

Murray v.
East India
Company,
5 Barn. & A.
205.

Clark v.
Hougham,
2 Barn. & C.
149.

An executor or administrator cannot sue for breach of a covenant that the covenantor was seised in fee, and had good right to convey, without shewing some special damage accrued to the testator in his lifetime by breach of the covenant, or that the executor or administrator has some interest in the premises. (a)

Nor can he sue on a covenant for further assurance, though the breach were committed in the time of the testator, &c. if the damage accrued only to the heir.

Where a bill was indorsed specially to the intestate, who at the time was dead, the property in the bill passed to the administrator, and he was held entitled to sue; and the bill having been accepted after the intestate's death, it was held, that the statute of limitations only began to run from the time of administration; for till that time there was no party in existence who could sue on the bill.

Where an administrator by mistake makes a payment out of the assets which ought not to have been made, he may recover it back in his representative character; and this although such payment may amount to a *devastavit*.

(O) How Actions by Executors, &c. must be laid:
And herein of joining a Matter in Right of the
Testator and in their own Right, in the same Action.

Page 531.

Davies v.
Williams,
1 Sim. R. 5.

Simons v.
Milman,
2 Sim. 241.

Partridge v.
Court, 5 Price,
412. 7 Id.
591.

Brassington v.
Ault, 2 Bing.
177. 9 Moo.
540.

Webster v.
Spenser,
5 Barn. & A.
560. See
2 Young & J.
75.

Ashby v.
Ashby, 7 Barn.
& C. 444.

WHERE one executor has alone proved he may sue without making the others parties though they have not renounced.

An executor filed a bill before probate. Plea that he had not proved the will allowed.

In an action by an administrator counts on promises made to the intestate may be joined with counts on promissory notes given to the administrator since the intestate's death; for the amount when recovered will be assets in the hands of the administrator.

But where the cause of action accrues to the executor, after the death of the deceased, he has the option of declaring in his private character.

An executor derives title not from the probate but from the will, and a probate granted to one executor enures to the benefit of all, and all must join in an action brought in that character.

Thus where one of two executors having alone proved the will and received money due to the testator, permitted it to be lent out to a third person; it was held, that both executors might join in an action to recover the money from the party in whose hands it was.

In an action against an executor a count cannot be joined which charges him personally; for the judgment in the one case would be *de bonis testatoris*, and in the other *de bonis propriis*; therefore

therefore a count for money had and received by an executor cannot be joined with a count on an account stated by the defendant as executor, for the former count charges him personally, the latter only to the extent of assets; but it seems a count for money paid for defendant as executor may be joined with such a count on an account stated.

1 Mann. & Ry. 102.
and see 9 Barn. & C. 66.
1 Barn. & Adol. 6.

And a count in *assumpsit* against husband and wife, who was administratrix, with the will annexed, upon promises by the testator to pay rent, cannot be joined with counts upon promises by husband and wife as administratrix for use and occupation by them after the death of the testator.

Wigley v. Ashton,
3 Barn. & A. 101.

(P) Of Actions and Remedies against Executors and Administrators.

Page 535.

WHERE an executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer to renew the bill from time to time till sufficient effects were received from the estate of the testator; it was held, that this meant sufficient effects in the ordinary course of administration, and that she had not precluded herself from applying, before paying the acceptance, assets to pay 3,000*l.* to trustees for her own use in discharge of a bond of her husband the testator, given before marriage.

Bowerbank v. Monteiro,
4 Taunt. 844.
The engagement here was in writing. If it had been by parol, it would not have been admissible in

evidence. Hoare v. Graham, 3 Camp. 51.

Debt does not lie against an administrator upon a simple contract of his intestate.

Barry v. Robinson,
1 New R. 295.

An administrator is not liable personally for rent of premises of the intestate although he has taken possession of them, if he proves that the premises have been productive of no profit to him, and that eight months after the death of the intestate he offered to surrender them up.

Remnant v. Bremridge,
8 Taunt. 191.
2 Moo. 94.

In an action against an executor on an account stated of monies due from him, as such, he is personally liable; but on an account stated with him of monies due from his testator, he is liable only as executor.

Powell v. Graham,
7 Taunt. 580.
1 Moo. 305.

On a reference between *A.* and *B.* administrator, &c., if the arbitrator award *B.* to pay a certain sum, *B.* is personally liable to attachment for nonpayment, though he have no assets.

Worthington v. Barlow,
7 Term R. 455.; and see

Dowse v. Cox, 3 Bing. 20.

Where a feme covert having an estate to her separate use, gave a bond to the plaintiff for repayment of money advanced by him to her son-in-law, and after her husband's decease she promised that her executors should pay the bond, the executors were held liable on this promise of the testatrix, for there was a strong moral consideration to support it.

Lee v. Muggeridge, 5 Taunt. 36.

An action lies against an executor to recover a specific chattel bequeathed after his assent to the bequest.

Doe v. Guy,
3 East R. 120.

A promissory note by which the makers as executors jointly and

Childs v. Mo-

nins, 2 Bro. & B. 460. and severally promise to pay *on demand* with *interest* renders them personally liable.

5 Moo. 232.;
and see Wightman v. Townroe, 1 Maule & S. 412.

Feely v. Read, 5 Barn. & A. 515. n. Executors holding a party to bail for a debt due to the testator without reasonable or probable cause, are liable to costs under the statute 43 G. 3. c. 146. § 3.

Jones v. Jones, 1 Bing. 249. If plaintiffs suing as executors on a count founded on an account stated, after testator's decease, with plaintiffs as executors of monies due from the defendant to plaintiffs as executors, and on a promise to plaintiffs as executors, are nonsuited, they are liable to pay costs; for they might have sued in their own right.
8 Moo. 146.
Dowbiggin v. Harrison, 9 Barn. & C. 666. Jobson v. Forster, 1 B. & Adol. 6.

Watson v. Pilling, 3 Bro. & B. 4. A defendant may be declared against as executor or administrator though the process only describe him generally.

Tidd's Prac. 150. So it is as to a plaintiff, executor, or administrator.

Hope v. Bague, 3 East R. 2. A declaration against an executor suggesting a *devastavit*, brought in the *delinet* only, is at any rate good after verdict; but it seems that, independent of the verdict, the plaintiff may on such a declaration take judgment *de bonis testatoris*, having waived part of his right by not declaring in the *debet*.

Powell v. Graham, 7 Taunt. 580. A promise made on good consideration by a testator that his executor shall pay, is the subject of an action of *assumpsit* against the executor, without averring assets or any promise by the executor. If there are no assets this is matter of defence.
1 Moo. 305.

Ashby v. Ashby, 7 Barn. & C. 444. A count for money had and received by defendant as executor, charges him personally, and therefore cannot be joined with a count for money due from him as executor, on an account stated as executor of money due from him as executor; for this count only charges him as executor.

Knight v. Quarles, 2 Bro. & B. 102. 4 Moo. 532. If an attorney employed for fees by an intestate to investigate a title to be conveyed to the intestate, and to see that it is a good one, omit to do so, the administrator may sue on the implied contract on the part of the attorney to do his duty, alleging an injury to the personal estate of the deceased; as the deceased might have elected to sue in case or *assumpsit*, the administrator may sue in *assumpsit*.

Wells v. Fydel, 10 East, 515. An executor of an executor must plead *plenè administravit* by the first executor as well as by himself, or must at least shew that he has no assets of the first executor, out of which any *devastavit* by him could be made good.

Tolputt v. Wells, 1 Maule & S. 395.; and see Prince v. Nicholson, 5 Taunt. 665. Though an executor may confess judgment to one or more creditors in equal degree, after action brought by another creditor, and plead the judgments in bar, yet he cannot plead a general judgment to one creditor for his own debt and in trust to pay the other creditors.
1 Marsh. 280. Meux v. Howell, 4 East, 10. Littleton v. Cross, 3 Barn. & C. 517.

Jones v. Tan. No action lies for a distributive share of an intestate's property against

against the administrator, or against his executor, although he has expressly promised to pay it. ner, 7 Barn. & C. 542.

Where a man, who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and her family at his residence in this country, and died abroad; it was held, that the woman might have the same authority to bind him by her contracts for necessities as if she had been his wife; but that his executor was not bound to pay for any goods supplied to her after his death, although before information of his death had been received. Blades v. Free, 9 Barn. & C. 167.

In an action against several defendants as executors, with a plea of *ne unques* executors, the plaintiff may have a verdict against the real executor, on the count laying the promises by the testator, and the other defendants must be discharged. Griffiths v. Franklin, 1 Moo. & Malk. 146.

On a plea by several executors, that they have fully administered, if some are shewn to have assets in their hands, and the others not, the latter are entitled to a verdict. Parsons v. Hancock, Id. 330.

On a plea of *plenè administravit* to an action against an administratrix, an unsatisfied creditor of the intestate is a competent witness for the defendant. Davies v. Davies, Id. 345.

Debt lies against an executrix upon a cause of action accruing after the death of the testator. Riddell v. Sutton, 5 Bing. 200.

Where an executrix referred to arbitration certain disputes and differences respecting certain unsettled accounts, and the arbitrators, without finding assets, awarded her to pay a certain sum; it was held, that *plenè administravit* was no bar to an action on the award. Ibid.

If executors neglect to give orders for the funeral of the testator, and have sufficient assets for that purpose, they are liable, upon an implied contract, to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. Tugwell v. Heyman, 3 Camp. 297.
Rogers v. Payne, 3 Younge & J. 28.

Where one, appointed executor, intermeddled with the estate of the testator, and afterwards renounced; it was held, that he was liable to be sued in equity, in the character of executor, by the legatees under the will, one of whom was also executrix, and had proved the will. Rogers v. Frank, 1 Younge & J. 409.

FAIRS AND MARKETS.

(C) Of the Duty and Power of Owners of Fairs and Markets in Things incident to them.

Page 555.

IT is the duty of the grantee of a market, to take care that proper space and accommodation are provided within a market for the purposes of buyers and sellers resorting to it; and if he suffer parts of the market to be appropriated to other uses, Prince v. Lewis, 5 Barn. & C. 363.; and see Mosley v. Walker,

7 Barn. & C. 40. uses, so as not to leave such accommodation, he cannot sue a party for selling goods without the market and near it.

(D) Of Toll and other Duties which Owners of Fairs and Markets are entitled to.

Page 556.

Mayor of Carlisle v. Wilson, 5 East R. 2. **WHERE** a corporation were entitled to toll on all goods passing in and out of their city, at the rate of one penny for every horse load, two pence for every cart load drawn by one horse, and two pence more for every additional horse; it was held that any alteration of the carriage, as by taking them in stage coaches instead of waggons or carts, could not vary the right of toll in proportion of two pence for each horse, although the number of horses was proportioned to the weight of passengers rather than of goods.

The Duke of Bedford v. Emmett, 3 Barn. & A. 366.; and see 2 Moo. 102. Where an act of parliament recited the original grant of a market, and that it was expedient provision should be made for the better regulating it, and for the more easy collection of tolls, &c. enacted that it should be lawful for the owner of the market to take from all persons who should pitch or expose to sale any fruits, &c. such tolls as were usually collected and taken within the market, it was held that the owner though not entitled at common law to any toll, might under this clause recover such tolls as at the passing of the act were usually paid in any part of the market, and that although the tolls usually paid in respect of the same articles, were different in different parts of the market.

Wells v. Miles, 4 Barn. & A. 559. A prescription for toll of corn brought into a town on market day, whereof any part shall be pitched in the market and sold, is bad, since there cannot be any toll in respect of goods not actually brought into the market.

Rickards v. Bennett, 1 Barn. & C. 223. A plea by a lord of a manor setting out burdens borne by him, and then prescribing, not by reason of those burdens but generally as lord of the manor, for a toll on all goods bought and delivered, or bought elsewhere and brought into and delivered in a town within the manor which from time immemorial had been parcel of the manor, was held good after verdict for the defendant, as a claim of toll traverse, although the burdens set out did not constitute a sufficient consideration for a toll thorough.

FEES.

(A) In what Cases a Fee shall be said to be due.

Page 563.

Morgan v. Palmer, **THE** mayor of *Yarmouth* was held not entitled to a fee of four shillings on the renewal of a publican's licence, though regularly

regularly paid for a period of sixty-five years; for this length of time could not raise a presumption of immemorial payment, since licences were not granted till the reign of *Edward* the 6th; and the mayor as justice of the peace was not entitled to any fee. 2 Barn. & C. 729.

A tipstaff is entitled to take a fee of six shillings and no more, for conducting a prisoner from the Judge's chambers to the King's Bench. In the matter of Salisbury, 5 Barn. & A. 266.

See tits. "SHERIFF," "OFFICERS," "EXECUTION," "ARREST," and "ATTORNEY."

FELONY.

(A) Of what Nature the Things taken must be, to constitute the Offence of Felony.

Page 572.

LORDHALES dictum (p. 573.) that the stealing an obligation for money, is felony at common law, seems at least doubtful; and accordingly the 2 G. 2. c. 25. § 2., and 52 G. 3. c. 143. § 1. had expressly made it felony to steal Exchequer orders or tallies, South Sea and East India bonds, and other instruments. 7 & 8 G. 4. c. 29. § 5. And now by Sir *Robert Peel's* late act (7 & 8 G. 4. c. 29. § 5.) if any person steal any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom, or of *Great Britain*, or of *Ireland*, or of any foreign state, or in any fund of any body corporate, company or society, or to any deposit in any savings bank, or shall steal any debenture, deed, bond, bill, note, warrant, or other security whatsoever, for money or for payment of money, whether of this kingdom or of any foreign state, or shall steal any warrant or order for the delivery or transfer of any goods or valuable thing, every such offender shall be deemed guilty of felony, and punishable in like manner as if he had stolen any chattel of like value with such security or with the money due thereon.

And with respect to stealing charters and muniments of title, the same act sect. 22. renders the stealing or destroying, or concealing of wills, &c. a misdemeanor, punishable by transportation for seven years, or such other punishment by fine or imprisonment as the court shall award; and it is not necessary to allege that the will is the property of any person, or of any value. § 22.

And by sect. 23, the same provision is made as to the stealing of title deeds and writings, as to real estate. § 23.

And by sect. 21. the same provision is made as to the stealing, obliterating, or destroying any records or proceedings of any court. § 21.

And with respect to animals *feræ naturæ*, the same act sect. 31. enacts, that if any person shall steal any dog, or shall steal any beast § 31.

beast or bird ordinarily kept in a state of confinement, not being the subject of larceny at common law, every offender shall on conviction of a justice, forfeit above the value of the animal any sum (not exceeding 20*l.*), which the justice shall think fit, and for the second offence shall be imprisoned for not exceeding twelve months, and kept to hard labour; and if the second conviction is before two justices, they may order the offender if a male to be once or twice publicly or privately whipped.

7 & 8 G. 4.
c. 29. § 44.

And with respect to things fixed to the freehold, it is by the same act sect. 44. enacted, that if any person shall steal or rip, cut or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, any such offender shall be guilty of felony, and being convicted, shall be punished as for simple larceny; and in case such thing is fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person.

§ 37.

And by the same act sect. 37. stealing, or severing with intent to steal, the ore of any metal, or *lapis calaminaris*, manganese or mundick, or any wad, black cawke, or black lead, or any coal or cannel coal, from any mine, is made felony punishable as simple larceny.

§ 38.

And by the same act sect. 38. stealing, cutting, or rooting up or destroying, or damaging with intent to steal, trees, saplings, shrubs or underwood, above 1*l.* value, growing in any park, pleasure-ground or orchard, or in any ground adjoining or belonging to any dwelling house, is felony, punishable as simple larceny; and the same acts as to trees, &c. growing in any other situation, of the value of 5*l.*, is felony, punishable in like manner.

§ 39.

And by sect. 39. any person stealing, cutting, breaking, rooting up, destroying or damaging with intent to steal, any tree, shrub, &c. of any value above one shilling, shall forfeit above the value such sum not exceeding 5*l.* as to a justice shall seem meet, and for the second offence shall be committed to gaol for any term not exceeding twelve months, and for the third offence shall be deemed guilty of felony, and punished as for simple larceny.

§ 40. 42, 43.

And see sect. 40. 42, 43. as to stealing, cutting or breaking down any wooden posts, pales, fences, &c. and roots, fruits, and vegetable productions.

(B) How far the Goods ought to belong to another.

Page 575.

7 & 8 G. 4.
c. 29. § 18.

AS to plundering wrecked vessels, it is now enacted by Sir *Robert Peel's* Larceny Act, 7 & 8 G. 4. c. 29. § 18., that if any person shall plunder or steal any part of any ship or vessel in distress,

treasure, or wrecked or stranded, or any goods belonging thereto, every such offender shall suffer death as a felon; provided that when articles of *small value* shall be stranded or cast on shore, and shall be stolen without cruelty or violence, the offender may be punished as for simple larceny, and in either case may be indicted in the county in which the offence shall have been committed, or in any county next adjoining; and see also sections 19, and 20. The 20 G. 2. c. 19. § 1, 2, 3, 4. 8. on this subject is repealed by 7 & 8 G. 4. c. 27.

With respect to stealing fish, by § 34. of the 7 & 8 G. 4. c. 29. any person unlawfully taking or destroying fish in any water in any land adjoining to a dwelling-house shall be guilty of a misdemeanor, and punished accordingly; and any person unlawfully taking fish in any water in any other situation, but which shall be private property, shall forfeit any sum, not exceeding 5*l.*, which a justice shall think fit. 7 & 8 G. 4. c. 29. § 34.

By Sir Robert Peel's act for improving the administration of criminal justice, 7 G. 4. c. 64. § 14. where a person is indicted for stealing the property of partners or tenants in common, it shall be sufficient to name one of the owners, and state the property to belong to such owner and others; and see also the same act, § 15 to 18., as to indictments for stealing the property of counties, ridings, parishes, townships, turnpike trustees, commissioners of sewers, &c. 7 G. 4. c. 64. § 14.

There is no doubt that felony may be committed of goods, where the owner is unknown; but if he is described as a person unknown in the indictment, and it appears that his name is known, the prisoner must be acquitted. 3 Camp. 264. 1 Holt, 595.

(C) What shall be said to be a felonious and fraudulent Taking.

Page 576.

AN assault with intent to rob is now punishable by transportation for life, or for not less than seven years, or imprisonment not exceeding four years, and if the offender is a male, by being once, twice, or thrice whipped. 7 & 8 G. 4. c. 29. § 6.

It is said, p. 576., that "if a person finds goods, and converts them to his own use *animo furandi*, yet he is not guilty of felony." But it is otherwise if he know the owner, or if there are marks by which the owner may be found. 8 Ves. 405. 2 Leach C. C. 952. 2 East's P. C. 664. Archbold's C. L. 121. Anon, *cor. Lawrence* J. 1804. Rex v. James, *cor. Gibbs* J. 1812. 2 Russ. on Cri. 102.

If the owner of the goods deliver them to the party accused of stealing, in any transaction of such a nature as to pass the *property* by the delivery, the taking and converting them cannot be felonious, although the owner were induced by fraud to part with them. As where a prisoner rode away with a horse from a fair Harvey's Ca. 1 Leach, 467. 2 East P. C. 669.; and see the other cases, 2 Russ.

on Cri. 109. *et seq.*

Rex v. Sharpless, 1 Leach, 95. 2 East P. C. 675.; and see the other cases of this class, 2 Russ. on Cri. 119. *et seq.* Archbold's C. L. 122.

Rex v. Banks, MS. Bayley J. Russell & Ry. 441.; and see Russ. on Cri. 132., and Leigh's Ca. MS. Bayley J. *Ibid.*

Rex v. Bra-sier, 1817. Russ. & Ry. 337.; and see Hale P. C. 505. 2 East P. C. 685.

Rex v. Mad-dox, Russ. & Ry. 92.

(a) See Russ. on Cri. 246, and cases there cited.

a fair after it was sold to him, without paying the purchase money, this was held no felony.

But where the transaction is not of that nature which passes the *property* in the goods, but only the *possession*, if the possession is obtained by a fraud practised on the owner *cum animo furandi*, here the obtaining the goods is felony. As where a hosier by desire of the prisoner took a variety of silk stockings to his lodgings, where the prisoner pretended to purchase some of them, and set them apart from the rest, and then, having sent the hosier to fetch more, decamped with the stockings, this was held felony; since there was no change of *property*, and the possession was obtained by a preconcerted fraud and with felonious intent.

Where the original delivery of the goods was not obtained fraudulently, the question whether a felony has been committed upon them by the party to whom they were delivered, depends on the point whether the lawful possession acquired by the delivery of them has been determined, and whether there has been any new and felonious taking of them. If the lawful possession has not been determined, the goods remain in the possession of the party to whom they were delivered as *bailee*, and while such possession continues, felony cannot be committed of them; and such lawful possession is not determined by the mere ending of the object of the bailment, if the goods remain still in the hands of the *bailee*. Thus if a party without fraud borrow or hire a horse to go to a certain place, and after going there, and returning accordingly, take the horse in a different direction and sell it, it is now settled not to be felony, though formerly held otherwise; for there was no original felonious intent, and the lawful possession was not at an end.

But the privity of contract, and, consequently, the lawful possession may be determined before the completion of the bailment, by the tortious act of the *bailee*, and in such case the taking may be felony. Thus where a warehouseman who had wheat delivered to him in bags for safe custody, without any authority to sell or to shew samples, took all the wheat out of some of the bags and sold it, this was held a felony, and the judges thought there was no difference whether the whole or a part were taken out of any one bag. But in such cases it must appear that the packages have been broken, and the goods taken out; for according to the carrier's case (page 577.) it is not felony to take away the whole package.

And, accordingly, where the master and owner of a ship disposed of some casks of butter delivered to him to carry, and made a false pretext that he had thrown them overboard, the judges held it no larceny, since it did not appear that he took the goods out of their packages.

Several points of nicety and difficulty (a) having arisen on the construction of the 3 & 4 W. & M. c. 9. (see page 578.) as to felony by lodgers, that statute is now repealed by the 7 & 8 G. 4.

c. 27., and Sir *Robert Peel's* Larceny Act, 7 & 8 G. 4. c. 29. § 45., has substituted a more simple and comprehensive enactment, and provided that the indictment shall be in the common form as for larceny. The statute enacts that if any person shall steal any chattel or fixture let to be used with any house or lodging, every such offender shall be guilty of felony, and punishable as for simple larceny, and it shall be lawful to prefer an indictment in the common form as for larceny, and as if the person was not a tenant or lodger, and to lay the property in the owner or person letting to hire.

The 21 H. 8. c. 7. (set out page 578.) as to stealing by servants is repealed by 7 & 8 G. 4. c. 27., and by 7 & 8 G. 4. c. 29. § 46. it is enacted that if any clerk or servant shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master he shall be liable to be transported for not exceeding fourteen years, nor less than seven, or to be imprisoned not exceeding three years, and if a male to be once, twice, or thrice whipped.

The provisions of the Bank Statute, 15 G. 2. c. 13. § 12. (mentioned page 579.) are repeated in the 35 G. 3. c. 66. § 6. and 37 G. 3. c. 46. § 6. (which make certain annuities created by the parliament of *Ireland* transferable, and the dividends payable at the Bank of *England*) with respect to effects deposited in pursuance of those acts. And there is a similar provision in the 24 G. 2. c. 11. § 3. with respect to the officers and servants of the South Sea Company.

It seems that a note once cancelled by the Bank of *England*, is not a note within the meaning of the 15 G. 2. c. 13., and the person offending against that act must be a person *intrusted* with a note, and not merely having access to it.

954. 1 New R. 1. Rex v. Bakkewell, Russ. & Ry. 35.; and see Aslett's Ca. 2 Leach, Russ. & Ry. 67.

Clandestinely taking away articles in order to induce the owner, a girl, to fetch them, and thereby give the party an opportunity to seduce her, is not a felonious taking.

Rex v. Dickinson, 1820, MS. Bayley J. Russ. & Ry. 420.

So, where the captain of a ship, taken as a prize, secreted some of the cargo and clandestinely removed it from the ship, it being doubtful whether he did so for his own benefit, or for that of his owners, he was recommended for a free pardon; but the majority of the judges were of opinion that if the goods had been secreted for his own benefit, it would have amounted to larceny.

Rex v. Van Muyen, Russ. & Ry. 118.

And where a person stole certain articles, and also took a horse, not with the intention of stealing it, but merely to get off more conveniently with the stolen goods, this was holden not to be a felonious stealing of the horse.

Rex v. Crump, 1 Car. & P. 658.

Where *A.*, at the instigation of a police officer, concerted with three persons to commit a felony, in order that the officer might apprehend them, and upon their conviction receive the reward, which was to be divided between the officer and *A.*, and *A.* with the others did commit the felony, it was holden by a majority

Rex v. Dannelly, Russ. & Ry. 310. 2 Marsh, 571.

majority of the judges that *A.* had not the felonious intention necessary to make him a principal, (although he acted from a bad motive, namely the reward,) because he was not present to aid and assist, but to detect, and had no intention that the felons should be successful.

Rex v. Cab-
bage, Russ. &
Ry. 292.

There are cases, however, which go to establish that it is not necessary that the taking should be *lucri causá*, if it be fraudulent, and with intent wholly to deprive the owner of his property. Thus, where a prisoner, to screen his accomplice, who was indicted for horse stealing, broke into the prosecutor's stable and took away the horse, which he backed into a coal pit and killed, it was objected at the trial that this was not larceny, because the taking was not with intent to convert the horse to the use of the taker, *animo furandi et lucri causá*. Seven of the judges held that it was larceny, and six of that majority were of opinion, that to constitute larceny it was not essential that the taking should be *lucri causá*, if it were fraudulent, and with intent wholly to deprive the owner of the property; but some of this majority thought that the object of the prisoner might be deemed a benefit or *lucri causá*.

Rex v. Morfit,
et al. Russ. &
Ry. 507.

Again, where the prisoners, servants in husbandry, opened the granary of their master by means of a false key, and took thereout two bushels of beans to give to their master's horses, in addition to the quantity usually allowed, this was holden larceny by a majority of the judges; but it was alleged by some of the judges, that the additional quantity of beans would diminish the work of the men who had to look after the horses, and therefore the "*lucri causá*," to give themselves ease, was an ingredient in the offence.

(D) What shall be said to be a carrying away.

Page 579.

Rex v. Welsh,
1824, MS.
Bayley J., Ry.
& Moo. C. C.
14.

WHERE the prisoner had lifted up a bag from the bottom of the boot of a coach and was detected before he got it out of the boot, and it did not appear that the bag was completely removed from the space which it at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space which that specific part occupied; the judges held, that there was a complete *asportavit*.

Rex v. Thomp-
son, Ry. &
Moo. C. C. 78.

Where the defendant drew a book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the prosecutor suddenly put up his hand on which the defendant let the book drop, and it fell into the prosecutor's pocket; this was considered a sufficient asportation to constitute larceny.

(E) By whom the Offence may be committed.

Page 579.

THOUGH voluntary drunkenness cannot excuse, yet where, as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated is a circumstance to be taken into consideration. *Rex v. Grindley*, 1819. MS. 1 Russ. on Cri. 8. As to the degree of insanity which shall excuse a party, see 1 Russ. on Cri. 10, 11, &c. *Collis on Lunacy*, 675. and the cases there collected; and see 39 & 40 G. 3. c. 94. as to the disposal of persons acquitted on the ground of lunacy.

It is no excuse for a wife that she committed the offence by the husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case that she acted by coercion. *Sarah Morris* was tried for uttering a forged order, knowing it to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered her to do it, but that she uttered the instrument in his absence. Upon a case reserved, the judges held that the presumption of coercion at the time of uttering, did not arise as the husband was absent, and that the wife was properly convicted of uttering and the husband of procuring. *Rex v. Morris*, 1814, Russ. & Ry. 270.; and see *Rex v. Hughes*, MS. 1 Russ. on Cri. 18.; *Rex v. Squire*, *et ux.*, *Id.* 16.; and see *tit. Baron and Feme*, (G) Vol. I.

Evidence of cohabitation and reputation are sufficient proof of the marriage in such cases. *Rex v. Atkinson*, MS. 1 Russ. on Cri. 20.

(F) Of what Value the Things must be: And herein of the Difference between Grand and Petty Larceny.

Page 580.

BY 7 & 8 G. 4. c. 29. § 2. the distinction between grand and petty larceny is abolished, and every larceny, whatever the value of the property, shall be subject to the incidents of grand larceny; and every court whose power was limited to trying petty larceny, shall have power to try any offence of larceny, the punishment of which cannot exceed the punishment by that act awarded for simple larceny; that is (by § 3.) transportation for seven years or imprisonment not exceeding two years, and if a male to be once, twice, or thrice whipped in addition to imprisonment. 7 & 8 G. 4. c. 29. § 2.

(G) Where the Offender is or is not excluded his Clergy.

Page 581.

BY Sir *Robert Peel's* act for further improving the administration of justice in criminal cases, 7 & 8 G. 4. c. 28. § 6., it is enacted, that benefit of clergy with respect to persons convicted of felony shall be abolished, but that nothing herein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing this act. 7 & 8 G. 4. c. 28. § 6.

And

7 & 8 G. 4.
c. 28. § 7.

And by § 7. no person convicted of felony shall suffer death unless for some felony excluded from clergy before or on the first day of the present session of parliament, or made punishable with death by some statute passed after that day.

§ 8.

And by § 8. persons convicted of felony not punishable with death, shall be punished in manner prescribed by the statute specially relating to such felony; and where no punishment is prescribed shall be punishable under this act by transportation for seven years, or imprisonment not exceeding two years; and if a male to be once, twice, or thrice publicly whipped in addition to such imprisonment.

7 & 8 G. 4.
c. 27.

By the statute 7 & 8 G. 4. c. 27. the several acts 3 & 4 W. & M. c. 9., 4 & 5 W. & M. c. 24., 1 Edw. 6. c. 12., 34 & 35 H. 8. c. 14., 2 & 3 Edw. 6. c. 33. cited at page 581., respecting benefit of clergy, are repealed; and so also the 8 Eliz. c. 4., 10 & 11 W. & M. c. 23., 12 Ann. c. 7., 22 Car. 2. c. 5., set forth under *tit.* "FELONY" (G).

(H) Where the Offender is to be transported.

Page 584.

5 G. 4. c. 84.
For a more
full abstract of
this act, see
1 Russ. on
Cri. 594.

§ 2.
The earliest act
inflicting the
punishment of
transportation
is 39 Eliz. c. 4.
6 Ev. Stat.
p. 852.

BY the 5 G. 4. c. 84. reciting that the laws regulating transportation were about to expire, and consolidating all provisions on the subject into that one act; § 1. it is enacted, that the act shall take effect on the last day of that present session of parliament, and that from that day all things remaining to be done touching the punishment, imprisonment, transportation, &c. of persons sentenced to transportation under any acts theretofore or then in force, shall be continued and done under that act. By § 2. offenders adjudged for transportation are to be transported under the provisions of that act, and also offenders receiving a conditional pardon, concerning whom an allowance and order may be made by a subsequent court. By § 3. places for transportation are to be appointed by his majesty, by and with the advice of the council, either within or without his majesty's dominions, and a secretary of state may authorize persons to contract for the transportation of offenders. Provision is then made by § 4, 5, 7, for delivery of offenders to the contractors by the sheriff or gaoler, and for the giving security by the contractors. Authority is given (§ 6.) to punish offenders misbehaving on the voyage, and a property in their services during the term of transportation is vested in the overnor of the colony or his assignees (§ 8.) By § 10. his majesty may appoint places of confinement in *England* and *Wales* either at land or on board of vessels for male offenders, and regulations are made as to the removal and confinement of the offenders there; (see the provisions of this act stated at large, and also as to the offence of returning from transportation. 1 Russ. on Cri. Book 2. Ch. 35.)

7 & 8 G. 4.
c. 29. § 2.

By the 7 & 8 G. 4. c. 29. § 2. the punishment of simple larceny is transportation for seven years, or imprisonment for two years with whipping (if a male) in addition to imprisonment.

By

By 7 & 8 G. 4. c. 28. § 6. benefit of clergy is abolished.

7 & 8 G. 4.
c. 28. § 6.
§ 8.

And by § 8. every person convicted of felony not punishable by death, shall be punished as prescribed by the statute relating to the offence, or if no punishment be prescribed shall be punished in the same manner as for simple larceny; (and see as to the several offences punishable with transportation for fourteen years and for life. Russell on Crimes (2d Edit.) Archbold Crim. Law.)

FELO DE SE.

(A) Where a Person shall be said to be *Felo de se*.

Page 586.

IF a man encourage another to murder himself, and is present abetting him while he does so, such man is guilty of murder as a principal; and if two encourage each other to murder themselves, and one does so, but the other fails in the attempt on himself, he is a principal in the murder of the other. Rex v. Dyson, Russ. & Ry. 525.

By the 4 G. 4. c. 52. the coroner shall no longer issue any warrant directing the interment of any person found *felo de se* in any public highway, but the coroner shall give directions for the private interment of the remains of such person, without any stake driven through the body, in the churchyard of the place where the person might by law or custom be interred if not *felo de se*, such interment to be made within twenty-four hours from the finding the inquisition, between nine and twelve at night, the rites of Christian burial not to be performed on such interment. 4 G. 4. c. 52.

FINES AND AMERCEMENTS.

(B) For what Offences the Party is to be fined and amerced.

Page 616.

A COURT of general gaol delivery has the power to make an order to prohibit the publication of the proceedings pending a trial likely to continue several successive days, and to punish disobedience to such order by fine. Rex v. Clement, 4 Barn. & A. 218. 11 Price R. 68.

And if an offending party being summoned to attend the court to answer for the contempt by an order issued for that purpose, should not appear, the court has jurisdiction to impose a fine on him in his absence. *In re Clement*, 11 Price 68.

A judge at *nisi prius* has the power of fining a defendant for a contempt committed by him in the course of addressing the jury. Rex v. Davison, 4 Barn. & A. 329.

FINES AND RECOVERIES.

(C) Who may levy Fines.

Page 636.

Stead v.
Izard, 1 New
R. 312.; and
see *Ex parte*
George,
8 Taunt. 590.

Roe dem.
Truscott v.
Elliott, 1 Barn.
& A. 85.

Hall v. Doe,
5 Barn. & A.
687.; and see
Doe v. Per-
kins, 5 Maule
& S. 271.

Doe v. Harris,
5 Maule & S. 326.

Helps v. Here-
ford, 2 Barn.
& A. 242.

Earl of Jersey
v. Deane,
5 Barn. & A.
569.; and see
Tyrrell v.
Marsh, 3 Bing.
31.

WHERE the estate of a married woman has been regularly sold with the consent of her husband, the conveyance executed by him and the purchase money paid, the Court of Common Pleas will not prevent the wife from levying a fine because her husband has since become *non compos*.

If one of two tenants in common of a reversion, levy a fine of the whole, such fine does not require an actual entry by the other tenant in common to avoid it.

Devise to trustees in fee in trust to permit *A. H.* to receive the rents and profits for life, remainder to *W. H.* in tail, remainder to *J. S.* in fee; held, that a fine with proclamations levied by *W. H.* to a stranger in the lifetime of *A. H.* was void, and therefore the heir of *J. S.* was not barred by non claim and writ of entry.

Where a husband and wife granted to trustees an estate, of which the wife's father was seised in fee-simple; and afterwards, in the life of the father, they levied a fine of lands to the uses of the settlement, and the father afterwards died, leaving the wife one of the coheiresses; held, that her moiety of the estate became subject to the uses of that settlement by reason of the fine as an estoppel against the husband and wife and all persons claiming title under them.

By marriage settlement certain manors and lands were limited to the husband for life; remainder to the wife for life, remainder to the use of the first and other sons of the marriage successively in tail male, remainder in case the wife should survive the husband to her in fee; but if she should die in the lifetime of the husband, remainder to the daughters successively in tail male, remainder to the use of such persons related by blood or consanguinity, and in such estates and interests, and in such manner, and charged with such sums of money in favour of such persons so related as she by her will might appoint, and in case of no such appointment to her in fee. The settlement also contained a power for the trustees there named at the request and by the direction of the husband and wife or the survivor, to sell or exchange the settled estates, and for that purpose to revoke all or any of the uses contained in the settlement; and also a covenant by the husband for further assurance on his part and of his wife, and all persons claiming under him. In pursuance of this settlement certain fines were levied. By deed, dated *March 1807*, reciting the settlement and the fines levied in pursuance of it, and the limitations therein contained; and further, that the

wife

wife was desirous of acquiring an absolute power of appointment over the manors, &c. comprised in the settlement in the event of her surviving, or dying in the lifetime of the husband, and there being a general failure of issue of her body inheritable to the manors, &c. under the settlement, the husband and wife covenanted to levy fines *sur conusance de droit come ceo*, &c. with proclamations to J. G., and his heirs of all the manors comprised in the settlement, which fines were to operate and to be taken to operate, first, for corroborating the uses contained in the settlement antecedently to the limitations to the use of the wife in fee-simple, and subject thereto to the use of such persons, &c. as the wife by will or deed might appoint. In pursuance of this latter deed, several fines *come ceo* were levied by the husband and wife; held, that under these circumstances these latter fines did not operate to extinguish, destroy, or suspend the right or power of the husband and wife, and the survivor of them to request and direct a sale or exchange of the settled estates under the powers for that purpose contained in the settlement, so as to prevent an exercise of those powers by the trustees.

(F) Of the Operation of a Fine in barring Strangers, or those who have but an uncertain Interest, as a Term for Years, or barely an equitable Interest.

Page 655.

BY a marriage settlement an estate was limited to the use of the husband and wife for life, with remainders to the children of the marriage, and in default of issue to the right heirs of husband and wife. There was a power in the husband and wife to charge the estate during their lives, and a power to certain trustees in whom the legal estate was vested, to sell on the direction of the husband and wife or the survivor. The husband and wife borrowed money by way of annuity, created a term of 1000 years, and levied a fine to G. in fee, which by a deed to lead the uses was declared to be in trust to cause the regular payment of the annuity and to corroborate the said term; it was held, that this fine did not extinguish the trustees' power to sell under the direction of the wife.

Tyrrell v. Marsh, 3 Bing. 31.

A fine and non-claim cannot be pleaded in bar to a bill to prevent the setting up of an outstanding term.

Leigh v. Leigh, 1 Sim. R. 349.

To a plea in bar of a fine a direct positive averment of seisin is necessary.

Dobson v. Leadbeter, 15 Ves. 230.

(G) Of the Remedies given to Strangers by Claim and Entry for the Preservation of their Right.

Page 666.

A HUSBAND claiming in right of his wife in order to avoid a fine, must enter within five years after his title accrues.

Doe v. Plumtree, 3 Barn. & A. 474.

Doe v. Watts,
9 East, 17.

Where an ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the statute 4 H. 7. c. 24., it is not necessary for the lessor to prove an actual entry to avoid such a fine, considering it to operate only as a fine at common law; by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue.

(H) Of erroneous Fines, and the Manner of reversing them.

Page 668.

Parker de-
mandant v.
Parker tenant,
4 Bing. 79.;
and see *Id.*
104.
Id. 606. See
2 Taunt. 313.
2 New R. 57.
1 Taunt. 144.
6 Bing. 275.

WHERE one of sixteen cognisors in a fine signed her name *E. P. B.*, whereas her name was *E. B.*, the court would not, upon affidavit of identity that the mistake was not discovered till after execution, and that one of the sixteen cognisors was dead, allow the fine to pass as to *E. B.*

An affidavit of the caption of a fine taken before a consul abroad is insufficient.

Fine permitted to pass as of a term, twenty-two years previous, upon payment of the king's silver, all surviving parties interested consenting, on its being shewn that, unknown to the parties, the clerk instructed to pass it had absconded with the money intrusted to him for payment of the king's silver, when that payment alone was wanting to complete the fine.

2 Ball & B.
272.

A fine may, at law, be impeached for fraud, and in matters of fraud equity has concurrent jurisdiction.

1 Will. 4. c. 70.
§ 27.

By the late act, 1 W. 4. c. 70. § 27., abolishing the judicatures of *Wales* and *Chester*, the court shall have the same power of amending fines and recoveries passed theretofore in any of the courts abolished by that act, as if the same had been levied, suffered, or had in the Court of Common Pleas.

RECOVERIES.

(A) Who may suffer a Recovery.

Page 680.

Norraile v.
Greenwood,
1 Turn. & R.
26.

EQUITABLE tenant in tail, aliens in fee by way of mortgage, a good equitable recovery may be suffered of the secondary equitable estate without the concurrence of the mortgagee.

Cormick v.
Trapaud,
6 Dow R. 60.

First tenant in tail under a will, before suffering a recovery, settles the estate on himself for life, with remainder to other tenants in tail in remainder under the will, and afterwards suffers a recovery and mortgages the estate; held valid against tenants in tail in remainder.

Biscoe v. Per-

Trustee to preserve contingent remainders joining in a recovery

covery with the remainderman in tail, having attained twenty-one, held no breach of trust, and no objection to a specific performance. kins, 1 Ves. & B. 485.

(D) Of erroneous and void Recoveries, who may avoid them, and by what Method.

Page 705.

WHERE one of the vouches became insane, between the time of executing the warrant of attorney and the passing of the recovery, the court refused to let it pass as to him, but permitted it as to the other parties. Vale and others, Vouches, 5 Bing. 176.

Meadow will pass in a recovery under the word land, and the court will not amend by adding the word "meadow." 4 Bing. 90.

In a recovery, "callesh to warranty" is an improper expression. Id. 101.

The court refused to amend a recovery by altering *Berks* into *Bucks*. Id. 426.; and see Id. 425. and 7 Bing. 455.

Where a lease and release were made to create a tenant to the præcipe in a recovery, and the lease was lost, it was held to be a case to which relief applies under 14 G. 2. c. 20. § 5. Holmes v. Aislabie, 1 Madd. 551.

FORCIBLE ENTRY.

(A) The several Statutes made relating to this Subject.

Page 712.

AN indictment for forcible entry may be maintained at common law, though the statutes give other remedies to the party grieved, provided the indictment charge the defendants with having used such force as constitutes a public breach of the peace. Rex v. Wilson, 8 Term R. 357.

Quere. If a party having only a possessory interest, and not a freehold, can maintain trespass for forcible entry under these statutes. Kemp v. Richardson, 2 Moo. 258.

(F) Of the awarding of Restitution, by whom, and in what Manner: And herein of the Nature of the Possessions, and to whom such Restitution is to be made.

Page 723.

IN all cases which admit of restitution, the prosecutor has a direct interest in the verdict, and, therefore, is not a competent witness. Rex v. Beavan, Ry. & Moo. Ca. 242. Rex v. Williams, 9 Barn. & C. 549.

FORGERY.

(A) In what Cases the making or altering of a Writing shall be said to be so far false and fraudulent as to amount to Forgery.

Page 745.

Rex v. Birkett, Russ. & Ry. 86.

Rex v. Holden, Russ. & Ry. 154.

Rex v. Sheppard, Russ. & Ry. 169.

Rex v. Mazagora, Russ. & Ry. 291.

Rex v. Port, Russ. & Ry. 101.

Rex v. Birkett, Russ. & Ry. 251.

Rex v. Webb, Russ. & Ry. 405; and see Rex v. Watts, *Id.* 436.

Whiley's Case, Russ. & Ry. 90.; and see Rex v. Marshall, *Id.* 75.

Francis's Case, Russ. & Ry. 209. Rex v. Bontien, *Id.*

260. Rex v. Peacock, Russ. & Ry. 278.

Rex v. Buttery and Macnamara, Russ. & Ry. 342.

FORGING a bill of exchange payable to the prisoners own or order, and uttering it without indorsement as a security for a debt, was holden to be a complete offence.

The offence of disposing and putting away forged notes is complete, though the person to whom they are disposed of be an agent for the bank to detect utterers, and applies to the prisoner to purchase forged notes.

Uttering a forged stock receipt to a person who employed the prisoner to buy stock, and advanced the money, was held sufficient evidence of an intent to defraud that person, and this, notwithstanding the person made oath that he believed the prisoner had no such intent.

The jury ought to infer an intent to defraud the person who would have to pay the instrument if genuine, although from the manner of executing the forgery it would not be likely to impose on him, and although the object be generally to defraud the person taking the instrument.

Altering a banker's one pound note, by substituting the word *ten* for *one* is a forgery.

And discharging one indorsement and inserting another, or making it thereby a general instead of a special indorsement, has been holden to be altering an indorsement.

Issuing a bill drawn by the prisoner in his own name, and accepted by the drawee, and adding a false description of the drawee, where there is no real person answering such description, is not a forgery.

A conviction of forgery was held right by the judges, where the name used by the prisoner in the forged instrument was assumed by him with intention of defrauding the prosecutor, though the prosecutor admitted that the prisoner's real name would have carried with it as much credit as the assumed name.

And if the assumed name be used for the purpose of fraud, and to avoid detection, it matters not whether it is the name of a person of credit or not.

On an indictment for forging a will, the probate of that will unrevoked is not conclusive evidence of its validity, so as to bar a prosecution.

(B) Of

(B) Of what Nature or Kind the Writing must be to constitute the Offence Forgery at Common Law.

Page 747.

WHERE the defendant having been committed to gaol, under an attachment for a contempt in a civil cause, counterfeited a discharge as from his creditor to the gaoler, under which he obtained his discharge; it was holden a misdemeanor at common law, although as the attachment was not for non-payment of money, the authority was a mere nullity, and no warrant to the gaoler; a majority of the judges also thought that it was a forgery at common law.

Fawcett's Ca. 2 East P. C. 862.; and see Wilcox's Case, Russ. & Ry. 50.

(C) What Offences of this Kind are made Forgery by Statute, and of the punishment to be inflicted on Persons guilty of Forgery.

Page 748.

FORGERY may be committed of an instrument on unstamped paper, on the principle that it is not material that the forged instrument should be so made, that if true it would be valid.

Hawkswood's Ca. 1 Leach, 257.; and see Rex v. Lyon, Russ. & Ry.

255.; and see Collecott's Ca. 4 Taunt. 300. Russ. & Ry. 212. 229.

So forgery may be committed in indorsing a bill in another's name, though there is no indorsement in name of the payee, and consequently the bill is not properly negotiable.

Rex v. Wicks, Russ. & Ry. 149.; and see Rex v. Cart-

right, Russ. & Ry. 106.

But if the name of the payee be omitted altogether in the bill, it cannot be a forgery.

Rex v. Richards, Russ. &

Ry. 193.; and see Rex v. Randall, Russ. & Ry. 195.

So also if the note fabricated be incomplete by wanting a signature.

Rex v. Pate-

Ry. 455.; and see Rex v. Burke, *Id.* 496.

So if a fabricated will of land be attested by only two witnesses, it is not forgery, unless it appear that the supposed testator had only a chattel interest.

Wall's Ca. 2 East P. C. 953.

By 9 G. 4. c. 32. § 2. a great anomaly in the law of evidence is removed, and the party whose name is forged is made a competent witness on a prosecution for forging an instrument.

9 G. 4. c. 32. § 2.

Respecting instruments relating to the public funds and stocks, see Russ. on Cri. (2nd edit.) b. iv. c. 34.; respecting bank securities, *Id.* c. 35.; respecting other public companies, *Id.* c. 36.; respecting forging stamps, *Id.* c. 37.; respecting forgery of official papers, *Id.* c. 38.; and see the provisions on these points in 1 W. 4. c. 66.

Respecting forgery of instruments b. iv. c. 34.; *Id.* c. 36.; and see the provisions on these points in 1 W. 4. c. 66.

A power of attorney to transfer stock signed, sealed, and delivered, is a deed within the meaning of the 2 G. 2. c. 25.

Rex v. Fauntleroy, Ry. & Moo. 52.

A bill drawn upon the commissioners of the navy, is a bill of exchange within the 2 G. 2. c. 25.

Chisholm's Ca. Russ. & Ry. 297.

A fabricated promissory note payable to two ladies, stewardesses

Rex v. Box,

6 Taunt. 325.
Russ. & Ry.
300.

Rex v. Harvey,
Russ. & Ry.
227.

Rushworth's
Ca. Russ. &
Ry. 317.; and
see Froud's
Ca. *Id.* 389.
as to an order

to a provident institution, and their successors, was held a forgery within the 2 G. 2. c. 25.; for it is not necessary that the note should be negotiable, and the payees might have sued on it.

A memorandum importing that *A.* had paid money to *B.*, but not any acknowledgment of *B.* having received it, was holden not a receipt within 2 G. 2. c. 25.

A forged order for the purpose of obtaining a reward for the apprehension of a vagrant under the 17 G. 2. c. 5., was holden not within the forgery statute 7 G. 2. c. 22., it being deficient in the requisites prescribed by the 17 G. 2. c. 5., which authorizes it to be made.

on the treasurer of a county under 48 G. 3. c. 75. As to the offence of fabricating the printed forms and paper used for banker's securities, see 1 W. 4. c. 66. §§ 17. 18.; and as to engraving plates or printing foreign bills of exchange without authority, see 43 G. 3. c. 56. § 1. Russ. on Cri. bk. iv. c. 59., and 1 W. 4. c. 66. § 19.

By 1 W. 4. c. 66., the statutes 5 Eliz. c. 14., 2 G. 2. c. 25. (except sec. 2.), the 7 G. 2. c. 22., the 45 G. 3. c. 89., and all the principal statutes respecting forgery are repealed from the 20th July 1830, except as far as any of the said acts repeal any other acts, and except as to offences committed before or upon the 20th July 1830, which are to be dealt with as if this act had not been passed.

1 W. 4. c. 66.
§ 1.

By § 1. reciting that several offences relating to forged writings, and to other forged and counterfeit matters, and to false personation, false oaths, false entries, and other false matters, are now by virtue of several statutes punishable with death: and that it is expedient that none of those offences shall hereafter be punishable with death, unless the same shall be made punishable with death by this act, and also that the statutes concerning such of those offences whether punishable with death or otherwise, as may frequently or seriously affect the interests of his majesty or his subjects, should be amended and consolidated into this act; it is enacted, "That where by
"any acts now in force, any person falsely making, forging,
"counterfeiting, erasing, or altering any matter whatsoever, or
"uttering, publishing, offering, disposing of, putting away, or
"making use of any matter whatsoever, knowing the same to
"be falsely made, forged, counterfeited, erased or altered, or
"any person demanding or endeavouring to receive or have
"any thing, or to do or cause to be done any act, upon or by
"virtue of any matter whatsoever, knowing such matter to be
"falsely made, forged, counterfeited, erased or altered, would,
"according to the provisions contained in any of the said acts,
"be guilty of felony, and liable to suffer death as a felon; or
"where by any acts now in force any person falsely personating
"another, or falsely acknowledging any thing in the name of
"another, or falsely representing any other person than the real
"party to be such real party, or wilfully making a false entry in
"any book, account or document, or in any manner wilfully falsi-
"fying any part of any book, account, or document, or wilfully
"making a transfer of any stock, annuity or fund, in the name
"of

“ of any person not being the owner thereof, or knowingly taking a false oath, or knowingly making a false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation, would according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; or where by any acts now in force, any person making or using, or knowingly having in his custody or possession, any frame, mould, or instrument for making of paper with certain words visible in the substance thereof, or any persons making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any of the said acts, be guilty of felony, and liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall, after the commencement of this act, be convicted of any such felony, as is herein-before mentioned, or of aiding, abetting, counselling or procuring the commission thereof, such person shall not suffer death for the same, unless the same shall be made punishable with death by this act; and if the same shall not be made punishable with death by this act, in such case every person who shall, after the commencement of this act, be convicted of any such felony, or of aiding, abetting, counselling, or procuring the commission thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years nor less than two years; provided always that nothing herein contained shall affect or alter any acts relating to the coin of this realm, or to any coin of any other realm lawfully current in this realm.

“ § 2. And be it enacted, that if any person shall forge ^{1 W. 4. c. 65.} or counterfeit, or shall utter knowing the same to be forged § 2. or counterfeited, the great seal of the united kingdom, his majesty's privy seal, any privy signet of his majesty, his majesty's royal sign manual, any of his majesty's seals appointed by the twenty-fourth article of the union to be kept, used, and continued in *Scotland*, the great seal of *Ireland*, or the privy seal of *Ireland*, every such offender shall be guilty of high treason, and shall suffer death accordingly: provided always, that nothing contained in an act passed in the seventh year of the reign of King *William the Third*, intituled *An Act for regulating of trials in cases of treason and misprision of treason*; or in an act passed in the seventh year of the reign of Queen *Anne* intituled *An Act for improving the union of the two kingdoms*, shall extend to any indictment, or to any proceedings hereupon, for any of the treasons hereinbefore mentioned.

“ § 3. And be it enacted, that if any person shall forge or
“ alter,

§ 3.

“ alter, or shall offer, utter, dispose of or put off, knowing the
 “ same to be forged or altered, any exchequer bill or exchequer
 “ debenture, or any indorsement on or assignment of any
 “ exchequer bill or exchequer debenture, or any bond under
 “ the common seal of the united company of merchants of
 “ *England* trading to the *East Indies*, commonly called an *East*
 “ *India* bond, or any indorsement on or assignment of any *East*
 “ *India* bond, or any note or bill of exchange of the governor
 “ and company of the Bank of *England*, commonly called a
 “ bank note, a bank bill of exchange, or a bank post bill, or
 “ any indorsement on or assignment of any bank note, bank
 “ bill of exchange, or bank post bill, or any will, testament,
 “ codicil, or testamentary writing, or any bill of exchange, or
 “ any promissory note for the payment of money, or any in-
 “ dorsement on or assignment of any bill of exchange or pro-
 “ missory note for the payment of money, or any acceptance of
 “ any bill of exchange, or any undertaking, warrant or order
 “ for the payment of money, with intent in any of the cases
 “ aforesaid, to defraud any person whatsoever, every such
 “ offender shall be guilty of felony, and, being convicted thereof,
 “ shall suffer death as a felon.

1 W. 4. c. 66.
 § 4.

“ § 4. And be it declared and enacted, that where by any act
 “ now in force any person is made liable to the punishment of
 “ death for forging or altering, or for offering, uttering, disposing
 “ of, or putting off, knowing the same to be forged or altered,
 “ any instrument or writing designated in such act by any special
 “ name or description, and such instrument or writing, however
 “ designated, is in law a will, testament, codicil or testamentary
 “ writing, or a bill of exchange, or a promissory note for the
 “ payment of money, or an indorsement on or assignment of a
 “ bill of exchange or promissory note for the payment of money,
 “ or an acceptance of a bill of exchange, or an undertaking,
 “ warrant or order for the payment of money, within the true
 “ intent and meaning of this act, in every such case the person
 “ forging or altering such instrument or writing, or offering,
 “ uttering, disposing of or putting off such instrument or writing,
 “ knowing the same to be forged or altered, may be indicted
 “ as an offender against this act, and punished with death ac-
 “ cordingly.

§ 5.

“ § 5. And be it enacted, that if any person shall wilfully make
 “ any false entry in, or wilfully alter any word or figure in any
 “ the books of account kept by the governor and company of
 “ the bank of *England*, or by the governor and company of
 “ merchants of *Great Britain* trading to the *South Seas* and
 “ other parts of *America*, and for encouraging the fishery,
 “ commonly called the *South Sea Company*, in which books the
 “ accounts of the owners of any stock, annuities, or other
 “ public funds which now are or hereafter may be transferable at
 “ the Bank of *England* or at the *South Sea House* shall be en-
 “ tered and kept, or shall in any manner wilfully falsify the
 “ accounts of such owners in any of the said books, with intent
 “ in

“ in any of the cases aforesaid to defraud any person whatsoever; or if any person shall wilfully make any transfer of any share or interest of or in any stock, annuity or other public fund which now is or hereafter may be transferable at the Bank of *England* or at the *South Sea* House, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud any person whatsoever, every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

“ § 6. And be it enacted, that if any person shall forge ^{1 W. 4. c. 66.} or alter, or shall utter, knowing the same to be forged or § 6. altered, any transfer of any share or interest of or in any stock, annuity or other public fund which now is or hereafter may be transferable at the Bank of *England* or at the *South Sea* House, or of or in the capital stock of any body corporate, company or society which now is or hereafter may be established by charter or act of parliament, or shall forge or alter, or shall utter, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity or public fund, or capital stock as is hereinbefore mentioned, or to receive any dividend payable in respect of any such share or interest, or shall demand or endeavour to have any such share or interest transferred, or to receive any dividend payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the several cases aforesaid, to defraud any person whatsoever; or if any person shall falsely and deceitfully personate any owner of any such share, interest or dividend as aforesaid, and thereby transfer any share or interest belonging to such owner, or thereby receive any money due to such owner, as if such person were the true and lawful owner; every such offender shall be guilty of felony, and being convicted thereof shall suffer death as a felon.

“ § 7. And be it enacted, that if any person shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity or other public fund, which now is or hereafter may be transferable at the Bank of *England*, or at the *South Sea* House, or any owner of any share or interest of or in the capital stock of any body corporate, company or society which now is or hereafter may be established by charter or act of parliament, or any owner of any dividend payable in respect of any such share or interest as aforesaid, and shall thereby endeavour to transfer any share or interest belonging to any such owner, or thereby endeavour to receive any money due to any such owner, as if such offender were the true and lawful owner; every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned

§ 7.

“prisoned any term not exceeding four years, nor less than two
“years.

1 W. 4. c. 66.

§ 8.

“§ 8. And be it enacted, that if any person shall forge the
“name or handwriting of any person, as or purporting to be a
“witness attesting the execution of any power of attorney or
“other authority, to transfer any share or interest of or in any
“such stock, annuity, public fund or capital stock, as is here-
“inbefore mentioned, or to receive any dividend payable in
“respect of any such share or interest, or shall utter any such
“power of attorney or other authority, with the name or
“handwriting of any person forged thereon as an attesting
“witness, knowing the same to be forged, every such offender
“shall be guilty of felony, and being convicted thereof shall be
“liable, at the discretion of the court, to be transported be-
“yond the seas for the term of seven years, or to be imprisoned
“for any term not exceeding two years, nor less than one
“year.

§ 9.

“§ 9. And be it enacted, that if any clerk, officer or servant
“of, or other person employed or intrusted by the governor and
“company of the Bank of *England*, or the governor and com-
“pany of merchants commonly called the *South Sea Company*,
“shall knowingly make out or deliver any dividend warrant
“for a greater or less amount than the person or persons on
“whose behalf such dividend warrant shall be made out is or
“are entitled to, with intent to defraud any person whatsoever,
“every such offender shall be guilty of felony, and being con-
“victed thereof shall be liable, at the discretion of the court, to
“be transported beyond the seas for the term of seven years, or
“to be imprisoned for any term not exceeding two years, nor
“less than one year.

§ 10.

“And be it enacted, that if any person shall forge or alter,
“or shall offer, utter, dispose of or put off, knowing the same
“to be forged or altered, any deed, bond or writing obligatory,
“or any court roll or copy of any court roll relating to any
“copyhold or customary estate, or any acquittance or receipt
“either for money or goods, or any accountable receipt either
“for money or goods, or for any note, bill or other security
“for the payment of money, or any warrant, order or request
“for the delivery or transfer of goods, or for the delivery of
“any note, bill or other security for payment of money, with
“intent to defraud any person whatsoever, every such offender
“shall be guilty of felony, and being convicted thereof, shall
“be liable, at the discretion of the court, to be transported
“beyond the seas for life, or for any term not less than seven
“years, or to be imprisoned for any term not exceeding four
“years, or less than two years.

§ 11.

“And be it enacted, that if any person shall, before any
“court, judge or other person lawfully authorized to take any
“recognizance or bail, acknowledge any recognizance or bail in
“the name of any other person not privy or consenting to the
“same, whether such recognizance or bail in either case be or
“be

“ be not filed, or if any person shall, in the name of any other
 “ person not privy or consenting to the same, acknowledge any
 “ fine, recovery, *cognovit actionem* or judgment, or any deed
 “ to be enrolled; every such offender shall be guilty of felony,
 “ and, being convicted thereof, shall be liable at the discretion
 “ of the court, to be transported beyond the seas for life, or for
 “ any term not less than seven years, or to be imprisoned for
 “ any term not exceeding four years, nor less than two
 “ years.

“ § 12. And be it enacted, that if any person shall without 1 W. 4. c. 66.
 “ lawful excuse, the proof whereof shall lie upon the party § 12.
 “ accused, purchase or receive from any other person, or have
 “ in his custody or possession, any forged bank note, bank bill
 “ of exchange, or bank post bill, or blank bank note, blank bank
 “ bill of exchange, or blank bank post bill, knowing the same
 “ respectively to be forged, every such offender shall be guilty
 “ of felony, and being convicted thereof, shall be transported
 “ beyond the seas for the term of fourteen years.

“ § 28. And be it declared and enacted, that where the having § 28.
 “ any matter in the custody or possession of any person, is in
 “ this act expressed to be an offence, if any person shall have
 “ any such matter in his personal custody or possession, or
 “ shall knowingly and wilfully have any such matter in any
 “ dwelling house or other building, lodging, apartment, field
 “ or other place open or enclosed, whether belonging to or
 “ occupied by himself or not, and whether such matter shall be
 “ so had for his own use, or for the use or benefit of another,
 “ every such person shall be deemed and taken to have such
 “ matter in his custody or possession within the meaning of
 “ this act; and where the committing any offence with intent to
 “ defraud any person whatsoever, is made punishable by this
 “ act, in every such case the word “person” shall throughout
 “ this act be deemed to include his majesty or any foreign
 “ prince or state, or any body corporate, or any company or
 “ society of persons not incorporated, or any person or number
 “ of persons whatsoever who may be intended to be defrauded
 “ by such offence, whether such body corporate, company,
 “ society, person or number of persons, shall reside or carry
 “ on business in *England* or elsewhere, in any place or
 “ country, whether under dominion of his majesty or not; and
 “ it shall be sufficient in any indictment to name one person
 “ only of such company, society or number of persons, and to
 “ allege the offence to have been committed with intent to
 “ defraud the person so named, and another or others, as the
 “ case may be.” (For further provisions see the act.)

FRAUD.

(A) What Acts are condemned in the Common Law Courts as fraudulent, though not within the express Provision of any Act of Parliament.

Page 767.

Parkinson v. Lee, 2 East, 314. Gray v. Cox, 4 Barn. & C. 108.

Bridge v. Wain, 1 Stark. 504. Gardiner v. Gray, 4 Camp. 144.; and see Laing v.

Williamson v. Allison, 2 East R. 446.

7 & 8 G. 4. c. 29. § 45.

Doe v. Roberts, 2 Barn. & A. 367.

Sowerby v. Warder, 2 Cox R. 268.; and see Evans v. Bicknell, 6 Ves. 182.

Ex parte Carr, 3 Ves. & B. 108.

Gore v. Stackpoole, 1 Dow. P. C. 18.

WITH respect to warranties on sale of goods, it is now settled that the rule established as to sales of horses, applies to other goods, that unless an express warranty is given or fraud is practised by the seller, he is not answerable though the goods turn out to be unmerchantable, notwithstanding a fair merchantable price be given.

But a warranty is implied in every contract, that the goods are of the denomination for which they are sold, as for instance that goods sold as "scarlet cuttings" are what is known in the market as "scarlet cuttings."

In an action on a warranty, the *scienter* need not be charged or proved.

As to stealing from lodgings (see p. 771.), the 3 & 4 W. & M. c. 9. is now repealed, and by 7 & 8 G. 4. c. 29. § 45. (extending and improving the former provision,) if any person steal any chattel or fixture, let with any house or lodging, he shall be guilty of felony, and liable to be punished as for simple larceny, and the indictment may be in the common form as for larceny, and the property may be laid in the owner or person letting to hire.

The grantee under a conveyance executed to give a colourable qualification to kill game, may maintain ejectment against the grantor, for the latter cannot set up his own fraud to invalidate the deed.

Courts of law and equity have a concurrent jurisdiction in cases of fraud, and therefore a demurrer for want of equity will not lie to a bill for relief against a fraudulent policy of insurance.

The effect of a wilful misrepresentation as to credit, is to give a remedy on the ground of fraud, but this is administered with great caution; and in bankruptcy where the evidence of the party is received, it must be in every particular consistent, clear, and unambiguous.

Estates in mortgage were sold under a decree to pay off the mortgage debts, but which was obtained by collusion between the tenant for life and others, to the prejudice of the remainder men in tail, and part of the estates was purchased by one

one cognizant of the fraud, and part by one who was not, though he might have known it, from a knowledge of the proceedings to obtain the decree under which the estates were sold. A remainderman in tail (three months after his title accrued), filed a bill to set aside the sale, and for a reconveyance of the estates, which was dismissed. On appeal against so much of the decree as related to those claiming under the purchase with knowledge of the fraud, the decree was so far reversed by the House of Lords; Lord *Redesdale* doubting whether it ought not also to have been reversed as to the purchaser, who though not cognizant of the fraud, might have been so if he pleased.

(B) What Acts are deemed fraudulent in Courts of Equity.

Page 771.

THE Court of Chancery will set aside a deed obtained by the keeper of a house of lunatics from a person residing under his care, though the party be not a lunatic at the time, on the general principle of inequality of situation, like the cases of guardian and ward, attorney and client, &c. Wright v. Proud, 13 Ves. 156.

And so also a deed executed in favour of a person acting as agent for managing a lady's affairs, if undue influence appears. (See cases, p. 780.) Huguenin v. Bazeley, 14 Ves. 273.

On the principle of *Cockshott v. Bennett* (p. 778), it was held, that where a creditor obtained from an insolvent a note for his debt, signed by his debtor and a *surety*, on the understanding that the plaintiff, in consideration of it, was to induce the other creditors to accept five shillings in the pound, and that the security given to the plaintiff was to be kept secret, the note was fraudulent and void, and the plaintiff could not recover upon it at law. Wells v. Girling, 1 Bro. & B. 447. 4 Moo. 78.; and see Jackson v. Lomas, 4 Term R. 170. Lancaster v. Rose, 4 East, 381.

Proviso in a lease, that lessee should not demise premises without licence in writing. Parol licence to underlet is insufficient; but if such licence is given as a snare, and under circumstances of fraud, the court will relieve. Richardson v. Evans, 3 Madd. 218.

A transaction of sale, made on a false or mistaken consideration between parties in the relation of brothers-in-law, the vendor being an heir succeeding to the estate sold, and the purchaser executor of the will of the vendor's father, and where the party selling is under circumstances of great pecuniary embarrassment and distress, will not be impeached if fairly made; but if the consideration for the purchase was the balance of an account which appears to be erroneous, the whole transaction must be so far investigated as to correct the accounts. McNeil v. Cahill, 2 Bligh, 228.

Where a partner withdrawing money from partnership by entries in books, disguises the transaction, or wholly omits or conceals it, it is a fraud, and will entitle others to sue his separate estate: otherwise if done openly. 6 Madd. 2. 1 Glyn & Ja. 74.

The share-holders in a joint-stock company are entitled to relief Blair. v Agar,

1 Sim. 37. relief in equity, where the conduct of the directors has been fraudulent, or a violation of the terms on which the company was formed.

Selsey v. Where a tenant for life and remainderman joined in a lease
Rodes, for twenty-one years to the steward of the former, in which
1 Bligh N. S. 1. certain common rights of disputed title were omitted, but in
respect of which, six years after, valuable allotments were made,
and the reversioner afterwards accepted the rent for five years;
it was held, that the lease could not, after so long acquiescence
and many acts, be impeached for fraud; though, considering the
relation of the parties, this transaction might have been ques-
tioned recently after.

Gordon v. Family agreements cannot be supported if founded on the
Gordon, mistake of either party to which the opposite party is accessory.
3 Swanst. 467.;
and see 1 Swanst. 137.

Naylor v. If a party, ignorant of the plain and settled principles of law,
Winch, 1 Sim. is induced to yield a portion of his indisputable right, equity
& Stu. 564. will relieve; but where the title is disputable, and he enters into
a compromise, no relief is given, nor will consideration be
enquired into if taken on due deliberation.

Middleton v. If a person be fraudulently prevented from doing any act in
Middleton, equity, it will be considered as if that act has been done.
1 Jac. & W. 94.

Maddeford v. A partner who superintended, exclusively, the accounts of
Austwick, the concern, agreed to purchase his co-partner's share for a sum
1 Sim. 89.; which he knew from the accounts, which he concealed from his
and see co-partner, to be inadequate, — the agreement was set aside.
3 Swanst. 75.
2 Swanst. 287.

Harris v. An agreement will not be avoided by reason that represent-
Kemble, ations made by one party to the other on the subject of it were
1 Sim. 111.; incorrect, if it be manifest that the party making the represent-
and see ations is speaking not from personal knowledge, but with refer-
13. 63. 1 Jac. ence to accounts which are equally open to both parties, and if
423. 1 Jac. & the representations be justified by those accounts.
W. 112.

Collins v. A master, in order to make a provision for a confidential
Hare, 1 Dow. clerk after his own decease, insures his life for 3000*l.*, he paying
Ca. N. S. 139. two thirds of the premium, and the clerk one third, and assigns
the policy to the clerk. The clerk has a liberal salary, independent
of this bounty. The master dies and in his will is found a letter,
stating that the assignment had been procured from him by
undue influence on the part of the clerk, and evidence of declar-
ations by the clerk that he had it in his power to ruin the credit
of the house by the manner in which he kept the accounts; it
was held, that the assignment, as to two thirds of the policy,
was fraudulent and void.

(C) Of fraudulent Conveyances to defeat Creditors and Purchasers within the 13 Eliz. c. 5. and 27 Eliz. c. 4.

Page 781.

A LIMITATION in a marriage settlement in favour of a stranger, is held not within the consideration of marriage, and is consequently voluntary and void against a subsequent purchaser for valuable consideration, and it matters not that the purchaser has notice. Sutton v. Chetwynd, 3 Meriv. R. 254.

And a limitation in favour of the settlor's brothers is also void as against a subsequent purchaser. Johnson v. Legard, 3 Madd. 283. 6 Maule & S. 67.

But a limitation in favour of the settlor's issue by a second marriage, is held valid against a subsequent purchaser. Clayton v. Wilton, 6 Maule & S. 67.

And where a father refused on his son's marriage to enable him to make a settlement, unless provision was made by the settlement for his brothers and sisters, these persons were held not to be mere volunteers; for though not within the consideration of marriage, they were within the agreement between the father and son, and therefore the settlement was not void as to them within the statutes. Pulvertoft v. Pulvertoft, 18 Ves. 92. Goring v. Nash, 3 Atk. 189. Jones v. Boulter, 1 Cox. 294.

It appears that a recital in a settlement after marriage, of articles before marriage, is not evidence against creditors, though binding on the parties. Battersbee v. Farrington, 1 Swanst. R. 106., and see 2 Ball. & B. 251.

A vendee under a colourable sale for only part of the value of the estate, cannot set aside a previous settlement though voluntary, for the sale is at least as fraudulent as the settlement. Doe v. Routledge, Cowp. 712. Metcalfe v. Pulvertoft, 1 Ves. & Bea. 784. Doe v. James, 16 East, 212.

Though a voluntary settlement cannot stand against a subsequent purchaser for value, yet the court will not assist a settlor who comes into court to set it aside himself. Smith v. Garland, 2 Meriv. R. 127.

(D) In what Court Fraud is cognizable.

Page 801.

AS to the circumstances of fraud which will set aside a will, see *Mountain v. Bennett*, 1 Cox R.

(E) Where a Wrong-doer is further punishable than by making void the fraudulent Act.

Page 802.

THE 52 G. 3. c. 63. as to embezzlement, is wholly repealed by 7 & 8 G. 4. c. 27., but its provisions are in effect re-enacted with alterations by the 7 & 8 G. 4. c. 29. § 49. 50. 7 & 8 G. 4. c. 27. The Id. c. 29. § 49.

Rex v. Prince,
3 Carr. & P.
517.; and see
Rex v. Somer-
ton, 7 Barn.
& C. 463.
Archbold, C. L. 228. (4th edit.)

The 52 G. 3. c. 63. was held to apply only to persons to whom securities were intrusted in the exercise of their functions or business, and not to one who as a private friend was intrusted to get a bill discounted, and converted it to his own use.

END OF THE THIRD VOLUME.

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